Annual Report of the Special Rapporteur on Child Protection

2022

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With material contributed by Dr Elaine O' Callaghan

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EXECUTIVE SUMMARY

Chapter 1: Progress Update and Reflection on 2019-2022 Term

Chapter 1 examines progress on issues covered and recommendations made in the four previous reports submitted during my term as Special Rapporteur on Child Protection: namely, the Annual Reports of 2020 and 2021; the report on children's rights and best interests in donor-assisted human reproduction and surrogacy of December 2020; and the report on illegal birth registrations of September 2021. Positive responses by Government to some recommendations are reported – in particular, changes made to the latest version of the Child Care (Amendment) Bill in relation to the reform of the guardian ad litem system, and measures adopted in response to the report on illegal birth registrations. (Some recommendations on these topics that were not accepted, and the implications of this, are also highlighted.) Chapter 1 also highlights areas where recommendations made in previous reports have not been accepted, with serious implications for Ireland's compliance with international human rights law – in particular, the proposed Health (Assisted Human Reproduction) Bill (which is contrary to children's rights in a wide range of ways), and the Online Safety and Media Regulation Bill (which fails to meet CRC and Council of Europe standards due to its failure to provide for an individual complaint mechanism allowing for the removal of harmful content online). Measures aimed at providing redress for historical abuses in Mother and Baby Homes, County Homes and schools are also considered; it is argued that these measures go some way towards addressing historical rights violations, but will exclude many deserving applicants. Chapter 1 goes on to outline a range of areas where important legislative reforms are proposed, but are moving very slowly, and calls on the Government to increase the pace of change on these issues. The Chapter concludes with a reflection on the role of the Special Rapporteur on Child Protection, aimed at maximising the added value that future appointees can bring to the child protection system.

Chapter 2: Annual Review

Chapter 2 provides an overview of the state of play in the Irish child protection system during the reporting period of July 2021 to June 2022, drawing on a wide range of reports of Irish and international bodies. Positive developments are highlighted, including evidence of children and families reporting that they feel well looked-after and respected within the care system; the expansion of the Barnahus/OneHouse project from a single pilot in Galway to include locations in Dublin and Cork; and the launch of the new national strategy on domestic, sexual and gender-based violence. However, Chapter 2 also highlights considerable challenges faced by the child protection system at present. The incidence of child homelessness and child poverty is increasing; persistent concerns have been expressed about Ireland's response to child trafficking; and the Russian invasion of Ukraine has precipitated a refugee crisis that gives rise to multiple child protection concerns. Longstanding under-resourcing of CAMHS has left it unable to meet the needs of many vulnerable children and young people; while backlogs in the examination of ICT devices in cases concerning child sexual abuse are increasing, and placing children at risk. Finally, while HIQA reports provide much evidence of positive feedback from children

and families who come into contact with Tusla, they also highlight concerns in relation to the management of referrals and safety plans; care planning and child-in-care reviews; aftercare; and staffing levels.

Chapter 3: Private Residential Care

Chapter 3 examines recent trends in Tusla's use of residential care as a mode of alternative care, focusing in particular on the recent trend of increased reliance on private residential care. It sets out the context and scale of this increase, before proceeding to present a detailed review of the international literature on the strengths and weaknesses of private residential care as a mode of alternative care. Issues that are considered include the capacity of private residential centres to meet the needs of children; recruitment, retention and qualifications of staff; maintaining standards through licensing, inspection and oversight; and the relative costs of public and private residential care centres. The findings of this literature review are used as a lens through which Tusla's recently published strategic plan on residential care is analysed. The aims of the strategic plan are broadly endorsed, and a number of recommendations are offered regarding its implementation.

Chapter 4: Case Law and Research Update

Chapter 4 reviews case law from international and Irish courts during the reporting period in the broad area of child protection. International case law addresses issues such as domestic abuse; the treatment of child migrants; and the proportionality of care orders. Irish case law includes a significant decision on the constitutionality of the statutory rape law; a series of important cases clarifying the circumstances in which a child in care may be placed for adoption; and a number of miscellaneous decisions addressing important issues regarding children in care or children at risk. Chapter 4 also reviews academic research published during the reporting period of relevance to the child protection system, on issues including children's rights in child protection; alternative care; disclosure of child sexual abuse; children and domestic abuse; and home learning during the COVID-19 pandemic. Chapter 4 concludes with discussion and recommendations based on key themes emerging from the case law and academic research.

Appendix A: Discussion Paper on Reviewing Legislative Compliance with the CRC

In its 2016 Concluding Observations on Ireland, the Committee on the Rights of the Child recommended that Ireland conduct a thorough assessment on the extent to which legislation affecting the rights of the child complies with the Convention. In response to a request from the Department of Children, Equality, Disability, Integration and Youth, I prepared a discussion paper examining how best such an assessment could be conducted. This paper draws on the output of the Committee on the Rights of the Child and of UNICEF, and also considers the approach taken in similar exercises conducted in other jurisdictions. It notes the absence of a clear template for the proposed exercise presents both a challenge and an opportunity. The challenge is in devising and implementing a process that meets the vision set out in the relevant output of the CRC Committee and UNICEF. This would require a properly resourced process drawing on adequate expertise and consultation, and a firm commitment to the process by all branches of Government. The opportunity

is for Ireland to produce the first published comprehensive and CRC-compliant review of national legislation. Succeeding in this goal would not only put Ireland in a position to significantly enhance our national compliance with our CRC obligations; it would provide a template for other States to perform similar exercises, and establish Ireland as a leader in the field that could be held up as an example to other States Parties to the CRC. To this end, the paper makes a number of specific recommendations regarding the design of the review.

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, Equality, Disability, Integration and Youth:

    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, Equality, Disability, Integration and Youth.

Dr Geoffrey Shannon held the post from 2006 to 2019. He was succeeded in 2019 by Professor Conor O'Mahony, who was appointed for a three-year term from 2019-2022.

ABOUT THE AUTHOR

Professor Conor O'Mahony is Professor of Law and Deputy Dean 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*, *Children and Youth Services Review*, the *International Journal of Law Policy and the Family*, the *Journal of Social Welfare and Family Law*, *Child and Family Social Work*, the *British Journal of 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 Department of Children and Youth Affairs.

ACKNOWLEDGMENTS

As ever, the work on this report benefitted from the assistance of a wide range of people over the past 12 months. I would like to note my gratitude to the following:

Dr Elaine O'Callaghan, who was my right hand throughout my term as Special Rapporteur on Child Protection, and made an indispensable contribution to researching each of the five reports I produced in that time. Quite simply, I could not have discharged my duties without her steadfast work, which was always of the highest standard.

- 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, Equality, Disability, Integration and Youth; Tusla; the Ombudsman for Children's Office; the Child Care Law Reporting Project; the Irish Human Rights and Equality Commission; the Children's Right Alliance; and various civil society organisations, who willingly responded to queries and engaged with me on a range of issues.

- Colleagues in academia who responded to specific queries or provided general support during the year, including Dr Kenneth Burns, Dr David Kenny and Professor Ursula Kilkelly in particular.

- My family for their support and understanding throughout the demanding three year period during which I sought to balance my commitments as Special Rapporteur with my commitments in UCC and at home.

Any errors or omissions in the report are mine alone.

Professor Conor O'Mahony

School of Law, University College Cork

30 June 2022

INTRODUCTION

The 2022 Annual Report of the Special Rapporteur on Child Protection covers the period of July 2021 to June 2022. During that time, one crisis (the COVID-19 pandemic) began to abate, but another (the Russian invasion of Ukraine) emerged. The challenges faced by those who work in the child protection system have not become any smaller. This Report follows the format of the previous two years by including an annual review of the state of play in the Irish child protection system, drawing on reports of national and international bodies (Chapter 2); and an update on case law and academic research of relevance to the broad area of child protection (Chapter 4).

My three-year term as Special Rapporteur on Child Protection ends with the submission of this Report, and it seems timely to reflect on progress in the system during that time. This is particularly relevant to the work of the past year, which included considerable time devoted to the production of a report on illegal birth registrations (submitted in September 2021), and to engagement with the Joint Oireachtas Committee on International Surrogacy in respect of the recommendations made in my report of December 2020 on Donor-Assisted Human Reproduction and Surrogacy. To that end, Chapter 1 will provide a detailed analysis of progress on issues raised and recommendations made in the four previous reports I submitted to Government during my term. It will also provide a reflection on the role of the Special Rapporteur, with a view to maximising the value added to the child protection system by future appointees.

Chapter 3 is devoted to a detailed examination of the use of private residential care as a mode of alternative care in Ireland. This is an issue that stood out in recent years as in need of significant attention, and it is timely that Tusla published a new strategic plan on residential care shortly before the completion of this report. This plan is analysed in light of a detailed review of international literature on the strengths and weaknesses of private residential care.

Finally, one of the tasks completed during the reporting period was the production of a discussion paper for the Department of Children, Equality, Disability, Integration and Youth on the approach to be taken to reviewing Ireland's legislative compliance with the Convention on the Rights of the Child. This was prompted by a specific recommendation made in the most recent Concluding Observations of the Committee on the Rights of the Child on Ireland's compliance with the Convention. The text of this discussion paper is reproduced in full in Appendix A.

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 2022.

This report may be cited as O'Mahony, C (2022), *Annual Report of the Special Rapporteur on Child Protection 2022*, available at https://www.gov.ie/en/collection/51fc67-special-rapporteur-on-child-protection-reports/.

CHAPTER 1

Progress Update and Reflection on 2019-2022 Term

1.1 Introduction

This year's Annual Report brings to conclusion my 3-year term as Special Rapporteur on Child Protection, during which time five reports were submitted to Government: namely, the Annual Reports of 2020, 2021 and 2022; the report on children's rights and best interests in donor-assisted human reproduction and surrogacy of December 2020; and the report on illegal birth registrations of September 2021. The purpose of this chapter is to provide a progress update on issues raised in the four previous reports. The focus will be on the most substantive issues that arose in those reports and that generated detailed recommendations for Government action or law reform. A range of other issues that were covered in the annual review chapters of the 2020 and 2021 Annual Reports will be covered in this year's annual review in Chapter 2.

In addition to the progress update, this chapter will also provide a reflection on the role of the Special Rapporteur on Child Protection (with a view to maximising the value added by the role); and a discussion of the overall level of progress in the child protection system over the course of the 2019-2022 term.

1.2 2020 Annual Report

1.2.1 Sections 3 and 4 of the Child Care Act 1991

The 2020 Annual Report of the Special Rapporteur on Child Protection focused primarily on issues relating to the Child Care Act 1991, with dedicated chapters examining the investigation of allegations of child sexual abuse under section 3 of the Act; voluntary care agreements under section 4 of the Act; and the reform of the law governing guardians *ad litem* (GALS) (currently regulated by section 26 of the Act). At the time of writing, the review of the Child Care Act 1991 (which commenced in September 2017) remains ongoing. No firm proposals have yet been published regarding reform of the Act other than the provisions governing GALs (in respect of which the Child Care (Amendment) Bill 2019 had been initiated). The Department of Children, Equality, Disability, Integration

and Youth (DCEDIY) provided an update to the Special Rapporteur for the 2021 Annual Report which indicated an intention to enact reforms of sections 3 and 4 broadly in line with the recommendations made in the 2020 Annual Report. However, 12 months later, no concrete progress is evident in this regard.

1.2.2 Reform of the Guardian ad Litem System

Some progress has been made in respect of the proposed reforms of the GAL system. The General Scheme of the Child Care (Amendment) Bill 2021 was approved by Cabinet in October 2021, and the Child Care (Amendment) Bill 2022 was introduced in the Dáil in April 2022. A number of recommendations made in my 2020 Annual Report have been implemented in whole or in part. In particular, the Bill has been considerably strengthened by the following changes to the 2019 version:

- Section 35B now provides for a clear presumption in favour of appointing a GAL in District Court child care proceedings, subject only to the exception that the court considers that the best interests of the child can be determined without such appointment being made, and (in respect of a child who is capable of forming his or her own views) it has determined other means by which to facilitate the expression by the child of those views.

- Section 35E(2)(d) now ensures that functions of a GAL are not limited to those expressly provided for in the legislation by stipulating that a GAL may perform such additional functions as the court may of its own motion direct either generally or for a specified purpose. Section 35E(11) reinforces this by allowing a court where it is satisfied that it is necessary and in the best interests of the child and in the interests of justice to do so, to order that the GAL shall have such of the rights of a party as may be specified by the court in the entirety of the proceedings or in respect of such issues in the proceedings as the court may direct.

These changes fully address concerns raised in my 2020 Annual Report that the text of the 2019 Bill would fail in its stated aim of introducing a presumption in favour of appointing GALs in District Court proceedings, and would result in GALs having a narrower range of functions and a lesser status than they enjoy at present.[1]

In relation to legal advice and representation for GALs, the Bill now provides in section 35D(2)(a) that legal advice will always be available to guardians *ad litem* on request. This strengthens the Bill relative to the 2019 version, which would have left the provision of legal advice at the discretion of the Minister for Children. This change is welcome; but it is regrettable that it has not been matched in respect of the provision of legal representation for GALs, which remains at the discretion of the Minister pursuant to section 35D(2)(b). As noted in my 2020 Annual Report,[2] it remains to be seen how this discretion will be exercised. If exercised restrictively, this proposal risks creating a situation where GALs are less able to effectively represent the child's views

1 C O'Mahony, *Annual Report of the Special Rapporteur on Child Protection 2020* at sections 4.3.2 and 4.3.3, available at https://assets.gov.ie/108822/caa4c294-0d99-4d35-8560-c7555588e1ac.pdf.

2 *Ibid* at section 4.3.5.

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and best interests in complex child care proceedings than they are at present. The recommendation made in my 2020 Annual Report is repeated here: namely, that the wording contained in section 13 of the Child Care (Amendment) Act 2011 strikes a better balance by allowing the GAL full discretion to decide whether to engage legal 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).

Other recommendations from my 2020 Annual Report have been rejected in full, including that 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; and that section 35H should allow the court the discretion to order that the appointment of a GAL should continue beyond one of the points in time specified in the section.[3] As a consequence, GALs may find themselves unable to access documents containing crucial information regarding a child's development that is critical to the GAL's assessment of the child's best interests; and GALs may be unable to perform certain functions that are usefully performed in a small number of cases at present, including monitoring the effectiveness of the operation of supervision orders, and participating in child-in-care reviews.

1.3 2021 Annual Report

1.3.1 Redress for Mother and Baby Homes, County Homes and Foster Homes

Chapter 3 of the 2021 Annual Report of the Special Rapporteur on Child Protection examined in detail the Final Report of the Commission of Investigation into Mother and Baby Homes, and made a number of recommendations in relation to redress to be afforded to women and children who spent time in Mother and Baby Homes, County Homes, and "boarded out" or "at nurse" foster placements. It was recommended that criteria determining eligibility for redress be devised and applied with a degree of flexibility that allows for recognition of the similarities in people's experiences, instead of highlighting their differences to justify refusing applications. Specifically, it was recommended that eligibility for redress should not be constrained by cut-offs regarding dates or duration of time spent in homes. It was also recommended that the redress scheme should make provision for all children who experienced ill-treatment, forced labour, or medical experimentation in the form of non-consensual vaccine trials in Mother and Baby Homes, County Homes or foster homes.[4]

The Government published details of the redress scheme in November 2021.[5] The recommendation that there should be no minimum residence period or cut-off date for women who spent time in the institutions was accepted. However, the scheme stipulated that children would only qualify for redress if they spent at least six months in an institution,

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3 *Ibid* at sections 4.3.6 and 4.3.7.

4 C O'Mahony, *Annual Report of the Special Rapporteur on Child Protection 2021* at section 3.8, available at https://assets.gov.ie/214234/9e893871-ecb7-4a28-879a-d0a83d5bc7e2.pdf.

5 See details at https://www.gov.ie/en/press-release/ce019-government-approves-proposals-for-mother-and-baby-institutions-payment-scheme-and-publishes-an-action-plan-for-survivors-and-former-residents-of-mother-and-baby-and-county-home-institutions/.

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which is directly contrary to the logic underlying the removal of a minimum residency period requirement for women. It creates an obvious discrimination between women and children who experienced similar harms, and makes no provision for children who experienced medical experimentation but spent less than six months in the institution.

Furthermore, the scheme makes no provision whatsoever for redress for serious ill-treatment and forced labour experienced by children in foster homes. This is in spite of the extensive evidence analysed in the Commission's Report regarding the nature of these rights violations and State knowledge of same, and the analysis in Chapter 3 of my 2021 Annual Report of how this amounted to a clear violation of Articles 3 and 4 of the European Convention on Human Rights (ECHR).[6] Indeed, the Inter-Departmental Group Report, on which the redress scheme was based, "notes the Commission's findings that children who were boarded out in some cases experienced some of the worst abuses" and "acknowledge[d] the severe and extremely distressing abuse experienced by some of these children, which includes neglect, physical and emotional and in some cases sexual abuse".[7]

It is impossible to reconcile the acknowledgment of the abuses experienced by children in foster homes (and the clear evidence of State failures to prevent or put to an end such abuses) with the fact that there are no proposals of any form that would provide redress to people who experienced such abuses. Litigation in the courts is not a realistic prospect for the vast majority of victims due to the Statute of Limitations, not to mention the associated costs and other barriers involved in mounting a legal action against the State. It is incumbent on the State to address this omission and to provide a mechanism for out-of-court redress for children who experienced rights violations in foster homes; as outlined in my 2021 Annual Report, anything less would fail to discharge the State's obligations under Article 13 of the ECHR. The fact that not all children in foster homes experienced abuse does not in any way relieve the State of this obligation, just as the fact that not all children in primary schools experienced sexual abuse did not prevent the State being found in violation of Articles 3 and 13 of the ECHR in *O'Keeffe v Ireland*.[8]

1.3.2 Online Safety and Media Regulation Bill

Appendix C of my 2021 Annual Report reproduced the submission I provided to the Oireachtas Committee on Media, Tourism, Arts, Culture, Sport and the Gaeltacht in May 2021 in relation to the General Scheme of the Online Safety and Media Regulation Bill.[9] This submission made a number of recommendations regarding how the Bill could be more compliant with Ireland's obligations under international children's rights law. The most important of these recommendations was that the Bill should provide for a statutory individual complaints mechanism which could be used to compel service providers to remove content that is harmful to children should they fail to do so through their own internal complaints systems. Related to this, it was recommended that the Bill should provide for a clear legal obligation to remove harmful content identified on foot of

6 O'Mahony (n 4 above) at sections 3.3.3 and 3.4.4.

7 https://assets.gov.ie/204591/dce1a5b9-de5e-4443-b4e1-b4e7eef02c06.pdf at [1.17].

8 *O'Keeffe v Ireland* (35810/09, 28 January 2014).

9 O'Mahony (n 4 above), Appendix C.

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complaints, and for remedies and other supports for children experiencing harm. Finally, it was recommended that the categories of harmful online conduct stipulated in the Bill should be drafted so as to encompass online gambling, and that the provisions on age-inappropriate online conduct should provide a definition of pornography. All of these recommendations were endorsed by the Oireachtas Committee in its report on pre-legislative scrutiny.[10]

The Online Safety and Media Regulation Bill 2022 was initiated in January 2022. The latest version does not make any provision for an individual complaints mechanism, restricting itself to a so-called "super-complaints" system under which complaints relating to the availability of harmful online content and compliance with the online safety codes could be made by nominated bodies.[11] The absence of an individual complaints mechanism from the Bill is a serious flaw in its design, and will inevitably result in situations where victims may find it extremely difficult or impossible to ensure the removal of harmful material posted online in the course of sexual abuse or exploitation, cyberbullying or other forms of harmful online conduct involving children. Moreover, the absence of an individual complaints mechanism clearly fails to discharge Ireland's obligations under the Convention on the Rights of the Child (CRC),[12] and makes it inevitable that the Committee on the Rights of the Child will highlight this in future reporting cycles. It is once again recommended that the Bill make provision for an individual complaints mechanism that could be used to compel service providers to remove content that is harmful to children. Such a mechanism should be supplemental to, rather than in place of, internal complaints mechanisms that service providers are required to implement. Complaints to the statutory mechanism should only be admissible if efforts to resolve the issue using the service provider's own complaints mechanism have first been made and have failed to resolve the issue.

The latest version of the Bill also contains no proposals responding to the recommendations made in respect of online gambling as a form of harmful online conduct, or providing a definition of pornography. It also omits any requirement that service providers should be required to conduct children's rights due diligence, including assessments of the impact on children's rights of activities on their service (the results of which are published). This fails to respond to a specific call by the UN Committee on the Rights of the Child that "States parties should require the business sector to undertake child rights due diligence, in particular to carry out child rights impact assessments and disclose them to the public,

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10 Joint Committee on Tourism, Culture, Arts, Sport and Media, *Report of the Joint Committee on the Pre-Legislative Scrutiny of the General Scheme of the Online Safety and Media Regulation Bill* (November 2021), available at https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_tourism_culture_arts_sport_and_media/reports/2021/2021-11-02_report-of-the-joint-committee-on-the-pre-legislative-scrutiny-of-the-general-scheme-of-the-online-safety-and-media-regulation-bill_en.pdf.

11 Online Safety and Media Regulation Bill 2022 (as amended in Committee (Seanad Éireann)), section 44, available at https://data.oireachtas.ie/ie/oireachtas/bill/2022/6/eng/ver_a/b06a22s.pdf.

12 See, eg, Committee on the Rights of the Child, *General Comment No 16 (2013) on State obligations regarding the impact of the business sector on children's rights*, CRC/C/GC/16 (17 April 2013) at [30] and Committee on the Rights of the Child, *General Comment No 25 (2021) on children's rights in relation to the digital environment*, CRC/C/GC/25, 2 March 2021 at [44] to [47].

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with special consideration given to the differentiated and, at times, severe impacts of the digital environment on children."[13]

1.3.3 Ex Gratia Scheme for Survivors of Sexual Abuse

An issue covered in my Annual Reports of both 2020 and 2021 was the ongoing delay in opening the revised *ex gratia* scheme for the provision of compensation to survivors of sexual abuse in schools, pursuant to the decision of the European Court of Human Rights in *O'Keeffe v Ireland* in 2014,[14] and the subsequent decision of the Independent Assessor in 2019 that found the original scheme to be incompatible with the *O'Keeffe* decision.[15] Similar concerns were expressed by the Irish Human Rights and Equality Commission in a communication to the Committee of Ministers of the Council of Europe.[16]

The revised scheme was finally published and re-opened in July 2021, and will remain open for two years from this date.[17] The condition of "prior complaint" that was found by the Independent Assessor to be incompatible with the *O'Keeffe* decision has been removed. Applicants to the scheme are now required to demonstrate:

1. That they experienced sexual abuse in a day school before November 1991 in respect of a primary school or June 1992 in respect of a post primary school;
2. That, had the Department of Education's Guidelines for Procedures for Dealing with Allegations or Suspicions of Child Abuse (November 1991/June 1992) been in place at the time the sexual abuse occurred, there would have been a real prospect of altering the outcome or mitigating the harm suffered as a result; and
3. That they instituted court proceedings against the State prior to 1 July 2021.

€31 million will be allocated in Budgets 2021 and 2022 to cover the projected cost of payments under the scheme.[18] As of 22 March 2022 (the most recent figures available), 90 applications had been received by the scheme, and 64 payments had been approved.[19] Figures for the number of applications rejected, or the reasons for same, are not available.

Initial concerns regarding the potential for a restrictive application of the condition regarding a reasonable prospect that the Department Guidelines might have altered the outcome or mitigated the harm do not seem to have come to pass; this is to be welcomed. Nonetheless, the revised scheme still suffers from two significant flaws.

The condition that applicants must have instituted court proceedings against the State

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13 On this point, see Committee on the Rights of the Child, *General Comment No 25 (2021) on children's rights in relation to the digital environment*, CRC/C/GC/25, 2 March 2021 at [38].

14 35810/09, 28 January 2014.

15 Decision of the Independent Assessor, 5 July 2019, available at https://www.gov.ie/pdf/?file=https://assets.gov.ie/27832/e7f47f4b9871431d88e5c68a69584e7a.pdf#page=1.

16 1411th meeting (September 2021) (DH) – Rule 9.2 – Communication from an NHRI (17/06/2021) in the case of O'KEEFFE v Ireland, available at https://hudoc.exec.coe.int/ENG?i=DH-DD(2021)670E.

17 See details at https://www.gov.ie/en/service/90a42-revised-ex-gratia-scheme/.

18 E O'Kelly, "Dept to pay around €31m to survivors of sexual abuse in primary schools", RTE News, 13 October 2021, available at https://www.rte.ie/news/2021/1013/1253468-school-abuse/.

19 See https://www.oireachtas.ie/en/debates/question/2022-03-22/491/.

prior to 1 July 2021 in order to qualify for an *ex gratia* payment is just as much at variance with the *O'Keeffe* judgment as the condition of prior complaint which the Independent Assessor considered in 2019. It suggests that the entitlement to compensation derives from whether and when a person instituted legal proceedings rather than from the rights violations experienced by children who were sexually abused in schools. This is clearly not the case.

As the Court noted in the *O'Keeffe* judgment, the Irish State's obligations towards children were not fulfilled when the State, "which must be considered to have been aware of the sexual abuse of children by adults … continued to entrust the management of the primary education of the vast majority of young Irish children to non-State actors (National Schools), without putting in place any mechanism of effective State control against the risks of such abuse occurring".[20] The judgment makes no reference whatsoever to the question of whether and when legal proceedings were instituted against the State.

The entitlement to redress derives from the fact that children were sexually abused in a school system in which the State had failed to implement effective safeguards. The rights of those who had not instituted court proceedings prior to 1 July 2021 were violated in precisely the same way as the rights of those who had instituted proceedings. This condition is therefore inherently discriminatory and at variance with the *O'Keeffe* judgment. If, for example, two individuals were abused by the same abuser in the same school, their rights were violated in the same way. It would be contrary to the ECHR to provide compensation to one of these individuals but not the other based on the incidental question of whether and when they had litigated a claim against the State.

Moreover, the cut-off date of 1 July 2021 was announced three weeks after it had passed, making it impossible for applicants to meet it by adjusting their position. It is an entirely arbitrary date, with no basis in either the *O'Keeffe* judgment or the Statute of Limitations, and seems designed only to exclude deserving applicants from the scheme.

It must be emphasised that many applicants had good reasons, deriving from the State's own conduct between 2009 and 2021, for not instituting court proceedings against the State if they had not already done so:

1. It is well documented that the State sought to pursue litigants (including Louise O'Keeffe herself) for enormous legal costs in the aftermath of the Supreme Court decision in *O'Keeffe*. This stance by the State had a significant chilling effect on litigation. It is entirely unreasonable to require applicants to have exposed themselves to substantial costs orders by pursuing court proceedings which the courts have repeatedly described as "bound to fail".[21]

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20 35810/09, 28 January 2014 at [168].

21 See, eg, *Mr A v Minister for Education* [2016] IEHC 268; *Naughton v Dummond* [2016] IEHC 290, *Kennedy v Murray* [2016] IEHC 291 and *Wallace v Creevey* [2016] IEHC 294. This is on the basis that the ECHR has no effect in domestic law in respects of events occurring prior to 1 January 2004; as such, the decision of the European Court of Human Rights in *O'Keeffe* cannot be relied on in an Irish court.

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2. Even following the European Court of Human Rights decision in *O'Keeffe*, the State excluded applicants from the *ex gratia* scheme if proceedings were before the courts in respect of their abuse. This approach acted as a further deterrent to litigation.

3. Finally, following retired Judge O'Neill's decision in 2019, the Taoiseach, Leo Varadkar TD, stated in the Dáil on 9 July 2019:

   "The best apology we can make to Louise O'Keeffe and all other survivors is to say further action will be taken. The State failed them at the time and failed them again when it did not own up to its responsibility. We will not fail them a third time." On foot of this statement, as well as multiple further statements made by the Department of Education in response to parliamentary questions between 2019 and 2021,[22] it was eminently reasonable for abuse survivors to wait and see what came of the review of the *ex gratia* scheme. Indeed, any competent lawyer would have advised them to do so, on the basis that litigation in the domestic courts was "bound to fail" and would expose them to liability for costs; whereas the Taoiseach had assured survivors that the revision of the scheme would meet the State's obligations to them. The terms of the revised scheme now punish survivors for relying on the assurances of the Taoiseach and the advice of their lawyers by excluding them from the scheme if they adopted a wait-and-see stance.

Applicants would have a good claim against the State in the European Court of Human Rights based on the precedent established in *O'Keeffe*. However, such a claim would take many years to come to a hearing and judgment. Forcing deserving applicants to pursue this route rather than including them in the *ex gratia* scheme would be morally indefensible, as well as more expensive for the State (which would have to pay its own legal costs even if it successfully defended the claims, as well as the applicant's costs in successful cases). It would also represent a fundamental breach of the State's obligations under the ECHR, under which it is up to the State Party in the first instance to provide a remedy for violations of Convention rights. The ECtHR clearly stated this principle in *Kudla v Poland*:

> … Article 13, giving direct expression to the States' obligation to protect human rights first and foremost within their own legal system, establishes an additional guarantee for an individual in order to ensure that he or she effectively enjoys those rights. The object of Article 13, as emerges from the *travaux preparatoires*, is to provide a means whereby individuals can obtain relief at a national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court.[23]

If States fail to provide effective remedies at national level, "individuals will systematically be forced to refer to the Court in Strasbourg complaints that would otherwise, and in the Court's opinion more appropriately, have to be addressed in the first place within the national legal system. In the long term the effective functioning, on both the national and

22 See, eg, PQs 394-399, 23 July 2019; PQ 32, 19 November 2019; PQ 462, 29 September 2020; PQs 399 and 401, 1 December 2020; PQ 400, 10 February 2021; and PQ 300, 3 June 2021.

23 30210/96, 26 October 2000 at [152].

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international level, of the scheme of human rights protection set up by the Convention is liable to be weakened".[24]

A further weakness in the revised scheme is the minimal provision made for covering applicants' legal costs. It makes provision for covering "costs arising from work that was strictly necessary to prepare and submit an application to the Scheme", up to a maximum of €4,000 plus VAT. This minimal provision for legal costs ignores the fact that since applicants are required by the scheme to have instituted legal proceedings against the State as a pre-condition to qualifying for an *ex gratia* payment, they will have incurred very substantial legal costs—in some cases, running to tens of thousands of Euros—that will not be covered by the scheme. This will significantly reduce the value of the €84,000 award that will be made to them.

The figure of €84,000 was calculated as a means of putting successful applicants in the same position as Louise O'Keeffe, who was awarded €30,000 by the European Court of Human Rights and €54,000 by the Criminal Injuries Compensation Tribunal. Crucially, however, the European Court of Human Rights also awarded Louise O'Keeffe her legal costs (amounting to €85,000 plus VAT).[25] The effect of this was that Louise O'Keeffe benefitted in full from the €84,000 compensation, and did not need to cover any legal expenses from that amount.

As currently designed, the revised *ex gratia* scheme will not put applicants in the same position as Louise O'Keeffe, since all successful applicants will be forced to use a substantial portion of their €84,000 award to cover legal costs incurred in the course of the litigation which the terms of the scheme requires them to have undertaken.

I wrote to the Minister for Education on 16 August 2021 calling on her to remove the condition of prior litigation from the revised *ex gratia* scheme and to assess claims solely by reference to the abuse experienced by the applicants; and to amend the scheme to make provision for all legal costs incurred in prior litigation against the State. I included a suggested revised set of terms for the scheme that incorporated these changes. I received no reply to this correspondence.

The Irish Human Rights and Equality Commission wrote to the Committee of Ministers of the Council of Europe in December 2021 indicating that it "continues to have significant concerns" regarding the same issues that have been identified here.[26]

I call once again on the Government:

1. To remove the condition of litigation against the State prior to 1 July 2021 so as to avoid excluding and further traumatising deserving applicants, and avoid repeat claims before the European Court of Human Rights that would be both expensive and embarrassing for the Irish State; and

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24 *Ibid* at [155].

25 35810/09, 28 January 2014 at [209].

26 1428th meeting (March 2022) (DH) - Rule 9.2 - Communication from NGOs (Irish Human Rights and Equality Commission) (02/12/2021) in the case of O'KEEFFE v Ireland, available at https://hudoc.exec.coe.int/ENG?i=DH-DD(2021)1363E.

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2. To amend the scheme to make provision for all legal costs incurred in prior litigation against the State, so as to ensure that successful applicants benefit from the full amount of the €84,000 *ex gratia* payment.

1.4 Report on Donor-Assisted Human Reproduction and Surrogacy

In 2020, the Government requested that I examine the implications of donor-assisted human reproduction (DAHR) and surrogacy for the rights and best interests of children. My report was submitted in December 2020 and published in April 2021.[27] It made 27 recommendations for legislative reform, drawing on Ireland's obligations under international human rights law; an analysis of best practice in other jurisdictions; and a survey of recent academic literature on children's rights in surrogacy.

The Health (Assisted Human Reproduction) Bill 2022 was initiated on 10 March 2022. In its current form, the Bill would implement just two of the 27 recommendations made in my report—namely, that domestic surrogacy be limited to altruistic surrogacy, and that legal advice be available to potential intending parents. If enacted without considerable amendment, the Bill will be contrary to children's rights in a range of ways.

First, the Bill only addresses domestic surrogacy arrangements, and makes no provision whatsoever for a legal framework for addressing international surrogacy arrangements. Even if domestic surrogacy is regulated, there will always be families who will opt for international arrangements, whether due to the availability of surrogate mothers or other issues. The approach proposed in the Bill amounts to keeping our head in the sand, and is contrary to children's rights principles on five separate counts:

1. It violates the principle of non-discrimination (Article 2 of the CRC), as it treats children differently based on the circumstances of their birth;
2. It fails to vindicate the right to family life (Article 8 of the ECHR) of children born through international surrogacy arrangements by leaving them as legal strangers to one or both parents;
3. It makes it much less likely that their right to identity (Article 8 of the CRC and Article 8 of the ECHR) will be vindicated, since no framework is in place to regulate the use of anonymous donors or the keeping of records;
4. It will lead to delays for the child in accessing Irish citizenship, and potential statelessness; and

27 C O'Mahony, *A Review of Children's Rights and Best Interests in the Context of Donor-Assisted Human Reproduction and Surrogacy in Irish Law* (December 2021), available at https://assets.gov.ie/130886/e66b52d7-9d3e-4bb4-b35d-cf67f9eea9fa.pdf.

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5. It fails to account for several recent judgments of the European Court of Human Rights in which States Parties have been required to enact a legal framework that allows for the possibility of legal recognition of family relationships arising from international surrogacy arrangements in which one of the parents has a genetic link to the child.[28]

My report recommended that for international surrogacy arrangements, legislation should make provision for the intending parents to apply to the High Court for parentage and parental responsibility, as well as a grant of nationality and citizenship to the child, subject to satisfying a range of prescribed criteria.[29]

Second, the Bill makes no provision for retrospective recognition of family relationships arising from domestic surrogacy arrangements which took place prior to the enactment of the Bill. Again, this violates the principle of non-discrimination, as it treats children differently based on the circumstances of their birth, and fails to vindicate the right to family life of such children. My report recommended that retrospective declarations of parentage in respect of children born through surrogacy arrangements should be provided for where a court has satisfied itself of a range of prescribed criteria.[30]

Third, the Bill only allows children born following surrogacy arrangements to access identifying information regarding surrogates or donors from the age of 16. The right to identity is a right of all children; it does not crystallise at a particular age. Moreover, extensive research shows that it is far better for children to be aware of their identity from a young age rather than to grow up with one sense of identity, only to later learn that this was not accurate. Young children normally exercise their rights through their parents, and gain independent rights as they mature. Accordingly, my report recommended that identifying information should be accessible to the child's parents from birth, and directly to the child from the age of 12.[31] The Bill has set this age higher at 16; but more significantly, it makes no provision for a child's parents to access identifying information on behalf of the child below the age of 16. This is contrary to the child's right to identity, and arguably also to the right of the family to make its own decision on the best age at which to share this information with the child.

Fourth, the Bill makes no proposals to address anomalies arising in the laws governing DAHR that result in some children falling outside of the scope of the Children and Family Relationships Act 2015 (in particular, children born following at-home artificial insemination, and children born as a result of DAHR procedures performed before 4 May 2020 and involving a known donor). Once again, this violates the principle of non-

28 See *Mennesson v France* (65192/11, 26 June 2014) and *Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother* (P16-2018-001, 10 April 2019).

29 O'Mahony (n 26 above) at sections 5.1 and 5.2.

30 *Ibid* at section 6.2.

31 *Ibid* at sections 4.2 and 4.3.

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discrimination, as it treats children differently based on the circumstances of their birth, and fails to vindicate the right to family life of such children. My report recommended that these gaps be closed so that the family relationships of all children born through DAHR can be recognised.[32]

Finally, the Bill proposes a post-birth parental order model that will leave a gap between the birth of the child and the transfer of parentage to the intending parents who have responsibility for caring for the child. During this time, the intending parents would have no right to make decisions in respect of the medical treatment of the child, which may be critical in the case of a newborn (and potentially premature) baby. This is contrary to the best interests of the child. My report recommended that for domestic surrogacy, provision should be made for a court application prior to the conception of the child that would combine advance authorisation of the arrangement and a pre-birth parental order.[33] This recommendation aims at eliminating this gap in decision-making powers, and at incentivising reliance on domestic surrogacy over international surrogacy due to the streamlined nature of pre-birth orders.

1.5 Report on Illegal Birth Registrations

In March 2021, following the publication of the report of the Independent Review into Incorrect Birth Registrations,[34] the Minister for Children, Roderic O'Gorman TD, requested the Special Rapporteur on Child Protection to examine the significant complexities and challenges associated with the matter, and set out proposed next steps for the Government. My report was submitted to Government on 30 September 2021 and published on 14 March 2022.[35] My report made 17 conclusions and recommendations on how the Government should respond to the issue of illegal birth registration in particular and to the broader phenomenon of illegal adoptions in general. Upon publishing the report, the Government simultaneously published an action plan detailing its response to these recommendations.[36] From a process perspective, this approach is commended as a productive way of clarifying how the Government proposes to respond to recommendations made by the Special Rapporteur on Child Protection (or indeed to any other independent report commissioned by Government).

From a substantive perspective, the Government's proposals would (if fully implemented) respond effectively to 14 of the 17 conclusions and recommendations in the report. The Birth Information and Tracing Bill 2022, which was passed by the Oireachtas in June 2022, provides for access to birth and early life information for persons affected by illegal birth registration (including a right to request an expedited review of their files with a view

32 *Ibid* at section 3.1 and 6.1.

33 *Ibid* at section 3.2.3.

34 *A Shadow Cast Long: Independent Review into Incorrect Birth Registrations* (Department of Children, Equality, Disability, Integration and Youth, May 2019, available at https://www.gov.ie/pdf/?file=https://assets.gov.ie/126409/d06b2647-6f8e-44bf-846a-a2954de815a6.pdf.

35 C O'Mahony, *Proposals for a State Response to Illegal Birth Registrations in Ireland* (September 2021), available at https://www.gov.ie/en/publication/6ff84-proposals-for-a-state-response-to-illegal-birth-registrations-in-ireland/.

36 Available at https://assets.gov.ie/218821/e42b89e9-a758-4cf2-8888-f6bd366c1b80.pdf.

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to establishing their true identity).[37] It also provides Tusla with the powers necessary to conduct further audit of adoption files with a view to establishing the true scale of the practice of illegal birth registration, and identifying other individuals affected by it.[38] The Bill amends the Civil Registration Act 2004 to empower An tArd Chláraitheoir (the General Registrar) to receive and request information concerning an affected person, and to make whatever amendments to the register of births as are necessary if satisfied that an existing entry is incorrect.[39] Finally, the Bill includes provisions allowing for persons affected by illegal birth registration to continue to legally use the identity they have used throughout their lives to date.[40]

In addition to the legislative measures in the Birth Information and Tracing Bill 2022, the Government's response makes further provision for counselling supports; for the establishment of a Specialist Tracing Team; and for the allocation of resources necessary to support the work of these services. Some provision is also made for financial support for persons affected by illegal birth registrations. However, this particular aspect of the response package is problematic. The current proposal is that the State would make a one-off payment of €3,000 to persons whose illegal birth registration at St Patrick's Guild has already been confirmed. First, the level of this payment is extremely low, and will not even cover expenses incurred by many of these individuals when accessing legal advice and/or DNA research. Second, and more significantly, there is no current proposal to make this financial support available to others whose illegal birth registration is confirmed in future. This is an irrational and discriminatory proposal. All individuals affected by illegal birth registration experienced the same harm, and were failed by the State in the same way; there is no justification for differentiating between them in the supports that are made available. It also compounds the harm experienced by persons affected by illegal birth registration to implement a scheme that suggests that some affected persons are worthy of State support, while others are not. It is strongly recommended that the Government amend this proposal so that all persons, upon establishing that they were subject to an illegal birth registration, would become entitled to the same financial supports on the same basis, with no differentiation as to the level of support or the conditions that must be met to qualify for it.

Recommendation 3 was that a State apology in respect of failures in the area of illegal birth registrations should be forthcoming if people affected by the issue indicated that they wished to see this happen. The Minister for Children delivered an apology on 10 May 2022 when introducing the Birth Information and Tracing Bill 2022 into the Seanad. Substantively, this met the terms of the recommendation. However, the handling of the delivery of the apology was less than ideal. While the wording of the apology itself was appropriate, the fact that only 24 hours' notice was given of the fact that the apology was to be delivered did not afford enough time to persons affected by the issue to prepare themselves for what was an important and emotional moment in their lives. It also served

37 Birth Information and Tracing Bill 2022 (as passed by both Houses of the Oireachtas), Part 2 and s 32(2)(b)(d).

38 *Ibid* at s 33.

39 *Ibid* at s 57.

40 *Ibid*.

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to limit the number of people who were in a position to attend in person. Moreover, while previous State apologies in relation to historical rights abuses have been delivered by the Taoiseach in the Dáil, the fact that this apology was delivered by a Minister in the Seanad was perceived by some affected persons as a lesser form of apology. There are important lessons to be learned from this around how any future State apologies might best be arranged so as to avoid causing any upset that takes away from the apology itself.

Recommendation 7 was that adoption records currently in private hands should be acquired by the State and held in a centralised archive. Through the Action Plan for Survivors and Former Residents of Mother and Baby and County Home Institutions, the Government has committed to a centralised archive of institutional records, including adoption records (Action 6) and to a National Memorial and Records Centre (Action 7). Initial work on the development of proposals for a National Memorial and Records Centre is being led by the Secretary General to the Government.[41] In response to a query I placed, the Government has indicated that the intention is that all adoption records will be held in this centre; what remains to be worked out is which records the repository would hold in original hard copy, and what records would be held in digital copy, with the original hard copy remaining elsewhere.

Three recommendations made in the report have not been met with specific proposals for action by the Government. First, recommendation 10 detailed that in addition to a further audit of Tusla files previously flagged as suspicious, the Specialist Tracing Team should conduct an audit of files in private ownership which have not, to date, been reviewed for markers of illegal birth registration. Although Part 7 of the Birth Information and Tracing Bill makes provision for safeguarding and ensuring access to records for the purposes of adoption tracing, and for taking ownership of records, there are no proposals at present for an audit of these files. This recommendation echoed a recommendation previously made by the Independent Reviewer, who had led a sample review of files held by Tusla and the Adoption Authority of Ireland, and who noted that it is "possible that there might be a higher level of irregularity occurring within the private sector than has been identified in either the AAI [Adoption Authority of Ireland] or Tusla reviews."[42] If files in private ownership (which currently account for around one-third of all adoption files in Ireland) are not audited, significant question marks will remain around the State's response to the issue of illegal birth registration. As such, recommendation 10 is repeated here.

The second recommendation that has not been accepted at this time is recommendation 15: namely, that the Status of Children Act 1987 should be amended to allow for court-ordered DNA testing of relatives other than potential parents in appropriate cases, with suitable safeguards included to ensure that this power is used in a proportionate

41 Government of Ireland, *An Action Plan for Survivors and Former Residents of Mother and Baby and County Home Institutions* (16 November 2021), available at https://www.gov.ie/pdf/?file=https://assets.gov.ie/204579/0b00bbf2-4319-4298-827e-6b0b01bf09ae.pdf#page=null.

42 *A Shadow Cast Long: Independent Review into Incorrect Birth Registrations* (Department of Children, Equality, Disability, Integration and Youth, May 2019) at pp 52-53 available at https://www.gov.ie/pdf/?file=https://assets.gov.ie/126409/d06b2647-6f8e-44bf-846a-a2954de815a6.pdf.

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manner. The rationale provided by Government for not accepting this recommendation is that introducing court-ordered DNA testing outside of the sphere criminal justice raises potential concerns regarding the compatibility of such a measure with the Irish Constitution and European law. No further explanation has been provided that points to the specifics of any potential incompatibility.

It is my considered view that these concerns are greatly overstated and unlikely to manifest themselves in an actual court decision. From a constitutional perspective, there is no case law that supports the proposition that court-ordered DNA testing is only permissible in the context of the investigation and prosecution of criminal offences. While the case law that has considered the constitutionality of mandatory DNA testing has all arisen in the criminal context, this is inevitable, since that is the only context in which legislation for mandatory DNA testing currently exists. By definition, there cannot have been any constitutional challenges to other forms of mandatory DNA testing that have not been legislated for or attempted. The existing case law accepts that in the context of DNA testing, the right to privacy must be balanced against the right of society to have criminal offences investigated and prosecuted.[43] There is no reason to conclude that the protection of another constitutional right (namely, the right to identity) is any less important an objective.

Neither is there any case law indicating that a law that provides for court-ordered DNA testing as a last resort to attempt to restore the right to identity to a person subject to illegal birth registration would amount to a violation of the right to privacy. Multiple cases have emphasised that the right to privacy is not an absolute right,[44] and it may be balanced against the constitutional rights of others[45] (including the right to identity in particular).[46] To the extent that the case law has considered the constitutionality of mandatory DNA testing at all, the only stipulation that has been made is that such testing should have an identifiable basis in law, consistent with due respect for constitutional rights.[47] Indeed, the case law does not even establish that a court order is necessary, and has upheld the constitutionality of existing laws allowing for DNA samples to be taken from persons in custody without the necessity to obtain an authorising court order.[48]

If the amendment recommended in my report were to be constitutionally challenged, there are two possible frames of reference for a court to determine its constitutionality. Because the measure would seek to balance two competing constitutional rights (ie the right to identity of the person subject to illegal birth registration versus the right to privacy of the purported relative), the correct frame of reference would be the test in *Touhy v Courtney*, when Finlay CJ stated:

43 See, eg, *McGinley v Reilly and DPP* [2009] 3 IR 125.

44 See, eg, *Kennedy v Ireland* [1987] IR 587 at 592 and *Haughey v Moriarty* [1999] 3 IR 1 at 58-59.

45 See, eg, *Cogley v RTE* [2005] 4 IR 79 at 90 and *Herrity v Associated Newspapers (Ireland) Limited* [2009] IR 316 at 340.

46 See *IO'T v B* [1998] 2 IR 321 at 354.

47 See *Wilson v DPP* [2017] IESC 54.

48 Criminal Justice (Forensic Evidence and DNA Database System) Act 2014, s 9.

> 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.[49]

The amendment recommended in my report of September 2021 is aimed at restoring the right to identity to persons subject to illegal birth registration. As outlined in detail in sections 2 and 3 of that report, their right to identity has been violated through a combination of the deliberate actions of third parties and the inaction of the State over a period of decades. Some individuals will be unable to reconstruct their identity using documentary research, as their birth records were deliberately falsified and there is no way to use them to identify their true parents or other relatives. However, research on commercial DNA databases may lead them to be able to narrow the field of possible relatives to the point where the production of a DNA sample from one individual is likely to confirm the existence of a close blood relationship, thus unlocking the identity of a parent or parents. If the purported relative refuses to produce a DNA sample, the quest to reconstruct a falsified identity will be frustrated. Failing to enact the recommended amendment would amount to granting one private citizen an effective right of veto over another private citizen's ability to vindicate his or her constitutional right.

The proposed amendment would 1) include safeguards aimed at ensuring that such mandatory DNA tests would have a clear basis in law; 2) include an additional safeguard (not present in the relevant provisions of the criminal law) in the form of judicial supervision, since a test could only take place following a court order; 3) require a threshold to be met involving *prima facie* evidence of a possible blood relationship between the parties; and 4) include further safeguards ensuring that the DNA sample could only be used for that specific and limited purpose, and would be destroyed immediately afterwards (although it should be noted that the case law to date has found that this is not a constitutional requirement).[50] It is difficult to see how such a proposal could be deemed to be "so contrary to reason and fairness as to constitute an unjust attack on some individual's constitutional rights". On the contrary: the proposal is the only way to uphold the constitutional right to identity of certain individuals whose birth records have been falsified.

The alternative (but less appropriate) frame of reference would be the proportionality test. This test is somewhat more demanding than the test in *Touhy v Courtney*, since it involves measuring the constitutionality of a restriction on a constitutional right against a policy aim rather than against another constitutional right. (This explains why it is less appropriate than the *Touhy v Courtney* test.) Nonetheless, even if a court were to apply the more demanding proportionality test, the proposed amendment would be highly likely to survive such scrutiny.

49 [1994] 3 IR 1 at 47.

50 See *DPP v Murphy* [2016] IECA 287 at [44] and [45].

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The proportionality test was set out by Costello J in *Heaney v Ireland*,[51] and requires that the law in question:

1. Pursue an objective of sufficient importance.
2. Be rationally connected to that objective, and not unfair or arbitrary.
3. Impair the right as little as possible.
4. The effect of the restriction on the right must be proportionate to the objective.

Applying these four steps to the proposed amendment:

1. The law would pursue an objective of sufficient importance—ie the vindication of the constitutional right to identity of a person for whom that right has been violated over a period of decades, in part due to failures by the State;
2. The law would clearly be connected to that objective, in that its purpose would be to secure a DNA sample that would be the only means of confirming or denying the existence of a close blood relationship between the parties;
3. The law would impair the right to privacy of the purported relative as little as possible due to the existence of the safeguards mentioned above, and the absence of any other means of confirming or denying the existence of a close blood relationship;
4. The effect of the restriction would be proportionate to the objective by virtue of the fact that one party has a constitutional right to know their identity, and to have an inaccurate record of their identity corrected; whereas the other party does not have a constitutional right to privacy that extends to denying close blood relatives knowledge of their relationship and exercising an effective veto over the vindication of the right to identity.

From a European law perspective, it bears repeating (as explained in detail in my report of September 2021) that the judgment of the European Court of Human Rights in *Mikulic v Croatia* in 2002 underlined States' obligations to ensure that people can establish their personal identity.[52] In that case, the Court found that there was a violation of Article 8 of the ECHR as the applicant was left "in a state of prolonged uncertainty as to her personal identity" given that the putative father refused to undergo DNA tests for three and a half years and the Croatian authorities had no way of enforcing this.[53] This would suggest that in the context of illegal birth registrations in Ireland, the State not only has latitude to legislate for court-ordered DNA testing in this context, but has a positive obligation to do so. In the absence of any Irish judgment clearly to the contrary, the *Mikulic* judgment would be of strong persuasive value in determining the Irish constitutional law questions arising on this issue.

51 [1994] 3 IR 593 at 607.

52 *Mikulic v Croatia* (53176/99, 4 September 2002).

53 *Ibid* at [66].

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Mikulic would also play a key role in determining any issue that might arise under aspects of European Union (EU) law. As the Irish courts have noted, the ECHR has a "pre-eminent role" in the interpretation of EU law.[54] Article 6(3) of the Treaty on European Union states that "[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms … shall constitute general principles of the Union's law." Meanwhile, Article 6(1) provides that the Charter of Fundamental Rights of the European Union "shall have the same legal value as the Treaties." A declaration annexed to the Lisbon Treaty stipulated: "The Charter of Fundamental Rights of the European Union, which has legally binding force, confirms the fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms," and noted "the existence of a regular dialogue between the Court of Justice of the European Union and the European Court of Human Rights".[55] Since any instrument of EU law is required to be consistent with the EU Charter of Fundamental Rights, and that Charter would be interpreted in light of ECHR case law including *Mikulic*, it is difficult to see how the amendment proposed in recommendation 15 of my report of September 2021 could be deemed to be contrary to either EU law or the ECHR. Conversely, a failure to enact this amendment places Ireland at risk of being found in violation of Article 8 of the ECHR, as interpreted in *Mikulic*.

The third recommendation that has not been accepted by Government is Recommendation 17: namely, that there be a State inquiry, based on the Truth Commission model, into the practice of illegal adoptions (broadly defined). The Government's response was that this recommendation will require "further consideration". If no such inquiry is established, it will remain the case that a wide range of illegal adoption practices (in respect of which considerable evidence already exists and which have implications for the human rights of both mothers and adopted children) will never have been the subject of an adequate State inquiry. This would fail to discharge the State's obligations under international human rights law, and ignore repeated calls by UN human rights bodies for the establishment of a State inquiry into illegal adoptions.[56] For these reasons, Recommendation 17 is re-stated here; I again call on the Government to move to establish an inquiry along the lines outlined in section 7 of my report of September 2021.

One final incidental point of controversy that has arisen in the context of the Government's proposed response is that the Birth Information and Tracing Bill 2022 proposes to use the term "false and misleading birth registration" in preference to the term "illegal birth registration". The latter term has been the preferred term outside of the legislation; it was used throughout my report, and has been used by the Minister for Children in public statements on the matter. Persons affected by illegal birth registrations have expressed a preference for the use of the term "illegal", on the basis that anything short of this minimises the seriousness of the rights violations that flowed from the practice. Nevertheless, the

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54 See *GT v KO* [2007] IEHC 326 at [62] to [63].

55 OJ C 326/339, 26 October 2012.

56 See, eg, Report of the UN Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, Visit to Ireland, 15 November 2019, A/HRC/40/51/Add.2 at [15] and [78(c)], and UN Committee against Torture, *Concluding observations on the second periodic report of Ireland*, CAT/C/IRL/CO/2, 31 August 2017 at [27] to [28].

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legislation has not used this term due to concerns that it may set a high bar (ie proof of actual illegality) regarding which individuals are entitled to avail of the provisions of the Bill of relevance to the practice of illegal birth registration, and potentially exclude some individuals from benefitting from these provisions.

It is my view that this is another overstated concern, and is an issue that could be addressed through the interpretation section of the Bill. The definition currently provided in section 2(2) for the term “false and misleading birth registration” differs from the formulation of the criminal offence in section 40 of the Births and Deaths Registration Act 1874, in that the former does not include the requirement that the provision of false information was “wilful”. The same definition could be applied in its current form to the term “illegal birth registration” for the specific purposes of the Birth Information and Tracing Bill 2022, such that the standard of proof that might apply to a criminal prosecution of an illegal birth registration would not be applied to the question of whether an individual was subject to an illegal birth registration within the meaning of the Bill. No difficulty need arise from the fact that the definition provided in this particular Bill differs from definitions of the same concept in other legislation: there is precedent for this in other areas of the law.[57]

1.6 Overview of Progress since 2019

The three year period from 2019 to 2022 has presented enormous challenges to the child protection system. In addition to the inherent challenges of the everyday issues, the system was faced by one of the biggest challenges of our time in the form of the COVID-19 pandemic, while simultaneously attempting to address a range of substantial legacy issues, including Mother and Baby Homes, illegal birth registrations and illegal adoptions, and historical sexual abuse in schools. Just as the worst impacts of the COVID-19 pandemic began to abate, the Russian invasion of Ukraine generated huge increases in the cost of living that will push significant numbers of vulnerable families into poverty and/or homelessness, and led to the largest influx of refugees this State has ever seen. (Chapter 2 will address all of these issues in further detail.) The optimism of 2019, at which point Ireland was beginning to feel the positive effects of recovery from the economic crash of 2008, has been replaced by multiple crises that will necessitate a lengthy spell of firefighting.

Chapter 2 of this Report will provide the annual review of developments in child protection in Ireland during the reporting period of July 2021 to June 2022. Read together with the updates provided in this Chapter, it can be seen that the picture is a distinctly mixed one. In some areas, concrete progress has been made in the right direction: the establishment of the Barnahus/Onehouse model for meeting the needs of victims of sexual abuse or assaults, and the establishment of specialist family courts, are both significant and welcome developments. Aspects of the Child Care (Amendment) Bill 2022 should have a positive impact on the regulation of the guardian *ad litem* system and respond to long-standing calls for reform. The Birth Information and Tracing Bill 2022, coupled with other measures

57 See, eg, the definition of “spouse” in s 227 of the Social Welfare Consolidation Act 2005, which clearly departs (for the purposes of that Act) from the definition of “spouse” provided in other areas of the law by defining “spouse” as including a party to a marriage that has been dissolved, being a dissolution that is recognised as valid in the State, or a man and woman who are not married to each other but are cohabiting as husband and wife.

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in response to my report on illegal birth registrations, will address a number of important issues relating to the right to identity and historical violations of that right. Chapter 3 of this report will examine the publication by Tusla of a commendable plan on residential care. However, all of the above remain in a developmental phase and are anything from 12 months to three years away from full delivery. Moreover, weaknesses remain in several of these proposals, as detailed in sections 1.2.2 and 1.5 above.

The allocation of €31 million for the *ex gratia* scheme for survivors of sexual abuse in schools is welcome, but the narrow eligibility criteria for the scheme will exclude deserving applicants. The same applies to the redress scheme announced following the publication of the Final Report of the Commission of Investigation into Mother and Baby Homes, which will compensate some survivors for some abuses, but will exclude many others—notwithstanding clear evidence of abuses and State failures.

In other areas, progress has been stagnant, or matters have disimproved. Section 1.4 above set out how the proposed assisted human reproduction legislation fails to adhere to principles of international children's rights law, and may well leave a situation where it excludes as many families as it includes. Chapter 2 will detail ongoing and worsening problems in the areas of child homelessness; backlogs of forensic examination of ICT devices suspected of containing child sex abuse material; the under-resourcing of child and adolescent mental health services (CAMHS) in the face of ever-increasing demand; and persistent concerns regarding the effectiveness of Ireland's response to child trafficking. There are also a number of areas in which the Government has made conscious policy choices to depart from Ireland's obligations under international children's rights law, including the omission of an individual complaints mechanism from the Online Safety and Media Regulation Bill (see section 1.3.2 above) and the decision not to raise the minimum age of criminal responsibility (as discussed in my 2020 and 2021 Annual Reports).[58]

In between the instances of positive progress and momentum on the one hand, and the instances of stagnation or regression on the other, lies a number of planned reforms which are in the pipeline but moving very slowly. This is particularly the case where legislative reform is required. The following is a selection of eight separate examples of ongoing legislative reform projects affecting children that have taken longer (and sometimes much longer) than they should have to come to fruition:

1. The reforms of the guardian *ad litem* system through the Child Care (Amendment) Bill (originally 2019; now 2022) will take a minimum of four years from initiation to enactment and commencement (assuming that the Bill comes into effect in 2023, which remains to be seen).

2. The pressing need for reform of section 3 of the Child Care Act 1991 was identified before my appointment as Special Rapporteur. I produced a discussion paper on this as part of my work on the Expert Assurance Group in 2019,[59] followed by

58 O'Mahony (n 1 above) at section 5.2.2 and O'Mahony (n 4 above) at section 1.2.2.

59 *Final Report of the Expert Assurance Group to the Minister for Children and Youth Affairs* (September 2019), Appendix 9, available at https://assets.gov.ie/48194/18906f6d5e294c12a8ba9f62b729181b.pdf.

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a more considered analysis and detailed recommendations in my 2020 Annual Report.[60] Notwithstanding the fact that the Government has accepted the need for reform on this specific issue, and has the benefit of detailed and carefully reasoned reform proposals, no progress is apparent and it is unclear whether or when the necessary amendments will be made. This reform process seems likely to take well in excess of five years.

3. The Health (Assisted Human Reproduction) Bill 2022 went to pre-legislative scrutiny in 2017. It will have taken a minimum of five years from that point to its enactment (assuming that it is enacted in 2022), and its commencement may be later still. In truth, this process was much longer; the Commission on Assisted Human Reproduction reported to Government as far back as 2005,[61] while the Government made a commitment to the Supreme Court in 2014 that legislation was being developed to deal with surrogacy.[62]

4. The review of the Child Care Act 1991 commenced in September 2017. At the time of writing, the review is ongoing and no clear end is in sight. Once the review is completed, draft legislation will need to be drafted, proceed through all the various stages of the legislative process, and be commenced. All in all, the review seems likely to take in the region of 10 years to generate concrete legislative reform. A decade is an extraordinarily long time to spend on a review of a single existing statute.

5. The Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography, which was adopted by the UN General Assembly in 2000, has been ratified by 176 countries. Ireland signed the Protocol in 2000, but has not yet ratified it—the only country in Europe that has failed to do so. A Government press release in January 2019 entitled "Ireland joining international stand against sale of children, child pornography and child prostitution" stated that "Ireland now meets all legal requirements of an international protocol to end the sale of children and should quickly move to ratification."[63] The press release stated that "[t]he DCYA has prepared a document for the attention of the Attorney General to demonstrate that Ireland is in compliance with the provision of the Convention and there is no need for further measures to be put in place."[64] However, it was later determined that further work is necessary to determine "what if any legislative measures may need to be put in place to ensure that the full range of offences covered by the Protocol can be prosecuted on an organised and transnational basis in line with Article 3.1

60 O'Mahony (n 1 above), Chapter 3.

61 *Report of the Commission on Assisted Human Reproduction* (April 2005), available at https://www.lenus.ie/bitstream/handle/10147/46684/1740.pdf?sequence=1.

62 See *MR v An t-Ard-Chláraitheoir* [2014] 3 IR 533.

63 See https://merrionstreet.ie/en/news-room/releases/ireland_joining_international_stand_against_sale_of_children_child_pornography%C2%A0and_child_prostitution.html.

64 *Ibid*.

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of the Protocol."[65] A response to a parliamentary question on 26 April 2022 stated that "[t]he Government continues to be strongly committed to the ratification of the Second Optional Protocol to the UN Convention on the Rights of the Child … officials in the Department of Justice are giving due consideration to legislative requirements to ensure that Ireland is in compliance with the obligations of the Optional Protocol and that there is engagement with the Office of the Attorney General on this matter."[66] It must be questioned why any outstanding legislative measures necessary to allow for ratification have not yet been clearly identified, let alone drafted and enacted. Three and a half years after the press release quoted above, and 22 years after Ireland signed the Protocol, there appears to be neither a clear timeline for its ratification nor a clear outline of the legislative measures to facilitate ratification. This calls into question Ireland's commitment on this issue.

6. The establishment of a specialist family court was included in the Programme for Government as far back as 2011[67]—yet the General Scheme of the Family Courts Bill was not published until 2020. The Bill itself remains unpublished at the time of writing; the Minister for Justice has stated that it will be published before the summer recess,[68] but it seems unlikely to be enacted until 2023 at the earliest.

7. The Education for Persons with Special Educational Needs Act 2004 was enacted 18 years ago this year, but remains uncommenced. A review of the Act was launched by Government in December 2021.[69] It must be questioned how an Act which has never actually been in operation can be the subject of a meaningful review. The more logical first step would be to commence the legislation and allow it to operate for some time, so that the experience of its operation can inform any review.

8. The Birth Information and Tracing Bill 2022, which was passed by the Oireachtas in June 2022, delivered on a commitment first made by Government in 2001.[70] A previous version of this Bill went to pre-legislative scrutiny in 2015.[71]

There are many people working in Government and the Oireachtas who are deeply committed to protecting children and improving their lives. However, a system that appears to take anything from five years up to 20 years to deliver legislative reforms on issues where the need for reform is clear is simply not responsive enough. This is

65 See https://www.oireachtas.ie/en/debates/question/2021-09-22/142/.

66 See https://www.oireachtas.ie/en/debates/question/2022-04-26/1138.

67 Government of Ireland, *Statement of Common Purpose* (2011) at p 20, available at https://merrionstreet.ie/en/wp-content/uploads/2010/05/programme_for_government_2011.pdf.

68 A Moloney, "Family court system 'not fit for purpose' – solicitor", *RTE News*, 16 June 2022, available at https://www.rte.ie/news/ireland/2022/0615/1305116-family-court/.

69 See https://www.gov.ie/en/press-release/69020-minister-josepha-madigan-launches-review-of-the-education-for-persons-with-special-educational-needs-epsen-act-2004/#:~:text=The%20EPSEN%20Act%20provides%20for,experiences%20of%20students%20and%20families.

70 See, eg, E O'Regan, "Adoptees in State homes to be given their birth details", *Irish Independent*, 25 May 2001.

71 See Joint Committee on Health and Children, *Report on the Pre-Legislative Scrutiny of the General Scheme and Heads of the Adoption (Information and Tracing) Bill* (November 2015), available at http://adoption.ie/wp-content/uploads/2018/11/JCHC-Report-on-the-Pre-Legislative-Scrutiny-of-the-General-Scheme-and-Heads-of-the-Adoption-Information-and-Tracing-Bill.pdf.

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especially so on issues affecting children, for whom time has a different meaning than for adults, and for whom delays in meeting needs may have long-term adverse impacts.

It is not enough for Government to say that it is committed to children's rights; it must demonstrate this through its laws, policies and actions. As such, if I were to make just one recommendation upon the conclusion of my term as Special Rapporteur on Child Protection, it would be that considerably more urgency is required in progressing and completing law and policy reform processes. A good start would be to examine the timelines on the reform projects listed above and to expedite them to ensure delivery within a reasonable timeframe. Five years should be seen as an outer limit from initiating to implementing reform, and not a minimum that is rarely achieved and is often far exceeded.

1.7 The Role of the Special Rapporteur on Child Protection: A Reflection

Establishing the role of Special Rapporteur on Child Protection in 2006 was a positive and progressive move on the part of the Irish Government. While many countries have an Ombudsman for Children or equivalent, the special rapporteur role is more normally associated with UN human rights bodies and is rarely seen at national level. I am not aware of the existence of a special rapporteur for child protection at national level in another jurisdiction. While there is an obvious area of overlap and common interest in Ireland between the Ombudsman for Children and the Special Rapporteur on Child Protection, the Special Rapporteur can bring a different focus and (under the current terms of reference) a more distinctly legal perspective to bear. Also, due to the narrower remit of child protection rather than children's rights broadly speaking, the Special Rapporteur on Child Protection can examine issues relating to child protection law and policy in greater depth than the Ombudsman for Children. For these reasons, it is pleasing to see that the Government proposes to continue to make appointments to the role of Special Rapporteur on Child Protection for terms of three years. The move to a public competition for the role in 2019 was also a positive development.

Having said that, my experience in the role during my three-year term has given rise to some reflections on how the role could be better structured and utilised. This brief reflection will highlight a number of these, with a view to maximising the value that will be added to the child protection system by future appointees.

1.7.1 Recruitment

It is important that recruitment campaigns for the public appointment competition are widely publicised, including through social media channels and professional networks. Reliance on PublicJobs.ie alone is likely to limit the pool of potential candidates.

1.7.2 Workload and Financial Support

The terms and conditions attached to the position of Special Rapporteur on Child Protection must be such as to make it attractive to the widest possible field of potential candidates. There are a limited number of people who have deep expertise in Irish child protection law. Few of them would be attracted to the role as currently designed.

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During my term, the position attracted a €25,000 per annum stipend. (As a public servant, I was not eligible to receive this sum; it was instead transferred to UCC to cover the cost of freeing up some of my time, and some part-time research assistance.) This level of support dictates that the Special Rapporteur on Child Protection will always be a part-time role, meaning that whoever is appointed must balance the considerable demands of the role with a full-time position that is their primary employment and cannot be neglected.

Having completed my term, it is now clear to me that the role of Special Rapporteur on Child Protection is considerably more demanding than the level of stipend reflects. The Special Rapporteur is required to do all of the following to a high standard:

- Research and write Annual Reports (which, if they are to be reasonably comprehensive, are inescapably lengthy);
- Research and write additional reports and discussion papers at the request of the Government;
- Respond to invitations to appear before Oireachtas Committees and participate in working groups;
- Respond to invitations to draft submissions and observations on proposed legislation, Tusla policies, HIQA standards, etc;
- Engage with stakeholders in the sector, including Tusla, the Ombudsman for Children, the Irish Human Rights and Equality Commission, and relevant civil society organisations;
- Respond to regular requests for comment from the broadcast and print media; and
- Respond to regular invitations to speak at conferences, seminars, report launches etc.

If the time involved in discharging all of the above duties were to be fully costed, it would be a multiple of the stipend amount of €25,000 per annum. In my case, UCC subsidised the role considerably, both through all of my research time being committed to it and through additional flexibility being afforded. It should also be noted that the €25,000 stipend also had to cover costs associated with the role, including travel, graphic design of reports, etc.

For these reasons, I wrote to the Minister for Children on 3 February 2022 recommending that serious consideration be given to significantly increasing the stipend associated with the position of Special Rapporteur in order to ensure that the position is attractive to suitably qualified applicants and to afford them the time necessary to discharge the role in an effective manner.

1.7.3 Engagement

If the Special Rapporteur on Child Protection is to add value to the child protection system in Ireland, it is imperative that there be regular and open engagement between the Special Rapporteur and the full range of Government Departments, State agencies and Oireachtas Committees whose work impacts on the broad area of child protection. The independence of the Special Rapporteur necessitates that some distance be kept; but at the same time, a certain amount of engagement is necessary (especially on technical legal or policy matters)

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to ensure that analysis and recommendations made by the Special Rapporteur are adequately considered and understood. That is not to say that all recommendations made should be accepted—it is a matter for Government to decide which recommendations to accept or reject. Nevertheless, recommendations deserve careful consideration and discussion at the least, and ideally, a clear rationale should be provided in circumstances where recommendations are wholly or substantially rejected.

During my three-year term, I experienced multiple examples of very positive and constructive engagement with my work. I engaged in regular discussions with officials in DCEDIY about my recommendations on the reform of section 3 of the Child Care Act 1991 and of the guardian *ad litem* system, as well as on the issue of illegal birth registrations. Along with my colleagues on the *Voluntary Care in Ireland Study*, which contributed detailed findings to Chapter 3 of my 2020 Annual Report, we made presentations to Department officials on more than one occasion. The discussion paper reproduced in Appendix A to this report in relation to reviewing legislative compliance with the CRC was also preceded by a number of detailed conversations. All of this engagement had a positive effect in contributing to my understanding of the issues and challenges arising at Government level, and in assisting the Department officials to understand more fully the nature of my recommendations and the rationale underpinning them.

I was also very appreciative of the opportunity for a number of very helpful conversations with staff of Tusla and the Adoption Authority of Ireland, both of whom were always willing to provide information or to answer questions that assisted me in my analysis. In addition, I was deeply impressed by the level of engagement and commitment among members of the various Oireachtas Committees who invited me to appear before them. It was clear that members had read and carefully considered my written submissions, and the questions that followed were stimulating and constructive.

As against this, I also encountered a number of situations in which Government departments were much less willing to engage with me. I wrote to the Department of Education on several occasions expressing concerns regarding the revised terms of the *ex gratia* scheme for survivors of sexual abuse in schools and offering to engage directly. However, this correspondence received no reply. Separately, although Government had numerous concerns relating to the recommendations made in my report on donor-assisted human reproduction and surrogacy (and appears to have rejected these recommendations wholesale), these concerns were not shared directly with me. Instead, those concerns were included by the Government in an Issues Paper provided to the Joint Oireachtas Committee on Surrogacy that set out the current legal position on international surrogacy; set out the issues and key challenges that arise in this area; and set out possible options for dealing with issues arising from international surrogacy. This Issues Paper was not provided to me, and has not been published. Several of the Government's concerns with the recommendations in my report were, in my view, based on a misunderstanding of the recommendations and the associated legal landscape;[72] direct engagement following the

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72 The submission that I presented to the Joint Oireachtas Committee on International Surrogacy in response to the Government Issues Paper is available at https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_international_surrogacy/submissions/2022/2022-05-12_opening-statement-professor-conor-o-mahony-government-special-rapporteur-on-child-protection_en.pdf.

submission of the report could have avoided this.

While again acknowledging that not all recommendations made by the Special Rapporteur on Child Protection will be accepted by Government, the value that the role can add to the child protection system will be significantly limited if Government departments other than DCEDIY are not willing to discuss the significant issues of the day. Child protection is a whole-of-Government issue and demands a whole-of-Government response; a Government-appointed Special Rapporteur on Child Protection requires the opportunity to engage constructively with all Government departments (and not just with DCEDIY) as appropriate.

1.7.4 Publication Timelines

A recurring issue throughout my term was the length of time that elapses between the submission of reports to Government and their publication, which ranged between four months (in the case of the surrogacy report) and seven months (in the case of the 2021 Annual Report). In the case of the report on illegal birth registrations, there was some rationale for the time lag in the fact that the Government wished to publish a package of response measures alongside the report, and the team working on preparing this was simultaneously engaged in considerable work associated with the Birth Information and Tracing Bill and the Mother and Baby Homes redress scheme. However, the other three reports were all published without any accompanying Government response. If the purpose of the delay before publication is merely to allow Government to consider the report before it is released to the public domain, it is difficult to understand why six or seven months is required.

Lengthy delays in publishing reports has a number of negative impacts. In the case of thematic reports (such as the reports on surrogacy and on illegal birth registration), the delays cause anxiety among individuals who are directly affected by the issues considered in the report and who are understandably eager to see the recommendations and the Government's response. In the case of Annual Reports, it means that at least some (and possibly much) of the analysis of the current state of play in child protection in Ireland will be outdated by the time of publication, especially in times when events move quickly (as they did during the past three years). It also creates an uncomfortable situation whereby a new appointee trying to establish themselves in the role of Special Rapporteur on Child Protection will face reports written by his or her predecessor being published (and widely publicised) well into their term, generating confusion among stakeholders and the public as to the identity of the current appointee. For these reasons, it is recommended that Government endeavour to publish all future reports of the Special Rapporteur on Child Protection as soon as reasonably practicable after their submission, and within three months at the latest.

1.7.5 Child Participation

One thing that I regrettably did not manage to do during my term was engage in structured consultation with children and young people regarding the issues arising in my various reports. That this did not occur was partly down to workload and a lack of capacity (due to the issues discussed at section 1.7.2 above); and partly down to not having the necessary

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skillset. Ideally, consultation with children and young people is something that the Special Rapporteur on Child Protection would do, given the nature of the role and the prevailing legal and policy context (including, in particular, Article 12 of the CRC and the *National Framework for Children and Young People's Participation in Decision-Making*).[73]

DCEDIY has the experience and in-house capacity necessary to support child participation of this nature through its Youth and Participation Division. It is recommended that this be used to provide support to future Special Rapporteurs to facilitate child participation work, and that consultation with children and young people be written into the terms of reference for the Special Rapporteur to emphasise the importance of this activity.

73 Department of Children, Equality, Disability, Integration and Youth, National Framework for Children and Young People's Participation in Decision-Making (2021), available at https://hubnanog.ie/wp-content/uploads/2021/04/5587-Child-Participation-Framework_report_LR_FINAL_Rev.pdf.

CHAPTER 2

Annual Review

2.1 Introduction

This Chapter will provide a review of developments in the area of child protection in Ireland during the course of the reporting period of July 2021 to June 2022, drawing on a range of national and international reports. The review will follow the structure established in previous Annual Reports by considering the protection of children from harm (section 2.2); court proceedings involving children (section 2.3); the treatment of children in the care system (section 2.4); meeting the needs of victims of abuse (section 2.5); child participation (section 2.6), and measures taken to address historical rights violations (section 2.7). Particular attention will be paid to topical issues such as child homelessness, child protection online, Child and Adolescent Mental Health Services (CAMHS), child trafficking and the child protection risks arising from the recent influx of refugees from Ukraine, and meeting the needs of victims of abuse. The Chapter will conclude with discussion of the key themes arising from the review and a summary of the key recommendations arising.

2.2 Protecting Children from Harm

2.2.1 COVID-19

Chapter 2 of the 2021 Annual Report of the Special Rapporteur on Child Protection contained an in-depth analysis of the impact of the COVID-19 pandemic on child protection including exposure to increased domestic abuse and neglect and cyberbullying; disruption of referrals to child protection services; and negative impacts on physical and mental health. Over the course of the reporting period of July 2021 to June 2022, the pandemic has been ongoing, but abating. There has thankfully been no return to the lockdowns and schools closures of 2020 and early 2021 that had the most acute impacts on the safety and wellbeing of children. Vaccines have been made available to most children, and measures such as mask-wearing and social distancing in schools and other settings where children gather have been relaxed or phased out. The pandemic is certainly not over: the incidence of COVID-19 remains high in June 2022, and the virus continues to pose a risk to public

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health (particularly among more vulnerable members of the population). Difficult decisions will remain necessary regarding the correct balance to be struck in seeking to mitigate the worst impacts of the virus while avoiding restrictions that have an even worse impact.

We are still grappling to fully understand the ways in which the pandemic has impacted on the safety and wellbeing of children, and more data and research is becoming available as time passes. The latest figures on child protection and welfare referrals to Tusla show that there were 73,069 referrals in 2021, which represented an increase of 5% on the 2020 figures.[1] Within this, there was a disproportionate increase of 19% in referrals related to child sexual abuse, from 3,653 to 4,331 referrals.[2] It is not possible to properly benchmark these figures against pre-pandemic years, since a change in methodology in how referral data is recorded by Tusla means that data from 2020 onwards is not comparable to data from 2019 or earlier.[3] Having said that, it is notable that both 2020 and 2021, during which time the data is comparable, involved several months of lockdown and school closure. Further analysis is needed to interpret exactly how COVID-19 has impacted on the overall trends; but on its face, the increase in total referrals and the disproportionate increase in referrals related to child sexual abuse is a cause for concern.

The Ombudsman for Children's Office (OCO) published a Child Rights Impact Assessment of school closures in Ireland during the COVID-19 pandemic, involving desk-based research as well as semi-structured interviews with individuals from four State agencies and seven NGOs.[4] The OCO concentrated on four key rights enshrined in the UN Convention on the Rights of the Child (UNCRC), namely the right to education (Article 28), the right to the highest attainable standard of health, including mental health (Article 24), the right to an adequate standard of living, with a particular focus on adequate nutrition (Article 27) and the right to protection from all forms of violence, harm and abuse (Article 19). The four general principles of the UNCRC were also considered: the right to non-discrimination (Article 2), the best interests principle (Article 3), the right to life, survival and development (Article 6) and the child's views (Article 12). In particular, the OCO concentrated on the impact of school closures on five distinct groups of children "children experiencing mental health difficulties, children experiencing homelessness, children living in Direct Provision, children with disabilities and Traveller and Roma children".[5]

1 Tusla, *Quarterly Service Performance and Activity Report Quarter 1 2022* at p 3, available at https://www.tusla.ie/uploads/content/Q1_2022_Service_Performance_and_Activity_Report_V1.0.pdf.

2 *Ibid* at p 12. The 2020 figures are available at Tusla, *Quarterly Service Performance and Activity Report Quarter 1 2021* at p 12, available at https://www.tusla.ie/uploads/content/Q1_2021_Service_Performance_and_Activity_Report_Final.pdf.

3 See Tusla (n 1 above) at p 3: "… the number of referrals for 2020 is the result of a new and improved methodology of capturing all of the need which is referred to us. For previous years, a different methodology was used and focused on the number of referrals requiring a social work response only. We are now capturing referrals which may not require a child protection response but do require consideration including in our remit for family support services. This current figure includes referrals of welfare concerns as well as a child protection concerns and is part of our continuous improvement to inform our decisions on resources and ways of working. The counting now provides an even greater account of activity and demand on child protection and welfare services."

4 Ombudsman for Children's Office, *The impact of school closures on children's rights in Ireland – A Pilot Child Rights Impact Assessment (CRIA)* (January 2022), available at https://enoc.eu/wp-content/uploads/2022/04/CRIA-FullReport-Ireland.pdf.

5 *Ibid* at p 3.

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The report emphasised that while both Government and NPHET "recognised the impact of Covid-19 restrictions on children and their education, it is unclear whether, and if so, when, how and to what extent, human rights concerns, including children's rights, have been considered by the Government in its decision-making regarding Covid-19 restrictions, including school closures".[6] It found that "there is insufficient information available to demonstrate that adequate and appropriate consideration was given to children's rights. Concerns have been raised, including by the OCO, about the extent to which school closures, particularly in 2021, were necessary as a measure to combat Covid-19".[7] Specific findings with regard to the right to education include that the child's "access to education during school closures depended heavily on their families' resources and the supports provided by parents/guardians and schools" and that "where children were provided with supports, such as devices and/or paper-based resources, such provision was reported to be inconsistent or insufficiently targeted towards some children's needs, with certain children still left without adequate opportunities to access and participate in education".[8] With regard to health, it was found that there was "an apparent increase in mental health difficulties" and "disruption to and cancellation of in-school health services and supports".[9]

In its consideration of the right to an adequate standard of living, the OCO praises "the continuation and extension of the School Meals Programme during school closures", although it is noted that there were "deficiencies in its delivery".[10] With respect to the right to protection from violence, harm and abuse, it was observed that there was an "increased exposure of children to harm and abuse, including domestic violence" and "reduced opportunities to identify, monitor and report child protection and welfare concerns".[11] The OCO made a number of recommendations including that "attention needs to be given to how expertise on children's rights in the statutory and non-statutory sectors in Ireland might be mobilised and integrated effectively into decision-making affecting children in emergency situations".[12]

A detailed investigation by Human Rights Watch revealed significant children's rights concerns relating to educational technology (EdTech) platforms endorsed by governments and used to facilitate home learning during the COVID-19 pandemic.[13] While Ireland was not one of the countries included in the study, numerous EdTech products that were reviewed by Human Rights Watch (eg SeeSaw, Edmodo) were widely used in Ireland during the COVID-19 pandemic, and some remain in use at a lower level today. The report found that EdTech products "helped fill urgent gaps in delivering some form of education

6 *Ibid* at p 10.
7 *Ibid* at p.11.
8 *Ibid* at p 31.
9 *Ibid* at p 32.
10 *Ibid*.
11 *Ibid*.
12 *Ibid* at p 36.
13 Human Rights Watch, *"How Dare They Peep into My Private Life?" Children's Rights Violations by Governments that Endorsed Online Learning During the Covid-19 Pandemic* (25 May 2022), available at https://www.hrw.org/report/2022/05/25/how-dare-they-peep-my-private-life/childrens-rights-violations-governments.

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to many children"; however, "in their rush to connect children to virtual classrooms, few governments checked whether the EdTech they were rapidly endorsing or procuring for schools were safe for children."[14] The result of this is that children and families were exposed to the privacy practices of the EdTech companies, which often included large-scale data harvesting and selling of data to advertising companies. The report notes:

> Of the 164 EdTech products reviewed, 146 (89 percent) appeared to engage in data practices that put children's rights at risk, contributed to undermining them, or actively infringed on these rights. These products monitored or had the capacity to monitor children, in most cases secretly and without the consent of children or their parents, in many cases harvesting data on who they are, where they are, what they do in the classroom, who their family and friends are, and what kind of device their families could afford for them to use.
>
> Most online learning platforms installed tracking technologies that trailed children outside of their virtual classrooms and across the internet, over time. Some invisibly tagged and fingerprinted children in ways that were impossible to avoid or get rid of—even if children, their parents, and teachers had been aware and had the desire and digital literacy to do so— without throwing the device away in the trash.[15]

Some EdTech products targeted children with behavioural advertising, which "not only distorted children's online experiences, but also risked influencing their opinions and beliefs at a time in their lives when they are at high risk of manipulative interference".[16] Most monitoring happened in secret, without the knowledge or consent of the children being monitored; moreover, children had no realistic possibility of opting out of this monitoring without opting out of compulsory education and giving up on formal learning during the pandemic.[17] The report notes that most EdTech products were offered to governments free of charge; "in the process of endorsing and ensuring their wide adoption during Covid-19 school closures, governments offloaded the true costs of providing online education onto children, who were unknowingly forced to pay for their learning with their rights to privacy, access to information, and potentially freedom of thought."[18]

Further academic research relating to the impact of COVID-19 on the safety and wellbeing of children is discussed in section 4.3.7 of this Report.

2.2.2 Child Poverty and Homelessness

The 2020 Annual Report of the Special Rapporteur on Child Protection documented the concerning child protection implications of the increasing rate of child homelessness during 2019.[19] In my 2021 Annual Report, I was pleased to be able to report that in May 2021, the number of children experiencing homelessness had reduced to 2,148; this was

14 *Ibid* at p 2.

15 *Ibid*.

16 *Ibid* at p 3.

17 *Ibid*.

18 *Ibid*.

19 C O'Mahony, *Annual Report of the Special Rapporteur on Child Protection 2020* at sections 1.2.1, available at https://assets.gov.ie/108822/caa4c294-0d99-4d35-8560-c7555588e1ac.pdf.

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a 44% decrease from the figure in October 2019, and was its lowest number since April 2016. At the same time, I cautioned that there was still much to do if child homelessness is to be eliminated, and that the standard of accommodation remained problematic for far too many children overall.[20]

More progress was needed to build on the progress made in 2020; but instead, the incidence of child homelessness has instead worsened over the past 12 months. In December 2021, 2,451 children were in emergency accommodation.[21] By March 2022, this had risen to 2,811;[22] and by May, the number had reached 3,028.[23] The methodology underlying the data collection changed in July 2021, limiting the extent to which the figures from before that date can be compared with subsequent figures. Nonetheless, the negative trend since July 2021 is all too clear, with a 42% increase between that date[24] and May 2022, and a 24% increase in the first five months of 2021 alone. At a time when a continuation of the previous year's reduction was still very much needed, the trend appears to have completely reversed. If the current rate of increase continues, the historic high of over 3,800 children accessing emergency accommodation in 2019 will be exceeded in early 2023. The Government has failed for too long to come to grips with Ireland's housing crisis. The multiple negative effects of this from a child protection standpoint were documented in my 2020 Annual Report, including on development, education, safety and wellbeing.[25] It is clear that further efforts are needed in this sector.

A report published in September 2021 by the Ombudsman for Children's Office (OCO) highlighted the impact of poverty and homelessness on children, which has been exacerbated by the COVID-19 pandemic, and urged the Government to prioritise these issues and ensure cross departmental coordination.[26] The OCO pointed to Ireland's obligations (including those outlined in the European Child Guarantee)[27] "to submit a national plan with specific targets, which focuses on breaking cycles of poverty, reduces the socio-economic impact of Covid-19 and tackles social exclusion" by the end of 2021.[28] The report noted that the State's "previous target of reducing by 70,000 the number

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20 C O'Mahony, *Annual Report of the Special Rapporteur on Child Protection 2021* at section 1.3.2, available at https://assets.gov.ie/214234/9e893871-ecb7-4a28-879a-d0a83d5bc7e2.pdf.

21 Department of Housing, Local Government and Heritage, Monthly Homelessness Report: December 2021 at p 6, available at https://assets.gov.ie/214263/79a5b633-01d9-4421-9ba6-aade97436264.pdf.

22 Department of Housing, Local Government and Heritage, Monthly Homelessness Report: March 2022 at p 5, available at https://assets.gov.ie/222484/1159ba1c-66ad-4b32-9dbb-49f473486c52.pdf.

23 Department of Housing, Local Government and Heritage, Monthly Homelessness Report: May 2022 at p 6, available at https://assets.gov.ie/228122/c441c68d-da59-4262-b16a-6d856acbfada.pdf.

24 The number of children accessing emergency accommodation in July 2021 was 2,129: see Department of Housing, Local Government and Heritage, Monthly Homelessness Report: July 2021 at p 6, available at https://assets.gov.ie/195431/f6bcb30b-0667-46d6-a032-b35befac57cb.pdf.

25 O'Mahony (n 19 above) at section 1.2.1.

26 Ombudsman for Children's Office, *A Better Normal: Eradicate Child Poverty. Eliminate Child Homelessness* (September 2021), available at https://www.oco.ie/library/a-better-normal-eradicate-child-poverty-eliminate-child-homelessness/.

27 See European Commission, "Council adopts European Child Guarantee", 14 June 2021, available at https://ec.europa.eu/social/main.jsp?langId=en&catId=1428&furtherNews=yes&newsId=10024.

28 Ombudsman for Children's Office (n 26 above) at p 6.

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of children in consistent poverty by 2020 … has been missed".[29] Further obligations on the Irish State in respect to homelessness highlighted by the OCO include the Lisbon Declaration, whereby "Ireland and all other signatories have made a commitment to reduce and combat homelessness by 2030".[30]

The OCO called for "a time-limited, cross departmental Joint Oireachtas Committee" to address child poverty and child homelessness.[31] Specific actions are proposed including the use of "reliable data like MESL to inform the rates set" in an effort to achieve an "adequate standard of living".[32] The OCO also called on the Government to "consider all options, including ESRI recommendations … to utilise the low cost of sovereign debt to significantly invest in housing"; "targeting services" to those "most at risk of slipping below the poverty line" including by providing free school dinners; expanding the "Area Based Childhood Programme"; further support for energy, transport and back to school expenses; "a dedicated plan" to prevent evictions; and a renewed commitment to "the recommendations of the Better Outcomes Brighter Futures (BOBF) mid-term review".[33]

Another reform endorsed by the OCO report, and which has been endorsed in the previous two Annual Reports of the Special Rapporteur on Child Protection, is the enactment of a constitutional amendment on the right to housing.[34] A commitment was made in very general terms in the current Programme for Government to hold a referendum on housing.[35] The Housing Commission is currently working on developing proposals for a wording for this amendment, and held a conference in May 2022 to this end (at which I was invited to speak, alongside a wide range of national and international experts on constitutional law and property law).[36] It remains to be seen what form this proposed wording will take, and whether it will be accepted by Government and the Oireachtas. There are multiple possible forms: for example, will the wording be couched as a constitutional right to housing; or a qualification to constitutional property rights that clarifies the scope of State power to intervene in the housing market; or a mere aspirational statement of principle? If it is to be a right to housing, how extensive and enforceable will this right be? My recommendation is that the amendment be based on section 26 of the Constitution of South Africa, which provides that everyone has the right to have access to adequate housing, and requires the State to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. This wording provides the best available model of how a constitutional right to housing can strike an effective balance between affording the elected branches of Government sufficient latitude to develop and implement policy, while also affording the courts the power to exercise a corrective function in situations where policy is clearly failing to respect this right and/or achieve progressive

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29 *Ibid* at p 7.

30 *Ibid*.

31 *Ibid* at p 8.

32 *Ibid* at p 9.

33 *Ibid* at p 10.

34 O'Mahony (n 19 above) at section 1.8.1 and O'Mahony (n 20 above) at section 1.3.2.

35 Government of Ireland, *Programme for Government: Our Shared Future* (October 2020) at p 120, available at https://assets.gov.ie/130911/fe93e24e-dfe0-40ff-9934-def2b44b7b52.pdf.

36 See details at https://www.gov.ie/en/publication/127ea-conference-on-a-referendum-on-housing-in-ireland/.

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realisation of it.

2.2.3 HIQA Inspections of Tusla Child Protection Services

HIQA inspections of Tusla child protection services made a number of findings in respect of the management of referrals and safeguarding which give rise to cause for concern. HIQA's July 2021 report, which summarised 44 inspections of children's services during 2020 (including residential centres, foster care, special care units, and Oberstown), found that "improvements were required to ensure safety plans were regularly reviewed and updated so that the measures in place were effective at keeping the child safe".[37] With regard to the investigation of retrospective allegations of sexual abuse, it stated that "the overarching finding of this inspection was that the management of waitlisted retrospective allegations of abuse was poor".[38]

In a subsequent report in September 2021, summarising 17 inspections of foster care services carried out in each of the Tusla service areas in 2019 and 2020, serious findings were made in relation to safeguarding and child protection. For example, in three areas, "not all allegations made by children in care were investigated in line with Children First (2017) and safety planning was not adequate for all children who required a safety plan", while in "seven service areas, the Interim Protocol for managing concerns and allegations of abuse or neglect against Foster Carers and Section 36 (relative) Foster Carers (Tusla, April 2017) was not followed in all cases and, in 11 service areas, investigations into allegations by children in care were not always timely and in line with Children First".[39] Further, "in Carlow/Kilkenny/South Tipperary, while the management of risk and associated safeguarding measures ensured children were visited, these measures were not reliable in regard to enabling children to disclose potential abuse" and "significant difficulties in allocating a consistent social worker to children in care ... reduced the likelihood that children would disclose their concerns or allegations to a familiar professional".[40]

A November 2021 report examined the implementation of Children First and efforts to ensure that children are protected; HIQA found that nine service areas were partially compliant, while three areas were substantially compliant. Issues included delays in recording screenings and in some preliminary enquiries, with "delays of between eight and 15 months found in a small number of cases in the Waterford/Wexford, Donegal and Midlands service areas" meaning that "some children's needs were not assessed in a timely manner so that appropriate interventions could be put in place".[41] HIQA also expressed concern about the use of waiting lists, stating that they "required a greater consistency in oversight, to ensure risks associated with waiting lists did not escalate into

37 HIQA, *Overview Report Monitoring and Regulation of Children's Services in 2020* (July 2021) at p 38, available at https://www.hiqa.ie/sites/default/files/2021-07/Childrens-Overview-Report-2020.pdf.

38 *Ibid* at p 43.

39 HIQA, *Overview Report Inspection of Statutory Foster Care Services 2019-2020* (September 2021) at p 31, available at https://www.hiqa.ie/sites/default/files/2021-09/Overview-Report-Inspection-of-Statutory-Foster-Care-Services_2019-2020.pdf.

40 *Ibid* at p 32.

41 *HIQA, Overview Report: Inspections of Child Protection and Welfare Thematic Programme 2019-2021*, (November 2021) at p 52, available at https://www.hiqa.ie/sites/default/files/2021-11/Overview-Report-Inspections-of-Child-Protection-and-Welfare-Thematic-Programme%202019-2021.PDF.

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a more significant issue".[42] Further, "continued improvement" was necessary in the safety planning process,[43] and "improvements were required in the completion and timeliness of notifications of suspected abuse to An Garda Síochána".[44]

A report of a child protection and welfare inspection in the Dublin South-West, Kildare and West-Wicklow service area, focusing on leadership, governance and management as well as safe and effective services noted many improvements were highlighted across the board since the last HIQA report in this service area in 2020.[45] However, several deficits were identified as needing to be addressed, such as "the disparity between the service provided in Dublin South West where referrals were receiving a service within two weeks, and the service provided in Kildare West Wicklow where higher priority referrals were waiting significantly longer for a response, in some cases up to nine months".[46] Indeed, it was found that "a low priority case could be seen much quicker in Dublin South West than a medium priority case in Kildare West Wicklow".[47]

HIQA also highlighted that "[q]uality issues in six records (three screening and three preliminary enquiry) resulted in risk to children being overlooked. These issues were not detected through audit or where they were detected, they were not promptly acted on. This undermined the efforts of the area to ensure the safety of children".[48] It is stated, also, that "the quality issues with the preliminary enquiry resulted in poor identification of risk to children and inadequate safeguarding. For example, concerns relating to neglect of a newborn that required a prioritized response were not addressed as part of the preliminary enquiry and in another case the history of domestic violence reported did not result in safety planning with the family or An Garda Síochána".[49] Further issues with safety planning were also identified: "in one case Tusla received a report that a child was homeless who waited two months before having contact with social work", while in a second case, "there was a reported concern that a child was sexually abused. This concern needed to be verified but sufficient actions were not taken to ensure the child did not have contact with the alleged abuser in the three and a half months up to the inspection", and in a third case, "there was no contact with a family for 18 months and staff did not know if the child was living with the person the child alleged had physically abused them. Action was taken on this case on foot of queries by an inspector".[50]

On the more positive side, HIQA published a separate report detailing its inspections of child protection and welfare services in the Mid-West, focusing on children listed on the Child Protection Notification System (CPNS) as well as those who were recently made

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42 *Ibid* at p 53.

43 *Ibid* at p 56.

44 *Ibid* at p 57.

45 HIQA, *Risk-based Child Protection and Welfare Report: Dublin South-West, Kildare, West-Wicklow* (27-30 September 2021), available at https://www.hiqa.ie/system/files?file=inspectionreports/4419-cpw-DSWKWW-27-September-2021.pdf.

46 *Ibid* at p 15.

47 *Ibid*.

48 *Ibid* at p 16.

49 *Ibid* at p 29.

50 *Ibid* at p 31.

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inactive on the CPNS.[51] The results of the inspections were overwhelmingly positive with most of the standards judged to be compliant. It was found, for example, that there was "effective leadership, governance and management arrangements" in place and that there was effective risk management and effective systems in place to drive quality improvement.[52] The inspectors were also confident that the child protection conferences were being run in a compliant manner, the child protection safety plans were compliant and inter-agency cooperation was also deemed to be compliant. Just one area was said to be "substantially compliant" rather than compliant and this concerned the performance of "functions in accordance with relevant legislation, regulations, national policies and standards to protect children and promote their welfare".[53] It was stated that "[t]here were interim national guidelines on child protection case conferencing and the child protection notification systems but these had not been subject to review and required updating by the Child and Family Agency".[54] Accordingly, this was "outside of the control of the Mid-West Area" and HIQA were scheduled to follow up directly with Tusla on this.[55]

Staffing of Tusla services is a recurring theme in HIQA reports. The July 2021 report commented that staff vacancies are "adversely impacting on service provision … inspectors found that six out of the seven service areas inspected in 2020 had waitlists in place as a direct result of staffing issues".[56] The impact of these waiting lists is that the risk "to children was not always well managed, in particular for children about whom multiple referrals of concern had been made to child protection and welfare services".[57] Issues noted in the November 2021 report as needing to be addressed included staff shortages in the Dublin North City service area, and the impact of this on Tusla's "capacity to provide services and manage referrals efficiently"; the report pointed to cases "awaiting a service", "non-adherence to the timelines",[58] and "unmanageable caseloads" in some service areas.[59] The overview report for 2021, published in June 2022, returned to this theme, noting that five risk-based inspections of child protection and welfare services were completed in 2021, and "vacant posts was a challenge in all five areas and this impacted on service provision."[60] Of 12 residential centres inspected during 2021, only five had their full staffing complement.[61] It was found that these ongoing staff shortages were impeding progress in the improvement of services in areas such as the timeliness of the screening of referrals, the management of waiting lists and the availability of supervision for staff.[62]

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51 HIQA, *Report of an inspection of a Child Protection and Welfare Service: Midwest* (7-9 September 2021), available at https://www.hiqa.ie/system/files?file=inspectionreports/4401-CPW-MW-07-September-2021.pdf.

52 *Ibid* at pp 8 and 15.

53 *Ibid*.

54 *Ibid*.

55 *Ibid* at p 23.

56 *Ibid* at p 37.

57 HIQA (n 37 above) at p 43.

58 HIQA (n 41 above) at p 30.

59 *Ibid* at pp 34-35.

60 HIQA, *Overview Report: Monitoring and Regulation of Children's Services* (June 2022) at p 49, available at https://www.hiqa.ie/sites/default/files/2022-06/Children's-Overview-Report-2021_0.pdf.

61 *Ibid* at p 54.

62 *Ibid* at pp 51-52.

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Consideration was also given as to whether there were safe recruitment practices "to protect children and promote their welfare" and HIQA found that two service areas were non-compliant in this regard, while four were partially compliant, one was substantially compliant and four were compliant. There were gaps in some employee's files, with no CVs or proof of Garda vetting or police vetting for employees from other jurisdictions. HIQA also considered whether staff "have the required skills and experience to manage and deliver effective services to children" and found that seven service areas were compliant, three were substantially compliant and two were partially compliant.[63] The main issues again related to staff shortages which directly impacted on children and their families given that there were delays. As to whether staff were supported and supervised in their work, HIQA found that two service areas were compliant, six were substantially compliant and four were partially compliant. There were issues with "the frequency and quality of supervision" as well as records of supervision.[64] Some positive initiatives were also in place, such as "individual counselling for staff" and a "culture of support".[65]

2.2.4 Policing and Child Protection

The Garda Síochána Ombudsman Commission Annual Report for 2021 included a case study on a case in which a Garda member was found in breach of discipline for failure to properly investigate allegations of childhood sexual abuse and failure to communicate with the victim on the progress of the investigation. It notes that after the Greater Manchester Police "had sent a comprehensive report to the Gardaí there was a protracted period where very little action was taken to conduct an investigation or to deal with the suspected offender, thereby leaving him to remain a risk to children." The Garda member concerned was found to be in breach of the Garda Discipline Regulations for two counts of neglect of duty, and was sanctioned accordingly.[66] The fact that disciplinary action was taken in this individual case is welcome. However, in the absence of further information about any other actions taken in this case, it is recommended that An Garda Síochána take steps to engage with the victim(s) in this case to mitigate any adverse impact arising from the delay; and to implement any measures that might be deemed appropriate to prevent re-occurrences of similar incidents in future.

The 2021 Annual Report of the Special Rapporteur on Child Protection discussed concerns arising from the cancellation by Gardaí of emergency 999 calls related to domestic abuse.[67] In September 2021, the Garda Commissioner revealed that emergency calls "continued to be cancelled, with no policing response, despite months of controversy over the practice." Discipline investigations were under way into those involved.[68] An independent review of the issue has been commissioned by the Policing Authority and is ongoing at the time

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63 *Ibid* at p 39.

64 *Ibid* at pp 41-42.

65 *Ibid* at p 43.

66 Garda Síochána Ombudsman Commission, *2021 Annual Report – GSOC in Transition* (May 2021) at p 48, available at https://www.gardaombudsman.ie/news-room/archive/gsoc-publishes-its-2021-annual-report-gsoc-in-transition/?download=file&file=4162.

67 O'Mahony (n 20 above) at section 1.3.7.

68 C Lally, "Garda members continued to cancel 999 calls despite controversy – Harris", *Irish Times*, 23 September 2021.

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of writing.[69] Section 4.2.1 of this report will discuss the recent judgment of the European Court of Human Rights in *De Giorgi v Italy*,[70] which reinforces that all complaints of domestic abuse must be investigated; cancelling 999 calls without taking any further action would fail to discharge the State's obligations under the ECHR.

Other issues relating to policing and child protection that arose during the reporting period include child protection online (which will be discussed in the next section) and the role of the Gardaí in dealing with young people experiencing crisis mental health events (which will be discussed at section 2.2.7 below).

2.2.5 Child Protection Online

There were 10,583 public reports of child sexual abuse material (CSAM) to Hotline.ie in 2020 (on par with the previous two years); of these, one quarter represented illegal content, predominantly child pornography.[71] The Hotline.ie Annual Report presented a breakdown of their statistics, noting that 81% of the children in these images are girls, 9% are boys and 10% are girls and boys, while 78% of them are aged 4-12 years, 7% are aged 3 and younger and 15% are aged 13-16 years.[72] Hotline.ie also reported a "142% increase in CSAM which appeared to be self-generated imagery or videos" and this "material predominately featured girls under the age of 15 engaging in explicit sexual activity on webcams. Hotline.ie Analysts also noted that signs of coercion or grooming were often present".[73] There has been a rapid increase in the number of images which have a commercial element and it is reported that there "appears to be an increasing trend in requesting cryptocurrency payment instead of more traditional and traceable alternatives".[74]

Of concern in this regard is the very small proportion of these reports which are actually investigated by An Garda Síochána. 2,852 of the reports received by Hotline.ie in 2020 "were classified as CSAM leads",[75] and a further 6,959 cases of potential CSAM were flagged to the Gardaí by the National Center for Missing and Exploited Children (NCMEC); however, it was reported in February 2022 that the Gardaí only investigated 160 of these reports.[76] A senior Facebook employee was quoted as stating: "My experience is that the material sent to the NCMEC is accurate. There are errors, of course, but not over 96%. If we were that bad at it, we'd know about it", and expressed concerns that An Garda Síochána are not equipped to deal with the volume of CSAM that is in circulation.[77]

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69 See https://www.policingauthority.ie/en/all-media/news-detail/statement-from-the-policing-authority-regarding-the-garda-siochana-review-of-the-invalid-and-unwarranted-closure-of-cad-incidents-999-calls.

70 23735/19, 16 June 2022. The judgment is only available in French; the summary above relies on the Court press release.

71 Hotline.ie, *Annual Report 2020, Break the Cycle, one report at a time* at p 17, available at https://www.hotline.ie/library/annual-reports/2021/2020-hotline-ie-annual-report-webready.pdf.

72 *Ibid* at p 20.

73 *Ibid* at p 15.

74 *Ibid* at p 22.

75 *Ibid* at p 15.

76 A Moore, "Only a fraction of child sex abuse images reported are investigated by gardaí", *Irish Examiner*, 7 February 2022.

77 *Ibid*.

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These concerns are corroborated to an extent by ongoing and worsening backlogs in the forensic examination of ICT devices in CSAM investigations. My 2021 Annual Report noted significant child protection risks arising from a two-year backlog in the examination of ICT devices seized by the Gardaí to secure potential evidence for cases involving sexual offences against children. In May 2021, delegates at the Garda Representative Association heard that this backlog has now risen to three years.[78] This figure was also reported by the Policing Authority, who noted that it "impacts on victims, suspects, investigation timelines, and potentially court outcomes", and that it arises in a context where An Garda Síochána has set a target of reducing the time it takes to ensure a device is analysed by Gardaí once seized to below 12 months.[79] The trend here is moving in the wrong direction to an alarming extent. In addition to the impact on parties involved in the cases in which the devices are seized, the delays pose risks to other parties by leaving perpetrators at large for extended periods in circumstances where they have come to the attention of the authorities, but the resources are not available to progress the investigations against them. This creates a risk that other children will experience preventable abuse.

It is recommended that targeted resources and recruitment campaigns be undertaken as a matter of the highest priority in order to mitigate these risks. It is not only a moral imperative to prevent abuse cases of this nature: it is also a legal imperative. Should a child experience abuse at the hands of a perpetrator who remained at large during a lengthy delay in examining an ICT device, that child would almost certainly succeed in arguing that the State had failed in its positive obligations under Article 3 of the ECHR to take steps to mitigate risks of child sexual abuse of which State authorities were aware, or ought to have been aware.[80]

In May 2022, the European Commission published a proposal for a new EU Regulation laying down rules to prevent and combat child sexual abuse.[81] This proposed Regulation is part of the *EU Strategy For a More Effective Fight Against Child Sexual Abuse*, which was published in July 2020 and discussed in the 2021 Annual Report of the Special Rapporteur on Child Protection.[82] The proposal describes the detection and reporting of child sexual abuse material as "necessary to prevent its production and dissemination, and a vital means to identify and assist its victims", and notes that the COVID-19 pandemic "has exposed children to a significantly higher degree of unwanted approaches online, including solicitation into child sexual abuse".[83] It continues:

> Despite the fact that the sexual abuse and sexual exploitation of children and child sexual abuse materials are criminalised across the EU by the Child Sexual Abuse Directive, adopted in 2011, it is clear that the EU is currently still failing to protect

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78 C Gallagher, "Garda struggling to tackle massive increase in child abuse cases, GRA conference hears", *Irish Times*, 24 May 2022.

79 Policing Authority, *Assessment of Policing Performance 2019-2021* (April 2022) at p 11, available at https://www.policingauthority.ie/assets/uploads/documents/Assessment_of_Policing_Performance_2019_2021.pdf.

80 See *Z v UK* (29392/95, 10 May 2001) and *O'Keeffe v Ireland* (35810/09, 28 January 2014).

81 Document 52022PC0209, COM/2022/209 final, 11 May 2022.

82 O'Mahony (n 20 above) at section 1.3.6.

83 Document 52022PC0209, COM/2022/209 final, 11 May 2022 at p 1.

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> children from falling victim to child sexual abuse, and that the online dimension represents a particular challenge.[84]

The vital role played by providers of online services is highlighted: their "responsible and diligent behaviour is essential for a safe, predictable and trusted online environment and for the exercise of fundamental rights".[85] Although some providers already voluntarily use technologies to detect, report and remove online child sexual abuse on their services, the measures taken by providers vary widely, "with the vast majority of reports coming from a handful of providers, and a significant number take no action."[86] Thus, the EU Commission has come to the view that "voluntary action has thus proven insufficient to address the misuse of online services for the purposes of child sexual abuse".[87] While several Member States have begun to prepare national laws addressing this issue, "this results in the development of divergent national requirements, in turn leading to an increase in the fragmentation of the Digital Single Market for services".[88]

As such, the EU Commission proposes "a clear and harmonised legal framework on preventing and combating online child sexual abuse ... [that] seeks to provide legal certainty to providers as to their responsibilities to assess and mitigate risks and, where necessary, to detect, report and remove such abuse on their services in a manner consistent with the fundamental rights laid down in the Charter and as general principles of EU law."[89] The obligations in the proposed Regulation would apply both to child sex abuse material (ie images) and to interpersonal communications for the purposes of grooming. The Regulation would include three main elements:[90]

1. The introduction of an obligation on service providers to prevent child sexual abuse online by assessing and mitigating risks and, where needed, adopt targeted orders to detect, report and remove online child sexual abuse. In effect, this would amount to automated scanning of online communications in order to detect potential child sex abuse material or grooming. Member States will be obliged to designate national authorities in charge of reviewing the risk assessment and the mitigating measures proposed by the service provider to prevent child sexual abuse online. Where such authorities determine that a significant risk remains, they would be empowered to apply to a court or an independent administrative authority to issue a detection order for known or new child sexual abuse material to address any remaining significant risk in a targeted manner.

2. The introduction of safeguards aimed at ensuring that detection technologies are only used for the purpose of detecting child sexual abuse, and will only be

84 *Ibid.*

85 *Ibid* at p 2.

86 *Ibid.*

87 *Ibid.*

88 *Ibid.*

89 *Ibid* at p 3.

90 See European Commission, "Questions and Answers –New rules to fight child sexual abuse", 11 May 2022, available at https://ec.europa.eu/commission/presscorner/detail/en/QANDA_22_2977.

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able to detect content using indicators to identify child sexual abuse that have been created based on child sexual abuse online previously identified by relevant independent authorities or a court in the Member States. Providers will be required to deploy technologies that are the least privacy-intrusive in accordance with the state of the art in the industry, and that limit the error rate of false positives to the maximum extent possible. Detection orders would be limited to situations where preventive measures are insufficient and only after several preliminary interactions with service providers. Detection would be performed automatically and anonymously; human review would only intervene when indicators point to online child sexual abuse in a specific image, video or conversation. Both providers and users would have a right to challenge any measure affecting them in Court and a right to compensation for any damage resulting.

3. The creation of a new agency called the EU Centre to Prevent and Combat Child Sexual Abuse. The Centre will maintain a database of indicators allowing the reliable identification of child sexual abuse materials and of solicitation of children. It will also receive and process reports from providers of any child sexual abuse materials or solicitation of children detected on their services, and will share them with the competent law enforcement authorities and Europol.

The proposed Regulation remains at draft stage at present and has some way to travel before becoming law. There is no question that the prevention and detection of child sexual abuse online is a legitimate aim. More than this, it is a specific positive obligation of State pursuant to Article 19 of the CRC and Articles 3 and 8 of the ECHR. The spiralling rate at which the Internet is being used to facilitate child sexual abuse means that doing nothing is not an option; a failure to act would be a violation of the human rights of the children affected. The scale of the problem, the volume of material involved and the complexities presented by changing technologies (including encryption) mean that it is difficult to see how the problem can be effectively tackled without at least some reliance on automated systems. At the same time, the Regulation has clear implications for the right to privacy of service users whose private correspondence would become subject to automated surveillance. As such, it will be essential that the Regulation takes an approach which is proportionate to the aim pursued, with robust safeguards against intrusions into privacy that are not strictly related to and necessary for protecting children from online abuse. Failure to strike the correct balance would lead to successful challenges to the law before the Court of Justice of the European Union. There is considerable detail in the Regulation and a wide range of perspectives will need to be brought to bear on its analysis, including experts in privacy and information technology law as well as children's rights law.

Following an eight-week period for public consultation and feedback, the Regulation will need to be agreed by the EU Commission and the EU Council.[91] It was reported in June 2022 that the Irish Government is supportive of the EU Commission's proposals, but that

91 European Commission, "Fighting child sexual abuse: Commission proposes new rules to protect children", 11 May 2022, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2976.

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concerns have been expressed about the proposed regulation by civil liberties groups.[92] The Department of Justice has noted that "[g]iven that the European headquarters of many large tech companies are located in Ireland, this will mean a particular responsibility on Ireland, in terms of national-implementation measures."[93]

The other important development in Ireland during the reporting period in the context of child protection online was the Online Safety and Media Regulation Bill 2022; this Bill, and its shortcomings from a children's rights perspective, was discussed in detail in Chapter 1 of this report, and will not be discussed separately here.[94]

Looking outside of Ireland, two publications by the Children's Commissioner for England in the past 12 months are noteworthy. The first explored children's and young people's experience of online sexual harassment, and to offer a practical guide to parents and carers on suitable ways for them to discuss these issues with their children.[95] This report drew on focus groups and workshops with children and young people, aged 16-21 years, and considered what "they wished their parents had known about online peer-on-peer abuse, and … the advice they would give to a child on dealing with these issues".[96] Five separate subjects were identified: pornography; sharing nude images; sexualised bullying; editing photos, and body image and peer pressure. It was found that more than half of 11–13-year-olds have already seen pornography and most of this was "unintentional".[97] With regard to sharing nude images, it was reported that "76% of girls aged 12–18 had been cyberflashed by a boy or man"; the Children's Commissioner recommended "that cyberflashing is treated as a standalone offence in any circumstance".[98] With regard to sexualised bullying, it was found that "girls are more likely to be targeted" than boys; where boys are targeted, this "often had a homophobic element".[99] Issues identified concerning editing photos and body image include "unrealistic beauty standards" for girls and a need to be "muscular" for boys.[100] With regard to peer pressure, it was found that social media can be very time consuming, yet it can also be positive as there appears to be "a shift towards people posting more honestly, discussing mental health and body issues".[101] This report provides parents and carers with useful advice for discussing these issues with children and young people, and also points to further resources where required.

In a separate report, the Children's Commissioner explored the issue of "peer-on-peer abuse online" and outlined a series of recommendations for government, the technology

92 C O'Keeffe, "Government backs EU proposals to scan personal messages for child-sex-abuse images", *Irish Examiner*, 25 June 2022.

93 *Ibid*.

94 See section 1.3.2 above.

95 Children's Commissioner, *The things I wish my parents had known: Young people's advice on talking to your child about online sexual harassment* (December 2021), available at https://www.childrenscommissioner.gov.uk/report/talking-to-your-child-about-online-sexual-harassment-a-guide-for-parents/.

96 *Ibid* at p 5.

97 *Ibid* at p 7.

98 *Ibid* at p 10.

99 *Ibid* at p 13.

100 *Ibid* at p 15.

101 *Ibid* at p 17.

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industry, teachers and parents regarding online safety for children, which are informed by the views of children.[102] For government, the "lack of effective age verification on sites hosting pornography" was flagged and the Children's Commissioner recommended urgent legislation to address this.[103] With regard to the technology industry, the "lack of enforcement of minimum age requirements on social media and messaging platforms" was highlighted and it was recommended that the "tech industry should invest in the development of better age assurance technologies which align with the Commissioner's principles on privacy, inclusivity, and efficacy".[104] It was also recommended that the technology industry "develop enhanced protections for accounts which are known to belong to under-18s" including "accelerated reporting functions, the removal of inappropriate features (eg visibility to strangers) and with the development of age-appropriate engagement algorithms".[105] The Children's Commissioner also called on government to develop "high-quality advice for schools and parents on tackling online sexual harassment and abuse".[106]

2.2.6 Bullying in Schools

In August 2021, the Joint Oireachtas Committee on Education, Further and Higher Education, Research, Innovation and Science published a report on *School Bullying and the Impact on Mental Health*.[107] Submissions made to the Committee emphasised the short- and long-term effects of bullying, including cyberbullying, on mental health, and accordingly, a range of recommendations were put forward to respond to this. In particular, it was recognised that there is a need to update the Action Plan on Bullying and the Anti-bullying procedures for primary and post-primary schools which date from 2013. These should "be informed by up-to-date research and evidence".[108] While data on individual bullying cases, the steps taken to address them, and the outcomes of these interventions are currently being collected by schools and reported to their Boards of Management, the report noted that "this data is not being fed back systematically to the Department of Education. The non reporting represents a missed opportunity to use this data to assess the efficacy of existing anti-bullying efforts and to improve the development of future interventions and programmes."[109]

Updated procedures should include "specific actions to address homophobic, transphobic,

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102 Children's Commissioner, *Online Safety Commission from Government: Our recommendations for making the online world safer for children* (March 2022), available at https://www.childrenscommissioner.gov.uk/wp-content/uploads/2022/03/cco-online_safety_commission_from_government_our_recommendations_for_making_the_online_world_safer_for_children_report_mar_2022.pdf.

103 *Ibid* at p 15.

104 *Ibid*.

105 *Ibid*.

106 *Ibid*.

107 Joint Oireachtas Committee on Education, Further and Higher Education, Research, Innovation and Science published a report on *School Bullying and the Impact on Mental Health* (August 2021), available at https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_education_further_and_higher_education_research_innovation_and_science/submissions/2021/2021-08-23_report-on-school-bullying-and-the-impact-on-mental-health_en.pdf.

108 *Ibid* at p 22.

109 *Ibid* at p 8.

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disability and racist bullying behaviours".[110] In addition, it is recommended that accurate data on bullying should be compiled in a National System held by the Department of Education.[111] Specific anti-bullying inspections should take place as well as focus on anti-bullying initiatives and programmes in Whole School Evaluations.[112] It was also recommended that the "Youth Mental Health Pathfinder Project" and a "National Mental Health Programme for Children and Young People" should be implemented without delay.[113] Multiple submissions emphasised the importance of accessible counselling and therapy and accordingly, it was recommended that these supports should be available on site at every school.[114] The need for an Online Safety Commissioner with capacity to deal with individual complaints was also emphasised and it is recommended that "Social Media Companies … remove offensive messages within a 48-hour period".[115] A focus was placed on bolstering teacher training, including "a mandatory online Cyber Bullying and Internet Safety Training Programme for all primary and secondary school teachers" as well as "Separate Mandatory Modules on School Bullying, Wellbeing (including Developing Resilience and Emotional Intelligence), Autism and Neurodiversity, Disability, Racism and Inclusivity" for Initial Teacher Education courses and CPD.[116] It was also recommended that the "FUSE Anti-Bullying and Online Safety Programme" be rolled out to all primary and secondary schools and that a pilot of the Barnardos Friendship Group and Roots of Empathy Programmes in primary schools should be undertaken.[117]

2.2.7 Child and Adolescent Mental Health Services (CAMHS)

During the reporting period of July 2021 to June 2022, CAMHS has been the focus of sustained public attention following a review of the operation of the service in South Kerry (known as the Maskey Report). The Maskey Report found that 227 children and young people treated by one Non-Consultant Hospital Doctor were exposed "to the risk of significant harm" while 13 other children and young people were also found "to have been unnecessarily exposed to a risk of harm under the care of other doctors in the service".[118] Further, it found "clear evidence of significant harm caused to 46 children", including "galactorrhoea (the production of breast milk), considerable weight gain, sedation during the day, and elevated blood pressure".[119] It is anticipated that this number "will change as new information becomes available from meetings with the children, young adults and parents affected".[120]

The Board of the Mental Health Commission (MHC) reviewed the Maskey Report and

110 *Ibid* at p 23.
111 *Ibid*.
112 *Ibid*.
113 *Ibid* at p 27.
114 *Ibid* at p 30.
115 *Ibid* at p 38.
116 *Ibid* at p 43.
117 *Ibid* at pp 50-51.
118 S Maskey, *Report on the Look-Back Review into Child & Adolescent Mental Health Services County MHS Area A* (January 2022) at p 49, available at https://www.hse.ie/eng/services/news/newsfeatures/south-kerry-camhs-review/report-on-the-look-back-review-into-camhs-area-a.pdf.
119 *Ibid*.
120 *Ibid*.

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found that it highlighted “a catastrophic failure of oversight, supervision and accountability underpinned by failings of governance at local, regional and national level”.[121] The Board has called on the Minister for Mental Health to ensure that “the HSE transparently and fully implement all the recommendations” emerging from the Maskey Report and also noted that Dr Susan Finnerty, Inspector of Mental Health Services,s will be carrying out “an independent review of the provision of CAMHS in accordance with her powers under the 2001 Act” (the Mental Health Act 2001), as a follow up to “a similar review in 2017”.[122] The Board also asked “that the MHC be given full regulatory powers over all areas of mental health services in Ireland to include those relating to community mental health services”.[123]

The Maskey Report is the most recent and high-profile example of shortfalls in the CAMHS service having implications for the protection of children from harm. Amidst the rightful focus on how to address the specific issues arising from that case, it is important that the wider picture remains in view. The 2021 Annual Report of the Special Rapporteur on Child Protection highlighted a number of instances in which pressure on Child and Adolescent Mental Health Services (CAMHS) gave rise to child protection concerns, whether due to lengthy waiting lists, restrictive admissibility criteria or inadequate availability of services.[124] More generally, it has been well documented that children and young people in Ireland are experiencing inordinate difficulties accessing necessary mental health support and services over a long period of time, and it is evident that this has been exacerbated by the COVID-19 pandemic.[125] The lack of resources in this area has severe consequences for children and young people, as well as for their families and carers.

According to Rooney *et al*, “children and adolescents who experience acute episodes of mental illness in Ireland represent a ‘neglected cohort’, with poor access to urgent psychiatry care”.[126] There are multiple indications of under-resourcing and staff shortages, leading to a lack of capacity in the system; and the situation appears to be getting worse rather than better. The Oireachtas Sub-Committee on Mental Health heard evidence in February 2022 that funding for mental health services in Ireland is just 5.5% of healthcare

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121 Mental Health Commission, “Findings of HSE report represent a catastrophic failure of oversight, supervision and accountability”, 1 February 2022, available at https://www.mhcirl.ie/news/mental-health-commission-findings-hse-report-represent-catastrophic-failure-oversight.

122 *Ibid*.

123 *Ibid*.

124 O’Mahony (n 20 above) at section 1.5.2.

125 See, eg, Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic reports of Ireland*, CRC/C/IRL/CO/3-4, 1 March 2016 at [53]; Department of Children and Youth Affairs, (2020) *How’s your head? Young voices during Covid-19*, available at https://assets.gov.ie/91225/d2c21ebd-09de-4424-b9fb-ddf0b404724f.pdf; Ombudsman for Children’s Office (n 4 above); N Doody, C O’Connor and F McNicholas, “Consultant psychiatrists’ perspectives on occupational stress in child and adolescent mental health services (CAMHS)” (2021) 191 Irish Journal of Medical Science 1105; L Rooney, D Healy and F MacNicholas, *The Garda Síochána and Child Mental Health: An investigation of pathways to crisis mental health care* (November 2021), available at https://www.policingauthority.ie/assets/uploads/documents/The_Garda_S%C3%ADoch%C3%A1na_and_Child_Mental_Health_FINAL.pdf; and R Gilligan, E Brady and L Cullen, *One More Adversity: The lived experience of care leavers in Ireland during the Covid-19 pandemic* (February 2022), available at http://hdl.handle.net/2262/98279.

126 Rooney *et al* (n 125 above) at p 69.

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funding, compared with 10% in the UK and Canada; 13.5% in Norway, and 15% in France.[127] It was stated at the same hearing that mental health services generally are facing "a consultant recruitment and retention crisis", with 136 out of 485 consultant psychiatry posts unfilled or are filled on a temporary locum basis; and that "[p]articular deficits arise in our CAMHS services", with over 3,300 children waiting for an appointment (6% of whom are waiting more than a year).[128] This compares with a waiting list figure of 2,000 children in August 2019.[129] RTE reported that the waiting list had grown to 4,003 children by April 2021, of whom 10% were waiting for more than a year.[130] Also in February, it was reported that only 92 psychologists were employed by CAMHS—less than half of the figure of 190 recommended in *A Vision for Change* in 2006[131]—while the number of CAMHS teams stood at 72, when 130 were needed.[132] In May 2022, it was reported that a shortage of psychiatric nurses had led to the closure of almost half the beds at the country's largest inpatient mental health facility for young people in Dublin. Facilities in Cork and Galway had no capacity to absorb the resulting overflow, since beds were closed in multiple units due to staff shortages.[133]

The impact of poor investment in support and services is visible in multiple child care court proceedings in which judges have shown frustration with the lack of assessments and treatments. The Child Law Project has observed that "[t]ime and again, the child's history provided to the court included a description of where help was sought for a child (by the child themselves, parents or a professional) but the request went unmet by psychology, disability or Child and Adolescent Mental Health Services (CAMHS)".[134] The authors state that they "see a pattern where the child's wellbeing and behaviour deteriorated and their risk of harm increased" in the absence of appropriate supports.[135]

Six of the 30 case reports published by the Project in October 2021 involved mental health issues, including one case where the District Court judge ordered an "immediate assessment" for a child who CAMHS had previously said was not "of sufficiently high priority to be placed on their waiting list".[136] The child in this case was "self-harming and

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127 N Baker, "Crisis in mental health services blamed on underfunding and consultant shortages", *Irish Examiner*, 8 February 2022.

128 *Ibid*. See further I Kelleher, "Lack of specialist child mental health resources far from surprise", *Irish Times*, 1 February 2022.

129 See https://www.oireachtas.ie/ga/debates/question/2019-11-26/58/.

130 D Connor, "CAMHS waiting list grows by more than a quarter", RTE News, 23 May 2022, available at https://www.rte.ie/news/ireland/2022/0523/1300631-camhs-delays.

131 N Baker, "'Crisis' of youth psychologist shortage met with 'deafening silence'", *Irish Examiner*, 21 February 2022.

132 N Griffin, "Camhs 'limping along' with too few staff, warns College of Psychiatrists", *Irish Examiner*, 2 February 2022.

133 C O'Keeffe, "Psychiatric nurses say 'no capacity' at child units in Cork or Galway after cuts", *Irish Examiner*, 25 May 2022. See further C O'Keeffe, "Mental health groups condemn bed closures at key child unit", *Irish Examiner*, 24 May 2022.

134 M Corbett and C Coulter, *Ripe for Reform: An Analytical Review of Three Years of Court Reporting on Child Care Proceedings* (October 2021) at pp 36-37, available at https://www.childlawproject.ie/wp-content/uploads/2021/11/CCLRP-Ripe-for-Reform-Report-October-2021.pdf.

135 *Ibid* at p 37.

136 Child Care Law Reporting Project, "Judge directs immediate assessment for deeply troubled child not permitted onto CAMHS waiting list" (2021), available at https://www.childlawproject.ie/publications/judge-directs-immediate-assessment-for-deeply-troubled-child-not-permitted-onto-camhs-waiting-list/.

depressed and deeply affected by trauma in her earlier childhood as a result of domestic violence, neglect and abandonment".[137] This case was listed for review in five months. In a separate case, a District Court judge also criticised the failure of CAMHS to carry out an assessment of a child who had "serious behavioural and emotional problems, including an addiction to aerosols" and concerns were also raised "about the nature of the relationship between the boy and his mother".[138] The child in this case is currently in Oberstown and "had been refused readmission to special care and the CFA had no care placement for him".[139] Tusla also reported being "unable to source a cognitive assessor or a tutor for the child".[140] This case highlights multiple gaps in resources for this particular child, and while the judge "directed the special care committee to consider the application for his admission again", the dearth of suitable placements means that the child is residing in an unsuitable environment with no appropriate supports.[141]

The UN Convention on the Rights of the Child (UNCRC) contains clear provisions about children's rights to health care, and the Committee on the Rights of the Child has expanded on these provisions in several General Comments.[142] Article 24 of the UNCRC provides that "States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services". The Committee on the Rights of the Child expressed concern about numerous aspects of mental health services and support for children and young people in its Concluding Observations for Ireland in 2016, including about the "long waiting lists for access to mental health support and insufficient out-of-hours services for children and adolescents with mental health needs, in particular eating disorders".[143] Concerns were also raised about the "lack of comprehensive legislation on children's consent to and refusal of … mental health-care services", the practice of admitting children to "adult psychiatric wards owing to inadequate availability of mental health-care facilities for children" and the "lack of a child-focused advocacy and information service for children with mental health difficulties".[144]

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137 *Ibid*.

138 Child Care Law Reporting Project, "Judge said 'disgraceful' that no CAMHS assessment or placement for teen whose situation GAL said was 'as bad as it gets'" (2021), available at https://www.childlawproject.ie/publications/judge-said-disgraceful-that-no-camhs-assessment-or-placement-for-teen-whose-situation-gal-said-was-as-bad-as-it-gets/.

139 *Ibid*.

140 *Ibid*.

141 *Ibid*.

142 See, in particular, Articles 24, 3 and 12 of the UNCRC. See also Committee on the Rights of the Child, General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), CRC/C/GC/15, 17 April 2013; Committee on the Rights of the Child, General Comment No. 7 (2005) Implementing child rights in early childhood, CRC/C/GC/7/Rev.1, 20 September 2006; and Committee on the Rights of the Child, General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence, CRC/C/GC/20, 6 December 2016.

143 Committee on the Rights of the Child (n 125 above) at [53] (b).

144 *Ibid* at [53] (a), (b) and (c). For further discussion about the need for child-focused advocacy, see C O'Mahony and F Morrissey, *A Human Rights Analysis of the Draft Heads of a Bill to Amend the Mental Health Act 2001* (October 2021) at p 21, available at https://www.mentalhealthreform.ie/wp-content/uploads/2021/11/Legal-analysis-MH-Act-28-October-1.pdf.

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The Council of Europe has also recognised that there is an immediate need for investment in mental health support and services for children and young people. The Committee of Ministers adopted the *Council of Europe Strategy for the Rights of the Child* (2022-2027) which seeks, in part, to address mental health issues in a number of ways. It proposes "[f]ostering children's access to mental health support, dealing with the root causes of children's mental health difficulties, and promoting children's mental well-being, including through support for parents, carers, professionals and volunteers working with children to raise awareness and fight taboos about children's mental health".[145] Further, children and young people should be provided with support "in coping with difficult life situations such as depression or other mental health issues, parental separation or divorce, a relative's death, lack of friends, or institutionalisation".[146]

Across Europe, "there is an increasing concern, including among children themselves, regarding their access to mental health services".[147] It is reported that almost one in ten child respondents from the EU "identifies as living with mental health problems or symptoms such as depression or anxiety, with girls far more at risk than boys, and older children reporting higher levels of problems than younger children".[148] Further, it is recognised that "[p]articular groups of children are more likely to experience mental health difficulties, such as children deprived of liberty, children having experienced or witnessed violence, children in care, children affected by migration and forced displacement, LGBTI children, children with disabilities, children living or working on the streets or children living in poverty".[149] The COVID-19 pandemic saw increased demand for mental health support services, as "many children struggle to cope with reduced social contact, reduced physical activity, anxiety and even the loss of loved ones."[150] This was compounded by a lack of investment in support and services over many years.

In England, research by the Children's Commissioner found that "[m]ore children have been struggling with their mental health since 2017—which covers the pandemic period" and that "[o]ne in six children have a probable mental health disorder. This is up from one in nine children with a probable mental health disorder in 2017".[151] It is estimated that "only around a third of children (32%) with a probable mental health disorder are able to access treatment".[152] In a consultation with over 550,000 children and young people in England in 2021, some 20% reported that they were "unhappy" with their mental health; girls were nearly twice as likely as boys to say this, and older children were more likely still.[153] Some

145 Council of Europe, *Strategy for the Rights of the Child (2022-2027): "Children's Rights in Action: from continuous implementation to joint innovation"* at p 23, available at https://rm.coe.int/council-of-europe-strategy-for-the-rights-of-the-child-2022-2027-child/1680a5ef27.

146 *Ibid* at p 24.

147 *Ibid* at p 20.

148 UNICEF, *Our Europe, Our Rights, Our Future: Children and Young People's Contribution to the new EU Strategy on the Rights of the Child and the Child Guarantee* (February 2021) at p 10, available at https://www.unicef.org/eu/media/1276/file/Report%20%22Our%20Europe,%20Our%20Rights,%20Our%20Future%22.pdf.

149 Council of Europe (n 145 above) at p 20.

150 *Ibid*.

151 Children's Commissioner, *Children's Mental Health Services 2020/21* (February 2022) at p 5, available at https://www.childrenscommissioner.gov.uk/report/briefing-on-childrens-mental-health-services-2020-2021/.

152 *Ibid* at p 13.

153 Children's Commissioner, *Mental health findings from The Big Ask* (October 2021) at p 2, available at https://www.childrenscommissioner.gov.uk/wp-content/uploads/2021/10/cco-mental-health-findings-from-the-big-ask.pdf.

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ethnic groups and children from a vulnerable background were also more likely to be unhappy with their mental health; "around a quarter of children with a social worker and a quarter of young carers said this".[154]

In *A Vision for Change*, it is recognised that children in care may have varied mental health needs given their different life experiences including "disrupted attachments in very early life, exposure to trauma, abuse, violence, deprivation, neglect and serious domestic disruption".[155] While it is acknowledged that children in care should "receive the maximum support required for their needs" and that their carers should be equally supported, the child care cases discussed earlier illustrate that this fails to happen in practice all too often. Similar concerns exist regarding children leaving the care system. A recent study conducted by Gilligan *et al* on the lived experiences of care leavers in Ireland during the Covid-19 pandemic, which includes accounts given by 16 care leavers aged 18-27 years,[156] the authors comment that "it was striking how often concerns about threats to mental health were mentioned by participants—as a current or recent issue, or as a challenge in the future".[157] Gilligan *et al* urge "a focus on mental health support" for this cohort.[158]

In the *Annual Report* of the National Review Panel for 2020, it is stated that "[m]any of the young people who died from suicide had been referred to CAMHS and some had received a consistent service".[159] It is evident, however, that the pathway to receiving CAMHS services is not always open to some of these young people; it is shown, for example that: "to be eligible for a CAMHS service, it was necessary for a young person to have a diagnosed treatable mental illness. Suicidal ideation is considered to be a mental health problem but does not always qualify for a CAMHS service".[160] This limitation can have severe consequences for those who urgently need mental health services, as highlighted in a review of the death of "Ava" in July, 2020, where it is concluded that "[t]he default position of referring young people who self-harm or attempt suicide to CAMHS is ineffective as the service will not treat people who are not suffering from a treatable mental illness. Treatable mental illness does not automatically include suicidal ideation or emotional distress" and that "Ava's mother was left … with nowhere to turn when she was told that her daughter was not at risk and was not eligible for a CAMHS service".[161] The report recommends that "Tusla publish clear guidance for practitioners about the appropriate channels through which to access mental health services for young people experiencing ongoing emotional

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154 *Ibid*.

155 Government of Ireland, *A Vision for Change: Report of the Expert Group on Mental Health Policy* (2006) at p 89, available at https://www.hse.ie/eng/services/publications/mentalhealth/mental-health---a-vision-for-change.pdf.

156 Gilligan *et al* (n 125 above) at p 6.

157 *Ibid* at p 45.

158 *Ibid* at p 48.

159 National Review Panel, Annual Report 2020 (August 2021) at p 13, available at https://www.tusla.ie/uploads/content/NRP_2020_Annual_report.pdf.

160 *Ibid*.

161 National Review Panel, *Review undertaken in respect of a death of a young person who had contact with Tusla: Ava* (July 2020) at p 6, available at https://www.tusla.ie/uploads/content/Ava_Executive_Summary.pdf.

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distress which often includes suicidal ideation and self-harming behaviour".[162] Doody *et al* emphasise the need for "clarity about the role and of [the] relationship between other agencies' to stem 'the repeated attempts to derogate responsibility'".[163]

Rooney *et al*'s research (published in November 2021) examined "the current care pathways of Irish youth experiencing a crisis MH (mental health) event from the commencement of the GS (Garda Síochána) involvement through to the initiation of psychiatric care".[164] The researchers interviewed 18 members of the Garda Síochána and 11 members of other professions such as psychiatrists, social workers and Emergency Department doctors and nurses.[165] The research also presented a literature review identifying best practice in other jurisdictions. The authors note that internationally, "Crisis MH [mental health] Intervention Models are increasingly becoming a social policy feature in many jurisdictions", and accordingly, they propose a similar focus in Ireland, with an opportunity to roll out "the CIT/CAST (Community Access Support Teams) pilot programs … to youth crisis MH events".[166]

Interviews with members of An Garda Síochána show that many feel ill-equipped to deal with crisis mental health events: "[a] major concern communicated by Garda members was that they believed they were 'the wrong people' to be tasked with crisis MH events".[167] Despite this, "the research suggests that members seem to be industrious and dynamic in their approach to youth crisis MH events", showcasing "a high level of insight regarding the vulnerable status of the child, which in turn precipitated a shift in their approach styles when managing crisis events from authoritarian to authoritative, age-appropriate and youth-centred".[168]

The researchers recommended specialist training for all members which "should be informed by frontline Garda members with experiences in the field, and mental health experts".[169] Members of the GS and medical staff expressed concern about the legislation and protocols which are in place, with one doctor commenting that "nobody wants to do anything that is illegal or outside of their powers. It seems that things are just clearer cut for dealing with adults", while a member of An Garda Síochána said that "I need to know where my role begins and ends. I also need to know where and when it gets to the point where another professional is obliged to take over and is in charge. Currently, that is not clear, it needs to be in black and white".[170]

In response, the authors recommended the development of "an interagency protocol that maps out the care pathway and provides a clear definition of the roles, jurisdiction, and responsibilities of each professional/agency", as well as a focus on "developing interagency

162 *Ibid* at p 9.
163 Doody *et al* (n 125 above) at p 4.
164 Rooney *et al* (n 125 above) at p 25.
165 *Ibid* at pp 26-27.
166 *Ibid* at p 71.
167 *Ibid* at p 67.
168 *Ibid* at p 70.
169 *Ibid*.
170 *Ibid* at p 54.

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relationships".[171] (A similar recommendation has been made by the Child Law Project.)[172] Rooney *et al* noted that internationally, "Crisis MH Intervention Models are increasingly becoming a social policy feature in many jurisdictions", and accordingly, they proposed a similar focus in Ireland, with an opportunity to roll out "the CIT/CAST (Community Access Support Teams) pilot programs ... to youth crisis MH events".[173] Important recommendations were also made around Garda wellbeing and future research.[174]

While Rooney *et al*'s research raised questions about the Gardaí being tasked with work related to the mental health of young people that they might not be well placed to carry out, similar concerns have been expressed about some of the work directed towards the CAMHS service. Some consultants have argued that there is "a widespread misunderstanding of CAMHS' 'core business', where the public and, at times referrers, believed it to be a 'catch-all service'" and note that "that CAMHS often received inappropriate referrals (e.g., for disability or social care issues), which overburdened CAMHS time and led to bad feeling from those turned away".[175] They argue that there is a need "for greater awareness of CAMHS' status as a specialist service to treat moderate to severe mental illness rather than a non-specialist service for youth with behaviour problems, transient emotional difficulties, or youth with disabilities".[176] 14 consultants urged understanding of their "overstrained resources" in CAMHS.[177] This may mean that some children with complex needs are not receiving CAMHS services, and are diverted elsewhere with an "excessive 'gate-keeping'" approach, as is evident in the National Review Panel review of the death of "Declan" in 2020.[178] It was found in this review that:

> A divergent, inflexible and ultimately counterproductive approach was adopted by each discipline with respect to the criteria used to access their services. This excessive 'gate-keeping' includes the requirement to fit a narrow definition of disability (HSE Disability Services); the requirement for parental compliance and to be within proximity to the clinic to which one was first referred (CAMHS); the requirement to be referred to special care or to be in criminal detention (ACTS); the requirement to be at greatest need at the point at which a bed becomes available with no account taken for temporary behavioural shifts and cycles (special care); the requirement that educational facilities must meet the needs of a child referred during the school year, within their existing resource allocation, and can refuse a referral on that basis (education); and the temporary severance of the care relationship between the child and the SWD while the child is in detention (youth justice).[179]

171 *Ibid* at pp 70-71.

172 Corbett and Coulter (n 134 above) at p 85.

173 Rooney *et al* (n 125 above) at p 71.

174 *Ibid* at pp 71-72.

175 Doody *et al* (n 125 above) at p 4.

176 *Ibid*.

177 *Ibid*.

178 National Review Panel, *Review in respect of a young person who died while in the care of Tusla: Declan* (2020) at p 10, available at https://www.tusla.ie/uploads/content/Declan_Executive_Summary.pdf.

179 *Ibid*.

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It was recommended in Declan's review that "Tusla review joint working with partner agencies and departments to raise the priority levels of services to children in care" and that "a more structured partnership with CAMHS is required to provide for the mental health needs of children in care".[180]

Issues highlighted in the literature as needing to be addressed include the provision of 24-hour access to mental health services for children and young people, "ensuring adequate levels and expertise of staffing",[181] ensuring that sufficient beds and units are available for children and young people,[182] as well as specialist training for members of An Garda Síochána who respond to mental health calls.[183] The Child Law Project has recommended that research be undertaken examining the treatment requirements of children and young people with mental health problems "who require detention for their own safety or the safety of others".[184] While there is a planned prescribing audit of the 72 CAMHS teams following the Maskey report,[185] the board of the MHC has stated that the "terms of reference and scope" should be "agreed and overseen by independent experts".[186] The Chair of the MHC has expressed concern that the terms of the audit have been narrowed, such that it is failing to follow the recommendations of the Maskey Report.[187] Reflecting on the level of significant harm and the risk of significant harm which is now known to have occurred in one CAMHS area in Ireland, the Chief Executive of the MHC stated that this "must be the catalyst for change".[188]

A key issue for children in care who have complex needs appears to be that no one agency assumes responsibility and ensures that they receive the support and services that they need. This is visible in reports from the National Review Panel which have repeatedly highlighted the shifting of responsibility in cases in which fatalities have occurred. Clarity around the role of CAMHS, as well as the role of other services which children may need including disability and social care must be provided. In particular, clarity around how these organisations may have to work together to serve the needs of an individual child is crucial. The Maskey Report highlighted serious flaws in the operation of CAMHS, including staff shortages, an overburdened service, and a lack of governance and accountability. The impact of Covid-19 is also having serious implications in practice; McNicholas *et al* comment that "concerns have correctly been raised about the 'wider collateral damage to children' of restrictions on education, socialisation, development and psychological well-being".[189] The authors refer to the "chronic under-resourcing" in this area as a "public

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180 *Ibid* at p 21.

181 Doody *et al* (n 125 above).

182 O'Mahony and Morrissey (n 144 above) at pp 20-21.

183 Rooney *et al* (n 125 above) at p 70.

184 Corbett and Coulter (n 134 above) at p 113.

185 P Cunningham, "Report into South Kerry CAMHS 'shocking' – Taoiseach", *RTE News*, 26 January 2022, available at https://www.rte.ie/news/munster/2022/0126/1275914-kerry-review/.

186 Mental Health Commission (n 121 above).

187 N Baker, "Warning over narrowing of HSE audit of child mental health services", *Irish Examiner*, 18 April 2022.

188 Mental Health Commission (n 121 above).

189 F McNicholas, I Kelleher, E Hedderman, F Lynch, E Healy, T Thornton, E Barry, L Kelly, J McDonald, K Holmes, G Kavanagh and M Migone, "Referral patterns for specialist child and adolescent mental health services in the Republic of Ireland during the COVID-19 pandemic compared with 2019 and 2018" (2021) 7(3) British Journal of Psychiatry Open at p6.

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health crisis" and note that "resourcing of CAMHS is urgently needed in the ROI to cope with the expected ongoing demand for services".[190]

In summary, deficits in the resourcing and organisation of CAMHS services have had a demonstrably negative impact on the safety and wellbeing of children in Ireland in recent years. This impact is most pronounced among the most vulnerable children with the most complex needs (although it is not limited to that cohort of children). Demand on CAMHS services has increased considerably, particularly in light of the impact of the COVID-19 pandemic, and seems likely to continue to increase in the short- to medium-term (particularly in light of the influx of refugees from Ukraine, which will be discussed further in section 2.2.8 below). It will not be enough to merely correct the historical shortfall in resourcing to meet current demand; it will be necessary to future-proof the service against a predictable increase in demand in the coming years. To this end, it is recommended that CAMHS services be prioritised for a significant increase in resourcing over a sustained period of 5-10 years. However, financial investment, while necessary, will not be sufficient in itself to address all of the difficulties discussed above. Challenges in recruitment and retention have contributed to staffing shortages; steps need to be taken to mitigate these challenges and to make the CAMHS service an attractive workplace. Other issues in need of urgent attention include governance issues such as regulation, oversight, supervision and accountability; criteria for eligibility for a CAMHS service; and inter-agency collaboration between CAMHS and related services that work with vulnerable children. Implementation of the recommendations of the Maskey Report will be an important starting point in addressing some of these issues.

2.2.8 Child Trafficking

Several publications in the reporting period highlighted concerns relating to Ireland's response to human trafficking, including child trafficking in particular. The Irish Human Rights and Equality Commission (IHREC) published its first report in its role as National Rapporteur on the Trafficking of Human Beings pursuant to Article 19 of the EU Anti-Trafficking Directive.[191] The report found that "human trafficking crimes are being committed in Ireland and people are being exploited in various ways for profit".[192] The most common forms of trafficking are trafficking for sexual exploitation, labour exploitation or forced criminality. Children account for 9% of the victims, which is less than the EU average (22%).[193] However, IHREC suggest that what appears as a lower incidence may in fact be down to a failure to identify child victims: "[n]o child victims were identified in 2021, which happens for a second year in a row and deserves attention."[194] The identification of child victims of trafficking was noted as "[o]ne of the most challenging aspects in the State's

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190 *Ibid* at pp 5-6.

191 Irish Human Rights and Equality Commission, *Trafficking in Human Beings in Ireland* (June 2022), available at https://www.ihrec.ie/app/uploads/2022/06/Human-Trafficking-report-FINAL-20-06-2022.pdf.

192 *Ibid* at p 12.

193 *Ibid*.

194 *Ibid* at p 123.

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response"[195] to human trafficking:

> Without successful and speedy identification, child victims are deprived of the societal support for escaping a trafficking situation. Furthermore, the limited identification of any child victim of trafficking for forced criminal activity or labour exploitation may also point to a more general gap in understanding of the full scope of child trafficking. This lack of understanding may, in turn, lead to contravention of the non-punishment principle where children are criminalised for crimes they were compelled to commit as a result of them being trafficked.[196]

The report states that "child trafficking remains more hidden and unknown" than trafficking in adults,[197] and there is "a general lack of knowledge and understanding of child trafficking within State agencies".[198] As a result, "substantial work needs to be done in the area of child trafficking".[199]

A particular point of concern relates to a lack of clarity regarding how it is to be determined whether an adult is "taking responsibility for the care and protection" of a young person within the meaning of section 15 of the International Protection Act 2015, which governs who may make an application for international protection on behalf of a person under the age of 18. IHREC point out that "[t]his lack of clarity could potentially give rise to a situation whereby a trafficker arrives in the State with a child under the age of 18 but by lodging an application for international protection under section 15 of the 2015 Act on the basis that they are 'taking responsibility' for the child, might avoid any scrutiny as to the true nature of the relationship or any risks that may arise for the child."[200] (Although the IHREC report does not highlight it, the same concern arises—and is arguably more pressing—in respect of section 14 of the Act, which is the trigger for the identification of separated and potentially trafficked children by immigration officers.)

IHREC was also "concerned that unaccompanied child victims do not always receive early legal counselling and/or legal representation regarding fundamental decisions such as the application for international protection", since "[f]ailing to do so undermines the necessity for working towards durable solutions for child victims, as required in Article 15.2 and Article 16 of the Directive."[201] On the positive side, the report noted that An Garda Síochána have made "significant progress" in recent years in the provision of dedicated interview suites and specialist trained Gardaí to undertake interviews with child victims.[202]

On foot of the analysis in the report, IHREC recommended the following:[203]

- The Department of Justice should work with AGS and Tusla to develop a methodology for collecting uniform and reliable data on the scale and different

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195 *Ibid* at p 19.

196 *Ibid* at p 125.

197 *Ibid* at p 120.

198 *Ibid* at p 19.

199 *Ibid*.

200 *Ibid* at p 135.

201 *Ibid* at p 139.

202 *Ibid*.

203 The recommendations in the report are summarised *ibid* at pp 21-31.

forms of exploitation of children;
- The new National Referral mechanism should adopt a child-specific identification procedure that addresses the particulars of a child's situation;
- That legislation be amended to capture all situations of child trafficking under a single provision;
- Children must, as a matter of policy, have prompt access to comprehensive legal advice;
- Child trafficking be specifically included the Children First Guidelines to ensure a broadened understanding of the phenomena of child trafficking;
- Specific guidelines providing clarity on section 15 of the International Protection Act 2015 as to when an adult is entitled to "take responsibility" for a child, must be drafted and circulated to all relevant persons;
- All child trafficking victims should be included in the 'Barnahus model' already operating in the State;
- Tusla must be provided with adequate staffing and expertise to ensure it can fulfil its obligations to detect and prevent the trafficking of children, and to participate effectively in the new NRM;
- Tusla should amend its policies and procedures to specifically include child trafficking; and
- Tusla should ensure that any professional (including *guardian ad litem*, social workers, guardians, intermediaries, lawyers, judges) who come into contact with a child victim of trafficking is trained to work with child victims of serious violent crime.

Meanwhile, the US State Department Trafficking in Persons Report for 2021 placed Ireland on the Tier 2 Watch List (the same rating as in 2020, when it had fallen from Tier 2 to Tier 2 Watch List).[204] The report found:

> The Government of Ireland does not fully meet the minimum standards for the elimination of trafficking but is making significant efforts to do so. These efforts included designating an independent human trafficking national rapporteur and establishing a formal national anti-trafficking forum composed of interagency and civil society stakeholders. In coordination with an international organization, the government launched a national anti-trafficking public awareness campaign. The government also increased funding for victim assistance, antitrafficking public awareness campaigns, and training. However, the government did not demonstrate overall increasing efforts compared to the previous reporting period, even considering the impact of the COVID-19 pandemic on its antitrafficking capacity.[205]

Shortcomings identified in Ireland's response to trafficking included that fewer suspected traffickers were investigated or prosecuted, and victim identification decreased for the fourth year in a row. It was found that the Government continued to have systemic deficiencies in victim identification, referral, and assistance, and lacked specialized

204 US State Department, *Trafficking in Persons Report 2021* (June 2021) at p 302, available at https://www.state.gov/wp-content/uploads/2021/09/TIPR-GPA-upload-07222021.pdf.

205 *Ibid*.

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accommodation and adequate services for victims.[206] The report noted that "[t]he prevalence of human trafficking in Ireland is likely much higher than official statistics report", and that "[t]raffickers subject Irish children to sex trafficking within the country."[207] A wide range of recommendations were made; the following are some notable examples:

- Vigorously investigate, prosecute suspects, and convict traffickers using the trafficking law;
- Continue to systematically train law enforcement, prosecutors, and judges on a victim-centered, trauma-informed approach to law enforcement efforts and trials and sensitize judges to the severity of trafficking crimes;
- Update and adopt a national anti-trafficking action plan with a clear timeline for implementation, responsible ministries, and resources for implementation;
- Improve victim identification and referral and issue a revised referral mechanism in coordination with NGOs, offering formal identification, a recovery and reflection period, and services to all victims;
- Increase efforts to identify and protect victims;
- Continue to train law enforcement and prosecutors on developing cases with evidence to corroborate victim testimony; and
- Offer specialized accommodations to trafficking victims that are safe, appropriate, and trauma informed.[208]

Also published during the reporting period was the National Report for Ireland by TRIPS (TRafficked International Protection Beneficiaries' Special needs), a two-year project co-funded by the European Union, and implemented by the Immigrant Council of Ireland, among other organisations.[209] The report states that while there are some statistics available regarding trafficking in Ireland, they "do not contain any information about victims who are successful applicants for international protection" and that although "in recent years the number of victims of trafficking in Ireland formally identified has decreased years on year", "[t]his is likely due to deficiencies in the identification process overall, rather than an indication of less cases existing in Ireland".[210] Distinct deficiencies in the integration process are highlighted: "there is no proper, long-term assessment made regarding the integration needs of a beneficiary of international protection", and while "the Immigrant Council of Ireland are beginning the process of defining these long-term integration needs", this is "under-resourced and not mainstreamed into statutory provision of support".[211] A number of points are raised with regard to the National Referral Mechanism, including that "[d]iffering rights" are "afforded to the individual based on whether they are a formally identified victim of trafficking referred through the National Referral Mechanism or if they are a victim of trafficking who has made an application for,

206 *Ibid*.

207 *Ibid* at p 305.

208 *Ibid* at p 302.

209 TRIPS, *Identification of Trafficked International Protection Beneficiaries' Special Needs, Summary National Report Ireland* (September 2021), Forum réfugiés-Cosi 09-2021, available at https://www.immigrantcouncil.ie/sites/default/files/2021-11/TRIPS%20Summary%20Report%20-%20Ireland.pdf.

210 *Ibid* at pp 20-21.

211 *Ibid* at p 23.

or attained, international protection".[212]

Other specific issues identified include racism, as well as gaps in the provision of psychological and counselling supports, housing supports and legal advice and it is noted that there is a need for "appropriate training in the support and care of victims of trafficking and gender-based violence in accommodation centres".[213] With regard to children, it is stated that parents have "[l]imited access to childcare supports".[214] Recommendations included a "clear, transparent and needs-based national integration system" and concrete improvements to address housing, education and employment needs.[215]

2.2.9 Refugees from Ukraine

The unprovoked and illegal invasion of Ukraine by Russia in February 2022 has sparked the largest refugee crisis in Europe since the Second World War. At the time of writing, almost 39,000 Ukrainian refugees had arrived in Ireland,[216] with approximately 250 refugees projected to arrive in the country each day for the coming period.[217] The vast majority of the refugees are women with dependent children; child benefit was being paid for over 10,000 children in mid-May, while an estimated 6,980 Ukrainian children had enrolled in Irish schools by 7 June.[218] 132 separated children had arrived in Ireland from Ukraine as of mid-May, of whom 72 were taken into care.[219]

There are multiple provisions of the CRC that set down obligations on States Parties in respect of the treatment of child refugees. These include the principle of non-discrimination (Article 2); the right to protection from harm (Articles 3(2) and 19); the right to special protection and assistance for children deprived of their family environment (Article 20); the right to appropriate protection and humanitarian assistance for children seeking refugee status (Article 22); and the right to physical and psychological recovery and social reintegration of child victims of armed conflicts (Article 39). In its General Comments, the Committee on the Rights of the Child has emphasised specific State obligations towards separated children, including the prioritised identification and registration of separated children; the assessment of vulnerabilities; and the appointment of a competent guardian as expeditiously as possible.[220] It will be seen in section 4.2.2 of this Report that a recent decision of the European Committee of Social Rights in a case involving Greece has emphasised that the rights guaranteed to migrant children under the CRC and other international law instruments must be fully vindicated even in circumstances where considerable numbers of children are in need of provision, and the system is under

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212 *Ibid* at p 41.

213 *Ibid* at pp 41-42.

214 *Ibid* at p 41.

215 *Ibid* at pp 42-45.

216 "Number of Ukraine refugees in Ireland nears 39,000", BreakingNews.ie, 26 June 2022.

217 S Molony and D McGrath, "Over 30,000 Ukrainian refugees now in Ireland as arrivals rise again to nearly 260 a day", *Irish Independent*, 18 May 2022.

218 *Ibid*.

219 K Holland and J Power, "Volunteers bringing Ukrainian children to Ireland leave them 'open to risk'", *Irish Times*, 13 May 2022.

220 Committee on the Rights of the Child, *General Comment No. 6 (2005) Treatment of Unaccompanied and Separated Children Outside their Country of Origin* (CRC/GC/2005/6, 1 September 2005).

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considerable strain.

Since the onset of war, several international bodies have emphasised the vulnerability of unaccompanied and missing children, stating that they "are at a higher risk of sexual exploitation and sexual abuse" and calling on States to take measures to address this risk "taking into account the increased vulnerability caused by factors such as deprivation of liberty, family separation, inadequacy of reception and care and lack of effective guardianship systems".[221] There are reports of volunteer groups helping children to travel from Ukraine to Ireland; concerns have been expressed by the UNHCR and by a number of aid agencies that well-meaning efforts by inexperienced or untrained volunteers may place children at risk.[222] In this context of heightened risk for children, the need for a robust child protection response in practice is clear.

As noted in the previous section, shortcomings in the identification of child victims of trafficking in Ireland, as well as in the provision of vital support services for them (including accommodation), have been highlighted in the past 12 months by national and international bodies. Similar concerns have been expressed over the past number of years by bodies including the European Committee of Social Rights, the Council of Europe Group of Experts on Action against Trafficking in Human Beings (GRETA), the OSCE Special Representative for Combating Trafficking in Human Beings and the UN Special Rapporteur on the sale and sexual exploitation of children.[223] These bodies have also emphasised the lack of data and information concerning children in this area.

IHREC has identified a "general gap in knowledge and expertise amongst social workers in how to identify and appropriately respond to evidence of child trafficking encountered

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221 Committee of the Parties to the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse (Lanzarote Committee), *Statement on protecting children from sexual exploitation and sexual abuse resulting from the military aggression of the Russian Federation against Ukraine* (10 March 2022) at p 2, available at https://rm.coe.int/statement-on-protecting-children-from-sexual-exploitation-and-sexual-a/1680a5dae7. See also Committee on the Rights of the Child, "Ukraine: Urgent and extra support needed for separated and unaccompanied children , says UN child rights committee" (24 March 2022), available at https://www.ohchr.org/en/press-releases/2022/03/ukraine-urgent-and-extra-support-needed-separated-and-unaccompanied-children; UNICEF, *Guidance for protecting displaced and refugee children in and outside of Ukraine* (10 March 2022), available at https://www.unicef.org/emergencies/guidance-protecting-displaced-children-ukraine; and Council of Europe's Group of Experts on Action against Trafficking in Human Beings (GRETA), "States must act urgently to protect refugees fleeing Ukraine from human trafficking" (17 March 2022), available at https://www.coe.int/en/web/anti-human-trafficking/-/greta-statement-states-must-urgently-protect-refugees-fleeing-ukraine.

222 Holland and Power (n 219 above).

223 See European Committee of Social Rights, Conclusions 2019: Ireland, available at https://rm.coe.int/rapport-irl-en/16809cfbc0; Committee of the Parties to the Council of Europe Convention on Action against Trafficking in Human Beings, *Recommendation CP(2017)29 on the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Ireland*, 13 October 2017 at p 2, available at https://rm.coe.int/cp-2017-29-irl-en/168075e9d0; OSCE Special Representative for Combating Trafficking in Human Beings, "On visit to Ireland, OSCE Special Representative for Combating Trafficking in Human Beings urges more prosecutions of traffickers and increased victim assistance" (21 February 2020), available at https://www.osce.org/cthb/446845; and *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*, A/HRC/40/51/Add.2, 15 November 2019 at [75].

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during the course of their work".[224] It notes, however, that it "has been informed that 945 Tusla staff have completed the Child Sexual Exploitation (which includes trafficking) e- learning module" and that "Tusla reports that it is continuing to raise awareness of trafficking matters amongst its staff and is contributing to discussions with the national coordinator (the Department of Justice) regarding the development of the trafficking strategy and action plan, which will also include a focus on training, including for Tusla staff".[225]

In late 2021, IHREC stated that it "is of the view that there is strong commitment in TUSLA to addressing child trafficking, but that the agency remains in the early stages of developing specific systems, manuals and expertise in this area".[226] The onset of war and associated influx of refugees in early 2022 has heightened the need for further training and resources in order to effectively safeguard the rights of child refugees and ensure that any potential trafficking, exploitation and abuse is promptly identified. A broader need for training "for communities and organisations that are likely to come into contact with Ukrainian refugees, to help them identify the signs of human trafficking, and learn about the support pathways that are available to them" has also been identified.[227]

A number of organisations working in this area in Ireland have highlighted their concerns that the National Referral Mechanism "will not have the capacity to deal with an increase in trafficking victims in Ireland", and requested that the Minister for Justice "urgently consults with civil society organisations on the subject".[228] The IHREC has made several recommendations in relation to the identification of child victims of trafficking including that "any new or renewed National Action Plan to Prevent and Combat Human Trafficking include, as an aim, the urgent adoption of special guidelines for identification and referral of child victims of trafficking", "the new National Referral Mechanism explicitly address the special identification and referral needs of child victims of trafficking, including within the broader system of protection of separated and unaccompanied minors" and "the mandatory appointment of a legal advisor with respect to every child suspected of being a victim of trafficking".[229]

Aside from the identification of potential victims of trafficking, an additional major concern in relation to refugees arriving to Ireland in large numbers is where to accommodate them. Child protection issues stemming from child homelessness and inappropriate

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224 Irish Human Rights and Equality Commission, *Contribution to the 4th Progress Report on the Fight against Trafficking in Human Beings in the European Union* (February 2022) at pp 24-25, available at https://www.ihrec.ie/app/uploads/2022/03/Contribution-to-the-4th-Progress-Report-on-the-Fight-against-Trafficking-in-Human-Beings-in-the-EU.pdf.

225 *Ibid* at p 37.

226 Irish Human Rights and Equality Commission, *Ireland's Actions Against Trafficking in Human Beings: Submission by the Irish Human Rights and Equality Commission to the Council of Europe Group of Experts on Action against Trafficking in Human Beings (GRETA)* (October 2021) at p 45, available at https://www.ihrec.ie/app/uploads/2021/10/GRETA-FINAL.pdf.

227 Immigrant Council of Ireland, "Call for urgent reform of National Referral Mechanism to protect victims of human trafficking", Press Release, 28 March 2022, available at https://www.immigrantcouncil.ie/news/call-urgent-reform-national-referral-mechanism-protect-victims-human-trafficking.

228 *Ibid*.

229 Irish Human Rights and Equality Commission (n 226 above) at p 45.

accommodation for children in direct provision in Ireland have been highlighted in the last two Annual Reports of the Special Rapporteur on Child Protection,[230] as well as in section 2.2.2 above in this Report. Similar concerns have been voiced by the Ombudsman for Children[231] and by Shore and Powell, who comment that "State responses to changing demographics in modern Ireland have illuminated contemporary child protection failings that have contributed to the creation of a newly stigmatised group within society: immigrant and asylum-seeking children".[232]

For separated children, research "unanimously" shows that "family foster care, especially for younger [separated children], is preferable to other forms of care".[233] In the context of the war in Ukraine, International Social Service has urged that "priority" be given to "family-based accommodation for children and their families, including to those children separated from their parents or caregiver".[234] It is within this context that the lack of appropriate accommodation, including a lack of foster carers, for separated children and child victims of trafficking is visible.[235] Tusla previously reported that "the children's residential unit for separated children can be used" as the staff "in these centres would have heightened awareness around issues of trafficking", and stated that "they try to place children who are victims of human trafficking into foster family placements and often outside of Dublin".[236] Nonetheless, the shortage of appropriate accommodation is a serious concern in the context of increasing numbers of separated children arrived from Ukraine.

It is recognised that children and young people exposed to war and having to flee their home "during crucial phases of their physical, emotional, social and cognitive development" are "particularly vulnerable to mental health problems".[237] Research has shown that unaccompanied children "are a particularly vulnerable group" and "studies describe severe psychological and psychiatric problems (e.g., anxiety, depression, post-traumatic stress disorder) in this population".[238] Indeed, some research points to the need

230 O'Mahony (n 19 above) at section 1.2.4 and O'Mahony (n 20 above) at section 1.3.8.

231 Ombudsman for Children's Office, *Safety & Welfare of Children in Direct Provision – An Investigation by the Ombudsman for Children's Office* (April 2021), available at https://www.oco.ie/app/uploads/2021/04/Safety-and-Welfare-of-children-in-Direct-Provision.pdf. This report is discussed in O'Mahony (n 20 above) at section 1.3.4.

232 C Shore and F Powell, "The social construction of child abuse in Ireland: public discourse, policy challenges and practice failures" in K Biesel, J Masson, N Parton and T Pöso (eds), *Errors and Mistakes in Child Protection: International Discourses, Approaches and Strategies* (Bristol University Press, 2020) at p 60.

233 F van Holen, L Trogh, E Carlier, L Gypen and J Vanderfaeillie, "Unaccompanied refugee minors and foster care: A narrative literature review" (2020) 25 *Child and Family Social Work* 506 at p 512.

234 International Social Service, *Ukraine Crisis & International Standards*, available at https://www.iss-ssi.org/images/News/Ukraine_Crisis_Fact_sheet_ISS.pdf.

235 See, eg, Irish Human Rights and Equality Commission (n 224 above) at p 16; Committee of the Parties to the Council of Europe Convention on Action against Trafficking in Human Beings (n 223 above) at p 3; and A Kenny, "Tusla seeking new foster carers across Ireland", *Irish Times*, 21 February 2022.

236 E Cunniffe and O Ayodele, *Detection, Identification, and Protection of Third-Country National Victims of Human Trafficking in Ireland* (ESRI Research Series Number 139, April 2022) at p 73, available at https://www.esri.ie/system/files/publications/RS139_0.pdf.

237 F Scharpf, E Kaltenbach, A Nickerson and T Hecker, "A systematic review of socio-ecological factors contributing to risk and protection of the mental health of refugee children and adolescents" (2021) 83 *Clinical Psychology Review* 101930 at p 1.

238 van Holen *et al* (n 233 above) at p 506.

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for "mental healthcare" for all unaccompanied minors "as a matter of routine".[239] The UN Special Rapporteur on the sale and sexual exploitation of children called on Ireland in 2019 to provide "resources for a national therapeutic service that guarantees access for child victims of sexual abuse and exploitation to specialized crisis workers and counselling that is timely, continuous and available throughout the country".[240] Section 2.2.7 above documented the significant capacity issues presenting themselves in CAMHS, and the fact that the COVID-19 pandemic has and will continue to place further pressure on a system that is already struggling to cater for demand. These challenges will be magnified further by the fact that considerable numbers of children and young people arriving in Ireland from Ukraine will be dealing with the manifold impacts of trauma and displacement, having been forced to leave their home (and possibly members of their family) to flee war, and to re-settle in a distant country with which they may have had no previous connection.

Research by Scharpf *et al* has found that "[f]actors on multiple socio-ecological levels contribute to risk and resilience among refugee youth. Consequently, practical efforts aiming to support this vulnerable group's mental health should be integrated across these levels and target several factors".[241] The authors suggest the need for "trauma-focused treatments such as narrative exposure therapy for children … and trauma-focused cognitive behavioral therapy".[242] It is also stated that "[e]arly screening for mental health problems and established factors contributing to mental health risk shortly after resettlement and regular follow-ups for vulnerable children could help to quickly introduce children to existing service programs and prevent the development of late-onset disorders".[243] Further, the authors emphasise the importance of "parents` mental health and parenting as key targets for interventions, which need to be tailored both to the cultural background of families and to the demands of the specific setting".[244] Similar conclusions are drawn by Cluver *et al*, who suggest that "[p]arenting reassurance and strategies to help them guide and support their children are urgently needed".[245] The role which schools can play in encouraging "social support and cohesion among peers" is also emphasised.[246] The need for "high-support living arrangements for unaccompanied youth" is also emphasised.[247]

Finally, while it is clearly important to make adequate provision for children arriving in Ireland as refugees from the war in Ukraine, this must not be allowed to detract from the importance of making equal provision for children arriving as refugees from elsewhere.

239 *Ibid* at p 513.

240 *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*, A/HRC/40/51/Add.2, 15 November 2019 at [81](e).

241 Scharpf *et al* (n 237 above) at p 12.

242 *Ibid* at p 13.

243 *Ibid*.

244 *Ibid*.

245 L Cluver, B Perks, S Rakotomalala and W Maalouf, "Ukraine's children: use evidence to support child protection in emergencies" (2022) 376 *British Medical Journal* o781, available at http://dx.doi.org/10.1136/bmj.o781 .

246 F Scharpf, E Kaltenbach, A Nickerson and T Hecker, (2021) "A systematic review of socio-ecological factors contributing to risk and protection of the mental health of refugee children and adolescents", 83 *Clinical Psychology Review*, pp 1-15, at p 13.

247 Scharpf *et al* (n 237 above) at p 13.

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The basic principle of non-discrimination (as set out in Article 2 of the CRC) dictates that all children arriving in Ireland have the same rights to protection, humanitarian assistance, accommodation, education, and recovery and integration—irrespective of their nationality or the location they have been forced to flee. As such, it is concerning to read reports that preferable treatment has been afforded to refugees from Ukraine as compared to refugees from elsewhere, including in relation to accommodation and educational provision.[248] Adequate provision for refugees from Ukraine, where it has been made, is a positive thing; but the State is legally obliged to provide for all children fleeing conflict and persecution on an equal basis.

2.2.10 Council of Europe Strategy for the Rights of the Child

The Committee of Ministers adopted the Council of Europe Strategy for the Rights of the Child (2022-2027), which focuses on six priority areas: freedom from violence; equal opportunities and social inclusion; access to and safe use of technologies; child-friendly justice; giving a voice to every child; and children's rights in crisis and emergency situations.[249] Cross-cutting issues to be mainstreamed across all thematic priorities include a gender-sensitive approach; an anti-discrimination approach; and ensuring children's participation.[250] With regard to freedom from violence, it is stated that the Covid-19 pandemic has exacerbated matters for children, and a wide range of measures are proposed, including supporting States outside the Council of Europe in acceding to the Lanzarote Convention and monitoring the implementation of the European Social Charter with respect to violence against children through the European Committee of Social Rights.[251] Suggestions from children included creating "child-friendly care proceedings that are easier for children to understand, allow them to form and express their opinions and participate in the proceedings, without being fully dependent on adults", making "child-friendly reporting and complaints mechanisms available and accessible for children at a low threshold, thus preventing (further) violence before it happens" and adding "psychological check-ups to regular medical check-ups to assess the mental health of children and be able to identify and respond to any concerns".[252] With regard to equal opportunities and social inclusion, the lives of vulnerable children are considered, including:

> … children in difficult economic situations or living in poverty, children affected by migration and forced displacement (including for the purpose of child labour), children without parental care (including children left behind by their parents due to labour migration) and/ or living in alternative care, children belonging to national minorities, including Roma and Traveller children, children with disabilities, LGBTI

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248 See, eg, A Conneely, "Hotel scenes prompt fears of a two-tier asylum system", *RTE News*, 13 June 2022, available at https://www.rte.ie/news/ireland/2022/0613/1304642-red-cow-refugees-reaction/ and E O'Kelly, "Schools criticise Dept over language support procedures", *RTE News*, 13 June 2022, available at https://www.rte.ie/news/education/2022/0613/1304634-ireland-schools-ukraine/.

249 Council of Europe (n 145 above).

250 *Ibid* at pp 10-11.

251 *Ibid* at p 15.

252 *Ibid* at p 16.

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> children, child victims of trafficking, children living and/or working on the streets, children with imprisoned parents or children who take on a role as caretakers.[253]

With regard to children in care, the Council of Europe recommends:

> … promoting de-institutionalisation, … analysing the issue of historical abuse of children and compensations of abuse within care settings including foster families, … reviewing the Recommendation on the rights of children living in residential institutions …. and by following up on the work of the Committee of experts … ensuring children's participation in care proceedings.[254]

With regard to the priority area of access to and safe use of technology, it is acknowledged that "[d]igital services or products may not be designed to meet the needs or uphold the best interests and the rights of children".[255] The Council of Europe urges, amongst many other issues, "that cases of online child sexual exploitation and sexual abuse are reported, investigated and prosecuted promptly, efficiently and appropriately".[256] Actions suggested by children include requiring "State institutions to regulate in national law the right of the child to privacy and protection from all forms of violence and exploitation in the digital environment and guarantee the accountability of international private actors".[257] The priority area of child-friendly justice includes endorsement of the Barnahus model as well as "[c]larifying the use of alternative dispute resolution mechanisms in disputes involving children".[258] The Strategy repeatedly emphasises the importance of making complaints mechanisms available to children at a low threshold.[259] (A specific example of this is the provision of complaints mechanisms through which children or their parents/guardians can seek to have harmful content removed from an online service; the Council of Europe called for this in its 2018 *Guidelines to respect, protect and fulfil the rights of the child in the digital environment*.[260] As discussed in section 1.3.2 of this Report, the Online Safety and Media Regulation Bill 2022 fails to make provision for any such complaints mechanism.)

On the issue of child participation and giving a voice to every child, it is suggested that Member States should consider "the possibility of lowering the voting age" and that children should be involved in developing "environmental policies".[261] The final priority area of addressing children's rights in crisis and emergency situations acknowledges the impact of the Covid-19 pandemic and of war on children's lives and focus is placed on children in migration, and the need for "strong child protection systems".[262] Children have suggested a range of possible actions in this area, including accommodating "migrant and

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253 *Ibid* at p 19.

254 *Ibid* at p 23.

255 *Ibid* at p 28.

256 *Ibid* at p 29.

257 *Ibid* at p 30.

258 *Ibid* at p 35.

259 *Ibid* at pp 16, 35, 36 and 40.

260 Council of Europe, Recommendation CM/Rec(2018)7 of the Committee of Ministers, *Guidelines to respect, protect and fulfil the rights of the child in the digital environment* at [67], available at https://rm.coe.int/guidelines-to-respect-protect-and-fulfil-the-rights-of-the-child-in-th/16808d881a.

261 Council of Europe (n 145 above) at p 41.

262 *Ibid* at p 47.

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refugee children in child-friendly accommodation centres or shelters", making "policies and procedures for the reception of migrant and refugee children more child-friendly and child rights-based" and ensuring "continuity in the free access to the health care system for children in situations of crisis and emergency and provide timely access to treatment, ensuring children's right to be heard and given informed consent in an age-appropriate manner".[263]

2.3 Court Proceedings Involving Children

In October /2021, the Child Care Law Reporting Project (since re-named the Child Law Project) published a review of three years of court reports from 2018-2021, detailing case reports largely from the District Court as well as some High Court cases and insights from some qualitative interviews with relevant experts.[264] The impact of the Covid-19 pandemic was considered as part of this, including issues such as domestic violence, addiction, school closures, social work and disrupted access arrangements.[265]

Multiple issues were identified in the District Court cases, including delays in accessing the required therapeutic and disability services, as well as mental health services and appropriate assessment and expert reports. The authors commented that "[t]ime and again, the child's history provided to the court included a description of where help was sought for a child (by the child themselves, parents or a professional) but the request went unmet by psychology, disability or Child and Adolescent Mental Health Services (CAMHS)".[266] Indeed, they "see a pattern where the child's wellbeing and behaviour deteriorated and their risk of harm increased" in the absence of appropriate supports.[267] The report also documented frustrations expressed by some judges in this regard: "We have observed judges frequently expressing concern about the lack of progress in obtaining parental capacity, attachment and cognitive assessments and access to therapeutic and other services for children with special needs".[268] In addition, the Report specifically detailed that there were "four District Court cases and one High Court case" concerning eating disorders, thereby also highlighting a need for dedicated supports in that area.[269] Dissatisfaction with the approach to facilitating family reunification was also reported and the authors made a specific reference in this regard to the use of Family Drug and Alcohol Courts in other jurisdictions.[270] Further issues were identified concerning voluntary care agreements, particularly where they are in place for very long periods of time.[271] (This reflects the analysis provided in Chapter 3 of the 2020 Annual Report of the Special Rapporteur on Child Protection.)

The Child Care Law Reporting Project report highlighted that "there can be significant

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263 *Ibid* at p 48.
264 Corbett and Coulter (n 134 above) at p iii.
265 *Ibid* at pp 61-65.
266 *Ibid* at pp 36-37.
267 *Ibid* at p 37.
268 *Ibid* at p 46.
269 *Ibid* at p 38. See also pp 86-87.
270 *Ibid* at p 39. See also p 70.
271 *Ibid* at p 40. See also pp 70-71.

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delays in securing a hearing date for care order applications of over a year in some parts of the country", meaning that children may "spend protracted periods of time in care" under an interim care order, which raises concerns as to "fair procedures, a shift in the evidential basis for the application, emotional toll and a delay in the children receiving therapeutic support".[272] With regard to the High Court cases which were examined, the report highlights young people's needs when leaving special care and wardship, and in particular, the need for "appropriate step-down or follow-on accommodation".[273] The importance of "interagency cooperation" between Tusla and the HSE/ CAMHS is also emphasised.[274] The Report also has a dedicated chapter examining issues such as domestic homicide, sexual exploitation and gender identity, and calls for a specific focus on each of these issues.

The Report outlined 22 recommendations, including reiterating calls for the establishment of a specialist family court as well as emphasising the need for specific legislative reform in areas such as voluntary care agreements, the child's right to be heard, the child's best interests, the court's powers to "make a decision on its own motion", domestic homicide and the protection of the identity of young people in care over the age of 18 years. Specific recommendations were also made around children's therapeutic needs and inter-agency cooperation. The authors concluded that there is a need for research examining the "disproportionate number" of children from ethnic minorities in care, as well as the treatment requirements of children and young people with mental health problems "who require detention for their own safety or the safety of others".[275]

Separately, the Child Law Project (as the Child Care Law Reporting Project is now known) published 30 individual case reports from the second half of 2021, which highlighted a number of serious issues including a lack of assessments and placements as well as a lack of appropriate mental health supports for children and young people involved in the care system. These cases demonstrate major gaps in resources for children who require specialised assessments, treatments and placements. Five cases were documented from the Special Care List in the High Court concerning a lack of suitable residential care placements. In one case, where the child had "issues of extremely high-risk behaviour, drug use, sexual exploitation", the judge expressed "concerns about a recurring problem of suitable placements being unavailable for children who require transition. I appreciate that many of these children present with problems that make it very difficult for residential units to be satisfied that they can cater for their needs, but because it is a recurring problem something needs to be done".[276] The judge explained that in a previous case "there has been a refusal in excess of 20 residential placements" for a child, while in the present case "there have been several refusals for this child".[277] A placement was identified for the child in this case but it was "in another county" meaning that both the child and the

272 *Ibid* at p 66.

273 *Ibid* at pp 83-84.

274 *Ibid* at p 85.

275 *Ibid* at p 113.

276 Child Care Law Reporting Project, "High Court hears of many issues with availability of onward placements", available at https://www.childlawproject.ie/publications/high-court-hears-of-many-issues-with-availability-of-onward-placements/.

277 *Ibid*.

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mother were unhappy as they wanted the child to live closer to the city and family. The judge, meanwhile, urged that the child be "encouraged … to try the placement", given the difficulties finding other suitable placements and because of the accessibility of drugs in another residential placement.[278]

In a separate case, the judge raised similar concerns about the child's access to drugs in a particular residential care unit, stating that "the young person 'appeared to have a bigger drug problem now than since he went in there'"; this "particular residential unit had featured in other reports", and there was a "drugs environment surrounding the unit".[279] The child in this case was removed from this residential unit following "a breakdown in the step-down placement", and he was moved to a hotel, and subsequently to accommodation in an adventure centre. The special care committee took the view that the child "did not meet the criteria for special care"; the guardian *ad litem* raised concerns about this, and also about the adventure centre as "it was not clear that the staff were qualified, it was not registered as a residential unit in compliance with the Child Care Act, and that the child was 'to some extent effectively homeless'".[280] The judge commented:

> … the agency needs to look at step-down placements being provided in areas where there isn't the easy access to drugs that is manifest in respect of a number of the step-down placements which are currently available. The recurring problem in this list is of finding suitable step-down placements. It does seem to be the issue that occupies much of the time and energy of the agency, the GAL and the parents, finding a suitable place and making it work.[281]

It was reported in this particular case that the child was living in emergency homeless accommodation, some three months after the initial placement breakdown, but eventually a suitable onward placement was identified. The GAL sought clarity about the child's aftercare as they were almost 18 years old.[282]

Six of the 30 case reports concerned unaccompanied minors, "many of whom had experienced significant trauma in their home countries and on their journey to Ireland", and who continue to experience "stress and anxiety" given the difficulties involved in reuniting them with their families.[283] In one case, a District Court judge granted a full care order for a child staying in a residential unit who had arrived in Ireland "unaccompanied in the back of a lorry from a European port". The case report included evidence from a social worker that the boy was experiencing some stress and anxiety "mostly concerned with his fears for his family at home and the current political climate" and he was referred to a "creative psychotherapist".[284] In a separate case report, a District Court judge made a 12 month

278 *Ibid*.

279 *Ibid*.

280 *Ibid*.

281 *Ibid*.

282 *Ibid*.

283 Child Care Law Reporting Project, "Introduction 2021 Vol 2", available at https://www.childlawproject.ie/publications/introduction-2021-vol-2/.

284 Child Care Law Reporting Project, "Full care order for boy who arrived at Irish port in back of lorry", available at https://www.childlawproject.ie/publications/full-care-order-for-boy-who-arrived-at-irish-port-in-back-of-lorry/.

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care order for a one year old baby who was also unaccompanied and who had a "very rare medical diagnosis".[285] The baby was in Ireland under "International Protection" and the prospective foster parents had already travelled to the orphanage to meet the baby. The case was listed for review in six months. In another case, where the District Court judge made a full care order for a child who had travelled unaccompanied to Ireland from Africa, the GAL in the case stated that "the CFA provided a lot of resources to unaccompanied minors which should be recognised".[286]

2.4 Treatment of Children in the Care System

2.4.1 HIQA Inspection Reports

Findings in HIQA reports published during the reporting period in relation to the treatment of children in care were mixed overall, with mostly positive findings in relation to special care and residential care, but some critical findings in relation to foster care, care planning, reviews, matching of children to placements, and allocation of social workers. Three special care units were inspected during 2020, and found that while two of these "were generally well-run", there were a number of concerns regarding the "quality and safety" of the third unit "and several serious incidents had occurred" which "highlighted the need for better managerial systems and stronger leadership, particularly in response to safeguarding concerns, managing risk and addressing the training needs of a small number of people working in the service".[287] It was found that "the skill-mix and experience of the team was insufficient to meet the challenges at hand, and this impacted negatively on the quality of care and decision-making, and on responses to risk in this centre".[288] In 2021, improvements were evident; it was found that "children in all units received good quality care within the least restrictive environment possible"[289] and that "[o]verall, children and young people in secure care benefited from the approach taken to their care", but that improvements were needed in relation to care planning, food, and increased support for young people with substance abuse issues.[290]

Inspections of residential centres in 2020 made largely positive findings; but "in a minority of cases, the needs of some children could not be met in their placement. The level of disturbance arising from their behaviours and care needs impacted negatively on other children placed with them and caused them distress".[291] These issues are not easily addressed and "[f]inding alternative placements for these children proved challenging to Tusla, and resulted in some children feeling unsafe and lacking the attention they needed from staff members for unnecessarily lengthy periods".[292] An inspection of a children's

285 Child Care Law Reporting Project, "Care order for very young baby who came into the country without parents", available at https://www.childlawproject.ie/publications/care-order-for-very-young-baby-who-came-into-the-country-without-parents/.

286 Child Care Law Reporting Project, "Judge speaks to unaccompanied minor, grants care order", available at https://www.childlawproject.ie/publications/judge-speaks-to-unaccompanied-minor-grants-care-order/.

287 HIQA (n 37 above) at p 55.

288 *Ibid* at p 56.

289 HIQA (n 60 above) at p 69.

290 *Ibid* at p 33.

291 HIQA (n 37 above) at p 47.

292 *Ibid*.

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residential centre in the Dublin Mid-Leinster area, where two children were living, reported that the children were "consistently positive" about their care.[293] The inspection also found that there was adequate staff available, that children had contact with family and friends, and that they had individualised care plans. The centre was deemed to be "substantially compliant" with its requirements to be "homely", and to promote "the safety and wellbeing of each child"; an identified issue was that two cars at the centre needed renewed tax certificates, but this was rectified.[294] The centre was also compliant with its safeguarding practices and it was found that staff had positive relationships with the children and that they were supported in meeting any health and development needs.

The September 2021 report detailed inspection findings that in four service areas (Carlow/Kilkenny/South Tipperary, Dublin South West/Kildare/West Wicklow, Mid-West and Midlands), "approximately one in five children in foster care in these service areas did not have an allocated social worker".[295] HIQA also considered "dual unallocated" cases where both the foster family did not have access to a "link social worker" and the child also did not have access to a social worker, describing this as a "poor safeguarding practice" in which "Tusla oversight of the placement is diminished".[296] This can have a serious impact on the child, with HIQA stating that in "the Mid West, a review of three (50%) of the six dual unallocated cases with a high priority status found that statutory requirements were not fulfilled in relation to care planning, reviews and visits to children".[297]

An inspection of foster care in Cork in February 2022 noted that Cork has the largest population of any Tusla service area, with 679 children in foster care and 2,083 open cases at the time of the inspection.[298] Previous inspections in Cork had noted "[s]ignificant concerns about organisational capacity to provide effective governance and assurance of social work practice", and "[i]nadequate leadership and governance across the four social work departments, with weak regional and national oversight of performance".[299] A particular concern had been substantial backlogs in child-in-care reviews; "248 child-in-care reviews … were overdue (almost a third of its child in foster care population some dating back over a four year period to 2016)".[300]

The February 2022 inspection noted that feedback from children and parents spoken to during the review was mostly positive, with social workers described as respectful and professional.[301] Foster carers described "big changes for the better" since the last inspection.[302]

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293 HIQA, *Report of a Children's Residential Centre* (8 September 2021) at p 5, available at https://www.hiqa.ie/system/files?file=inspectionreports/4164_CRC_08%20September%202021.pdf.

294 *Ibid* at p 11.

295 HIQA (n 39 above) at pp 14-15.

296 *Ibid* at p 15.

297 *Ibid*.

298 HIQA, *Risk-based Child Protection and Welfare and Foster Care Inspection Report: Cork* (February 2022) at p 4, available at https://www.hiqa.ie/system/files?file=inspectionreports/4384_CPW%20and%20FC_Cork_17%20February%202022.pdf.

299 *Ibid* at p 6.

300 HIQA (n 39 above) at p 22.

301 HIQA (n 298 above) at p 9.

302 *Ibid* at p 10.

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It also found that leadership, governance, management and oversight had all improved significantly,[303] and that additional resources had had a positive impact on reducing the backlog of child-in-care reviews.[304] Ongoing concerns were noted in respect of delays in progressing child protection and welfare assessments and children not having an allocated social worker,[305] as well as "gaps in service capacity to provide a suitable range of placements for children with high and complex needs".[306] Although caseloads were noted as being more manageable than in the past, one social work department nevertheless indicated that 10 of its practitioners has unmanageable caseloads due to recruitment and retention issues; two other departments lacked the capacity to allocate referrals in a timely manner, "with some children waiting many months before any direct work was done with them and their families".[307]

Shortcomings in relation to care planning and review were not unique to Cork; HIQA reported that this was the "weakest" issue nationally, with three areas "non-compliant major" and ten areas "non-compliant moderate".[308] HIQA concluded that there is a "need for more effective management oversight of the care planning and child-in-care review process, with timely sign-off of care plans, and distribution of good quality child-in-care review minutes".[309] It was further stated that "Tusla also needs to establish a system to interrogate and validate the data provided to them from each area in relation to this statutory requirement since the data provided in one area did not indicate the significant size of the problem, nor raise concerns at a national level".[310] Resources are clearly a factor here; the February 2022 inspection report for Cork demonstrates how backlogs in child-in-care reviews are often at least partly caused by heavy caseloads, and the recruitment of additional staff is an important part of addressing the issue.

HIQA also considered how children and young people were matched with their carers, and found that four service areas "had neither matching meetings nor placement officers and evidence of the matching process was not available on the children's files in all cases".[311] Further, "[t]he majority of service areas, 11 out of 17, were reported as not having a sufficient number of foster carers … This resulted in some children being placed with private foster care services outside their local area, sometimes being at a distance from friends and family and having to change schools".[312] It was also observed that "[i]n some cases, given the shortage of placements, children were placed with Tusla foster carers who already had other children placed with them, resulting in placements where the number and mix of children was not in line with the national standards".[313] HIQA emphasises the

303 *Ibid* at p 11.
304 *Ibid* at p 13.
305 *Ibid* at p 11.
306 *Ibid* at p 13.
307 *Ibid* at p 14.
308 HIQA (n 39 above) at p 21.
309 *Ibid* at p 25.
310 *Ibid*.
311 *Ibid* at p 26.
312 *Ibid* at p 27.
313 *Ibid*.

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value of using "an already tried and tested system across all 17 service areas … to promote good governance" in areas such as matching children to foster carers.[314] Improvements were noted during 2021. Six thematic inspections "found robust matching processes that sought to place children in their own community. Inspectors found that only two of the six service areas had placed children outside of their area. Given the challenges with recruitment, this was a positive achievement."[315]

Shortcomings in the monitoring of unallocated cases were highlighted in a child protection and welfare inspection in the Dublin South-West, Kildare and West-Wicklow service area, which found that "there remained "[c]ases awaiting allocation were not consistently audited in line with the SOP for the Management of Unallocated Cases".[316] Severe issues with timelines are also highlighted: "of the six cases that remained unallocated awaiting initial assessment, one case was waiting over four months, one case over five months, two cases were waiting over six months and two cases were waiting eight months or longer for an initial assessment".[317]

Governance issues such as quality assurance, oversight, and data management were another strong theme in the HIQA reports. The July 2021 report noted that "the systems of oversight, monitoring and quality assurance are not as effective in some children's services as they should be across all services".[318] In September 2021, with regard to care planning and review processes, it was stated that "Tusla also needs to establish a system to interrogate and validate the data provided to them from each area".[319] HIQA also advised that reporting systems in respect of voluntary care agreements be improved.[320]

The November 2021 report considered whether the services were performed "in accordance with relevant legislation, regulations, national policies and standards" and found that three areas were compliant, five areas were substantially compliant and four areas were partially compliant. The report found that "oversight and assurance of the quality and safety of the service required improvement"; examples cited included improving the frequency and structure of management meetings in the Cavan/Monaghan service area; ensuring good quality information and key data analysis in the Waterford/Wexford, Dublin North City and Cavan/Monaghan service areas; service planning and consistently adhering to policies, procedures and guidance in the Kerry service area;[321] and communication in the Cavan/Monaghan service area.[322] Further, a "consistent finding from eight of the 12 inspections carried out in the thematic programme was that children's case files were not always updated" on the National Child Care Information System (NCCIS) and HIQA commented that "procedures surrounding this required standardisation to

314 *Ibid* at p 38.
315 HIQA (n 60 above) at p 60.
316 HIQA (n 45 above) at pp 25-26.
317 *Ibid* at pp 29-30.
318 HIQA (n 37 above) at p 68.
319 HIQA (n 39 above) at p 25.
320 *Ibid*.
321 HIQA (n 41 above) at p 20.
322 *Ibid* at p 28.

ensure consistency in practice".[323]

One of the most positive aspects of the HIQA reports was the level of direct engagement with children and families as part of the inspections, and the largely positive feedback recorded in the course of these engagements. Innovative measures including child-friendly surveys have been introduced to ensure that children's views could be captured notwithstanding the challenges posed by the COVID-19 pandemic.[324] Over 1,000 children were consulted as part of inspections during 2020 and they suggested a range of recommendations "which reflected findings of non-compliance by HIQA in those children's services inspected over the course of 2020", including: "more frequent contact with an allocated social worker, … stability and consistency in social work allocation, … social workers could take action quicker, … rules for children should be stricter, … always explain to children what is happening, … listen more to children, … keep in contact with children who are no longer part of the service if they want you to, … better planning for children leaving care".[325] Similarly positive findings were reported based on consultation with children during 2021.[326] In particular, it was pleasing to see children and young people report that they feel listened to in the care system, with children in residential care benefitting from regular meetings with staff and the ability to make suggestions, and children in foster care being assisted to complete review forms and attend planning meetings.[327] Many children reported a very positive relationship with their social worker; but other children did not have a social worker allocated to them, or complained that frequent changeover of social workers meant that they had to start all over to build a relationship and repeatedly tell their story to new social workers.[328]

The September 2021 report included details of an inspection during which the views of children aged 6 years and older were sought.[329] It is pleasing to note that most children and young people expressed positive feedback about foster care, aftercare and their social workers. Some raised issues such as not knowing their social workers: "[t]he social worker changes a lot" and "[t]hey help me but I hate that I keep getting new ones all the time as it's hard getting to know them",[330] and they also raised issues about contact with family and friends: "I don't see enough of my family because they keep on cancelling their visits to see me. I don't get to go to town with my friends due to corona".[331]

A summary of findings from inspections of child protection and welfare services in 12 of the 17 Tusla service areas was published by HIQA in November 2021. Children, their parents and family members were consulted as part of the inspections and HIQA found that they were "positive" about the services and the social workers, with children commenting, for

323 *Ibid* at p 35.
324 HIQA (n 60 above) at pp 18-19.
325 HIQA (n 37 above) at p 26.
326 HIQA (n 60 above) at pp 19-20.
327 *Ibid* at pp 24-25.
328 *Ibid* at pp 29-30.
329 HIQA (n 39 above) at p 9.
330 *Ibid* at pp 10-11.
331 *Ibid* at p 12.

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example that: "I can trust them with what I say", and "[s]he asks for my opinions and involves me in meetings".[332] A minority of children expressed the view that social workers should improve their listening and communication skills, and some were dissatisfied when their social worker changed: "I told that social worker everything about my situation then she was just gone".[333] Similarly, the majority of parents were positive about their experiences, while a minority expressed concerns about access to services and communication with social workers. In the Mid-West service area, two parents said they felt that the communication with them was "poor and inconsistent", while in the Kerry service area, two parents said that social workers "could have been more sensitive to their needs and views".[334] The most recent overview report noted that most parents consulted during 2021 expressed positive views about their participation in child protection conferences, although some felt that it could be intimidating and would like to have more support.[335]

One outlier in the reports was a child protection and welfare inspection in the Dublin South-West, Kildare and West-Wicklow service area, which stated that "[t]he area did not identify children who were agreeable to speak with us".[336] While children have a right to be heard, they do not have an obligation to express their views; they are entitled to decline to contribute to decision-making processes if that is their preference. At the same time, where it is found that children are not willing to speak with inspectors, it is vital that careful consideration be given as to why children opt not to participate, especially if a large proportion (or, as in this case, all) of the children in a particular area take this position. Efforts should be made to review whether children are provided with sufficient information to make them feel comfortable in participating or expressing their views, and whether the structures and environment provided for this purpose are suitable.

2.4.2 National Review Panel Reports

The National Review Panel published its Annual Report for 2020 in August 2021.[337] During the review period, the deaths of 30 children and young people were notified to the NRP: one child in care, six in aftercare, and 23 known to social work services. This was up from 22 deaths the previous year, and from an average of 21 deaths per year over an eleven year period; however, the report points out that the number of referrals has doubled in the same time period—so a lot more children are known to child protection services and would be captured within the notified deaths.[338] The largest proportion of deaths (39%) was from natural causes, and with three age cohorts making up the highest proportion: infants under 12 months (nine deaths), 11-16 year olds (also nine), and 17 to 20 year olds (eight). Suicide accounted for seven deaths.[339] The number of deaths of young people in aftercare was six, up from zero in 2019—"highlighting the

332 HIQA (n 41 above) at pp 16-17.

333 *Ibid* at pp 18-19.

334 *Ibid* at p 20.

335 HIQA (n 60 above) at pp 34-35.

336 HIQA (n 45 above) at p 8.

337 National Review Panel (n 164 above).

338 *Ibid* at p 12.

339 *Ibid* at pp 9 and 13.

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vulnerability of this group”.[340]

The report noted that the children and young people whose deaths were notified were involved with a range of different systems including health, mental health and youth justice, with Tusla social work services playing a minor role in certain cases. Many of the young people who died from suicide had been referred to CAMHS, “and some had received a consistent service. However, to be eligible for a CAMHS service, it was necessary for a young person to have a diagnosed treatable mental illness. Suicidal ideation is considered to be a mental health problem but does not always qualify for a CAMHS service.”[341]

In relation to serious incidents of abuse and neglect, the report cited research noting “an association between the source of a report and the likelihood of a response, showing that reports from professionals, mandated or otherwise, are more likely to be substantiated or considered critical than reports from families or members of the public”.[342] The NRP suggests that “professionals should routinely challenge their own perceptions about the reports made by extended family members and that work to address family conflict should, if possible, be part of an intervention.”[343]

2.4.3 Aftercare

The HIQA reports contain a number of findings regarding ways in which aftercare provision could be strengthened. The September 2021 report found that “not all young people were referred to the aftercare service when they reached 16 years of age and this sometimes led to delays in completing assessments and to delayed aftercare plans”.[344] As part of the child protection and welfare inspection in the Dublin South-West, Kildare and West-Wicklow service area, HIQA inspectors spoke with “five young people availing of the after care service” and three of these five young people “felt that they needed more support”, with one commenting that they needed help completing forms for SUSI (Student Universal Support Ireland), for example, and another commenting that they needed help with housing and trying to avoid homelessness.[345] These comments are supported by data outlined in the report which shows that “only 37% of eligible young people in foster care (17 of 46) and 42% of 18 to 22 year olds (86 of 203) were allocated [aftercare support] at the time of inspection”.[346]

A research report by Gilligan *et al* shed light on “the lived experiences of care leavers in Ireland during the Covid-19 pandemic”, providing accounts given by 16 care leavers aged 18-27 years in interviews.[347] At the outset, the authors outlined the international research

340 *Ibid* at p 7.

341 *Ibid* at p 13.

342 *Ibid* at p 10, citing S Whelan, *At the front door: child protection reporting in a changing policy and legislative context* (PhD Thesis, Trinity College Dublin, 2017).

343 *Ibid*.

344 HIQA (n 39 above) at p 34.

345 HIQA (n 45 above) at pp 8-9.

346 *Ibid* at p 19.

347 Gilligan *et al* (n 125 above) at p 6.

context, and noted that "the Covid-19 pandemic in early 2020 seems to have amplified … vulnerabilities and challenges that many care leavers may face" and these challenges include issues pertaining to housing, access to mental health services, education and employment.[348] They identified three main themes in their interviews with young people: "i) the challenges experienced by care leavers during the pandemic, ii) those things that helped them to get through, and iii) lessons learned as a result of this experience".[349] Among the challenges experienced by care leavers, "processing the loss of a family member during or soon before Covid" was highlighted by some, while others highlighted financial losses which they experienced when their work hours were reduced.[350] Loneliness and mental health issues as well as the meaning of "home" and not having support from a family were also raised.[351] Things that helped care leavers during the pandemic included support from friends and family as well as support from professionals, including mental health teams and aftercare workers who helped with issues relating to housing.[352] Keeping busy with hobbies, volunteering and work was also noted to be helpful to care leavers during the pandemic.[353] Care leavers were also asked what they learned about themselves during the pandemic, and some developed "a greater awareness of the absence of a 'safety net' but also an opportunity to figure things out for themselves and develop a sense of independence".[354]

Gilligan *et al* commented that the care leavers "in our sample often reported a sense that they were facing Covid challenges with fewer personal supports or resources than their peers who had not come from the care system".[355] It is shown by the authors, for example, that a relationship break up or a change of accommodation can be more difficult for a care leaver to navigate during the pandemic in the absence of a strong support system, which a care leaver may lack. Indeed, it is noted that "[m]any participants seemed well aware of how fragile their supports or how flimsy their safety net might prove to be when tested".[356] The authors identified two main messages from their interviews with caregivers: first, that relationships, both informal and formal are of huge importance to their lives, and second, that there is a "the risk of precarity—emotional and material" that faces some care leavers.[357] With regard to the risk of precarity, it is explained as follows: "There were some who found aspects of their emotional and/or material stability somewhat fragile at the time of interview. For others, the risk of emotional or material precarity in the future was a worry, even if currently things were reasonably stable".[358] Further, "it was striking how often concerns about threats to mental health were mentioned by participants—as a current or

348 *Ibid* at pp 9-11.
349 *Ibid* at p 19.
350 *Ibid* at pp 21-23.
351 *Ibid* at pp 23-29.
352 *Ibid* at pp 30-33.
353 *Ibid* at pp 33-37.
354 *Ibid* at p 38.
355 *Ibid* at p 42.
356 *Ibid* at p 42.
357 *Ibid* at pp 44-45.
358 *Ibid* at p 45.

recent issue, or as a challenge in the future".[1] As regards the policy implications of this study, Gilligan *et al* suggested six areas that merit attention: "i) a focus on the importance of informal support …; ii) priority support for care leavers with additional needs; iii) a focus on mental health support; iv) the supportive value of recreational activity and interests … ; v) a review of eligibility and age conditions for after care support; and vi) strengthening the evidence base for policy making and the delivery of support".[2]

2.5 Meeting the Needs of Victims of Abuse

It was reported in May 2022 that the number of child sex abuse victims seeking support from Children at Risk in Ireland (CARI) has more than doubled and its waiting list is now the longest it has ever been in its 33-year history.[3] The waiting list more than doubled in 2020 alone (from 92 to 198). There are currently 254 children waiting to access CARI's services, and it is estimated that it will take five years to clear the waiting list unless emergency funding is provided by Government. When these figures are read in tandem with the increasing numbers of child sex abuse referrals to Tusla (discussed in section 2.2.1 above), it is clear that there is a pressing need for additional investment in services of this nature. The ongoing development of the Barnahus/OneHouse project is timely in this regard; but while the establishment of additional services in Dublin and Cork to augment the existing pilot in Galway is extremely welcome, it will be some time before these services are in a position to begin operating. The allocation of additional resources to the CARI Foundation and related services in the meantime is necessary to meet Ireland's obligations under Article 39 of the Convention on the Rights of the Child to "take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse … in an environment which fosters the health, self-respect and dignity of the child."

In June 2022, One in Four published *Only a Witness*, a research study of the experiences of clients of One in Four in the criminal justice system.[4] The study focused on adults who had engaged with the criminal justice system in respect of sexual abuse experienced when they were children. 10 clients (3 men and 7 women, aged between 20-55 years old) who had completed their interaction with the criminal justice system participated in the study. Seven cases resulted in a conviction (one of which was overturned on appeal); one case was dismissed following judicial review; one case was stayed, and one had a verdict of not guilty.[5]

The majority of participants reported positive experiences of the Gardaí, describing them as supportive and understanding.[6] A minority raised concerns about issues such as delays in calls being returned; the manner in which Gardaí reacted when taking their statement;

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1 *Ibid*.

2 *Ibid* at p 48.

3 M McGlynn, "Child sex abuse charity's waiting list for support services doubles", *Irish Examiner*, 31 May 2021.

4 J Brown, D McKenna and E O'Kennedy, *Only a Witness: The experiences of clients of One in Four in the criminal justice system* (June 2022), available at https://www.oneinfour.ie/Handlers/Download.ashx?IDMF=491615e8-9c8f-4126-ad86-d057838625a6.

5 *Ibid* at p 32.

6 *Ibid* at pp 35-37.

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and the physical environment in which their statement was taken.[7] Experiences of prosecution teams were more mixed; while some participants were satisfied with their interactions, several expressed frustration at how little time and attention they received from the prosecution solicitors.[8]

The most negative evidence all related to the trial itself, which participants found to be a significantly re-traumatising experience; some of them described it as worse than the abuse itself.[9] Specific issues highlighted were that it felt like the process was weighted in favour of the defendant, and that being cross-examined by the defence legal team was "cruelty".[10] Experiences of judges varied, with some described as warm and respectful, but others felt trivialised by the judge's attitude towards them.[11]

The report made a wide range of recommendations aimed at mitigating the negative impacts on sexual abuse survivors of interacting with the criminal justice system.[12] Some of the more significant recommendations included that:

- Gardaí working with victims of sexual abuse be specially selected and trained;
- Consistent and regular information be provided by Gardaí to complainants;
- Suitable and appropriate environments and times for the taking of statements be provided;
- Prosecution teams provide consistent and structured communications with complainants;
- Prosecution lawyers and judges working on sexual crime cases should be required to undertake specialist training on the dynamics and impact of sexual violence, while training for all legal professionals should include material on sexual violence;
- A specialist sexual violence unit be established, within the DPP's Office, with a maximum time limit for legal professionals to work in this field;
- Consideration be given to establishing a specialist court to try sexual crimes;
- Ethical guidelines on the cross examination of complainant witnesses in trials of sexual crimes should be introduced;
- Professional support and guidance be given to complainants in the preparation of their Victim Impact Statements;
- Appropriate, separate and private witness facilities be provided in every trial location, as is available in the Central Criminal Court in Dublin.
- Complainants be automatically provided with a specialist support person for the duration of the criminal trial whose role is to explain and clarify the various processes and procedures;
- Free legal aid be available to complainant witnesses in all categories of sexual crime to enable them to seek independent legal advice; and
- An enforceable Code of Practice specifically around the reporting of sexual abuse

7 *Ibid* at pp 37-39 and 44-46.
8 *Ibid* at pp 51-55.
9 *Ibid* at pp 60-63.
10 *Ibid* at pp 62, 65-66 and 84.
11 *Ibid* at pp 72-73.
12 The recommendations are summarised *ibid* at pp 96-98.

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cases be introduced and implemented to avoid exploitative and sensationalist reporting.

This is an important and timely piece of research; there is limited literature available on the direct experiences of this particular cohort of complainants in the criminal justice system in Ireland, and the evidence presented in the report are worthy of close attention by Government for that reason. The recommendations were generated by both the participants in the research and by One in Four, based on its many years of experience in supporting victims through the criminal justice system and beyond. Given their provenance, these recommendations are persuasive and point to the need for extensive reform in how sexual crime cases in general (and particularly retrospective child abuse cases involving adult complainants) are investigated and prosecuted. It is noteworthy that there is considerable overlap between these recommendations and recommendations made in the *Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences* (otherwise known as the O'Malley Review), which was published in August 2020.[13]

In February 2022, Tusla published a *Review of the Provision of Accommodation for Victims of Domestic Violence*.[14] It cited data from 2019 that 1,134 women and 2,918 children were accommodated during that year, and as well as data indicating that there was a significant increase in demand for accommodation services during the COVID-19 pandemic.[15] It was noted that:

> In 2019, 4,381 enquiries about availability of a refuge place did not result in access to refuge, almost two thirds of these because of a lack of available or suitable places. This demand represents only the visible aspect of need i.e., women who have sought help either directly from a domestic violence support service or through a referring professional or service.[16]

At the start of the COVID-19 pandemic, there were 155 units of emergency domestic violence accommodation operational in Ireland; this was compared to the to Istanbul Convention, the explanatory report to which states there should be one family place for every 10,000 of population (indicating there should be 476 family places provided in Ireland, based on 2016 Census data).[17] (It is noteworthy in this context that the population has since increased by 7.6%,[18] meaning that over 500 places are now required to meet the standard.) More than 1.25 million people were located more than 30 minutes from a unit or family place.[19] The review found that the number, location and type of accommodation for

13 Department of Justice, *Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences* (August 2020), available at https://www.justice.ie/en/JELR/Supporting_a_Victims_Journey.pdf/Files/Supporting_a_Victims_Journey.pdf.

14 Tusla, *Review of the Provision of Accommodation for Victims of Domestic Violence* (February 2022), available at https://www.tusla.ie/uploads/content/TUSLA_-_Domestic_Violence_Acc_Provision_Single_Page.pdf.

15 *Ibid* at p 16.

16 *Ibid*.

17 *Ibid* at p 18.

18 Central Statistics Office, "Census of Population 2022 - Preliminary Results", 23 June 2022, available at https://www.cso.ie/en/csolatestnews/pressreleases/2022pressreleases/pressstatementcensusofpopulation2022-preliminaryresults/.

19 Tusla (n 372 above) at p 18.

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victims of domestic abuse needed to "substantially increase", with at least 60 new family places/units needing to be prioritised urgently to address areas of under-provision.[20] At the same time, the review concluded that "responding to the needs of victims of DSGBV is complex. A response system must go beyond dealing with individual victims and towards well-developed planning, focusing on prevention, combating gender-based violence and holding perpetrators to account."[21] The importance of inter-agency collaboration was also emphasised, and the review recommended the development of an inter-departmental governance structure to oversee the implementation of the commissioning plan to provide safe domestic violence accommodation nationally.[22] Crucially, it was recommended that the Government "[e]xplicitly designate a lead department/ agency responsibility for progressing future safe domestic violence accommodation developments.[23]

In response to the review, the Minister for Justice and the Minister for Children, Equality, Disability, Integration and Youth released a joint statement acknowledging the need to "dramatically increase the provision of refuges.[24] On 28 June 2022, the Government published *Zero Tolerance*.[25] This strategy includes 144 actions aimed at addressing a range of issues related to preventing and responding to domestic abuse, with a particular focus on clearly identifying children and young people as both witnesses and victims and survivors. The plan has four pillars: protection, prevention, prosecution and policy co-ordination. The number of refuge spaces will increase to 282, with at least one refuge in every county; the first 24 new spaces will be open by the start of 2024. While this is a significant increase (effectively 100%), it must be pointed out that it still only amounts to approximately 55% of what would be needed to comply with the Istanbul Convention standard. The Minister for Justice has been quoted as stating that it is what could be achieved in the first five years, and more would be added.[26] Given the enormous shortfall at present, and the prevailing trend of rising population, it must be questioned whether this target is ambitious enough for a five-year period; there is clearly a risk is that in 2027, significant numbers of requests for a place in a refuge will not be met.

Other actions set out in the strategy include:

- An updated secondary school curricula at junior and senior cycle to include consent, domestic violence, coercive control and safe use of the internet;
- Awareness raising campaigns to focus on attitudes among men and boys, increase awareness of services and supports among victims and reach migrant and minority communities, as well as the rollout of the national campaign on consent;
- Doubling the maximum sentence for assault causing harm from five years to 10 years;

20 *Ibid* at p 11.

21 *Ibid* at p 19.

22 *Ibid* at pp 27-30.

23 *Ibid* at p 31.

24 "Ministers McEntee and O'Gorman welcome publication of review of accommodation for victims of domestic violence", 16 February 2022, available at https://www.justice.ie/en/JELR/Pages/PR22000028.

25 Department of An Taoiseach, "Government publishes Zero Tolerance strategy to tackle domestic, sexual and gender-based violence", 28 June 2022, available at https://www.gov.ie/en/press-release/5b6b5-government-publishes-zero-tolerance-strategy-to-tackle-domestic-sexual-and-gender-based-violence/.

26 K Holland, "Government to unveil €363m plan to tackle domestic and gender violence", *Irish Times*, 28 June 2022.

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- Increased training for frontline practitioners to enable them to identify domestic abuse and refer victims to support services;
- Engagement with the judiciary to consider the creation of specialised judges for domestic, sexual and gender based violence cases;
- Strengthening the range of emergency orders available to the courts;
- Enact legislation to introduce stand-alone offences of stalking and non-fatal strangulation; and
- The establishment of a new statutory agency by 1 January 2024, tasked with delivering excellent services to victims of domestic, sexual and gender-based violence; ensuring a robust set of national service standards and governance arrangements are in place; and co-ordinating a range of other State responses.

In addition, the strategy expressly commits to the implementation of recommendations of the O'Malley Review.

2.6 Child Participation

A study by O'Neill *et al* on behalf of the Office of the Ombudsman for Children examined "the potential to mobilise social and digital media to support children and young people's right to be heard", especially "in the context of public decision-making".[27] The authors carried out a literature review as well as 22 interviews with relevant professionals and consultations with children and young people. The consultations included four separate workshops with a total of 95 participants, aged between 13 and 17 years old, in the north, south, east and west of Ireland. In addition, ten focus groups with children and young people ages 8 to 17 years were held, each with 5 or 6 young people, in an effort to capture "seldom heard voices".[28] The literature review showed that "children are immersed in the digital environment" and that this "offers a particular opportunity to examine their digital experiences and identify opportunities so that youthful enthusiasm can be harnessed to engage in further creative and civic activities".[29] The authors noted, however, that "[o]nly limited numbers are attaining higher levels of civic engagement activities using digital technologies, requiring a range of interventions to support digital literacy", and they suggested "a proposed framework for children and young people's digital participation".[30] Findings from the consultations with children and young people included that they "enjoy a wide range of benefits through their use of social and digital media" and that they "are confident about their ability to express themselves" through these fora.[31] One young person commented, for example that ""It's a good place to make changes as illustrated by the climate change movement online".[32]

Negative comments included that "young people faced higher risks of receive (*sic*) abusive

27 B O'Neill, T Dinh and K Lalor, *Digital Voices: Progressing children's right to be heard through social and digital media* (Ombudsman for Children's Office, September 2021) at p 14, available at https://www.oco.ie/app/uploads/2021/09/Digital-Voices-Progressing-Childrens-right-to-be-heard-through-social-and-digital-media.pdf.

28 *Ibid* at p 23.

29 *Ibid* at p 44.

30 *Ibid* at p 44.

31 *Ibid* at p 62.

32 *Ibid* at p 56.

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comments online" and that "Not everyone has access".[33] One young person, aged 13-17 years old, commented that "It's actually pretty easy to bully online because ... the report systems on a lot of social media do not work".[34] Issues such as cyberbullying and "unwanted communications" present challenges which children and young people want addressed through a focus on "safety, respect for privacy, higher quality information, training and supports".[35] A concrete recommendation included a need for "a dedicated space where young people could express their views, safely and securely".[36]

The interviews with relevant professionals showed support for "the idea of addressing children where they are to be found and that digital spaces were particularly important in the lives of children and young people".[37] One professional from a youth organisation stated that "[o]ur vision is to see that Student Councils in school would be recognised and listened to as a stakeholder group and recognised in the same way as parents and teachers are in the community".[38] Professionals also raised the issue of safety, stating that it "may compromise the participation process",[39] and also questioned whether children's views are actually heard in practice, with one educator stating that "for the most part, your voice is not going to be heard if you're young within the existing social media network platforms as they stand. I would think that a place is needed for them to feel that they are being heard".[40] The need for follow-up post consultation with children was also emphasised, with one academic commenting that "one young person in care said that, 'I've been asked so many times you know, for my views on things and I've asked so many times would I get involved in this and I've got involved in five or six things and absolutely nothing, once they heard what I said they closed the book'".[41]

The authors put forward a range of recommendations to further enhance children and young people's right to be heard through social and digital media, including the establishment of a "Digital Participation Expert Forum" which could, among many functions, "highlight opportunities within the public decision-making sphere where digital participation can make a difference", and "identify challenges and needs arising at the local and national level as regards children's rights, child online safety, protection of children's data etc.".[42] Further, it was recommended that a "Charter for Children and Young People's Digital Participation" be drawn up to show "commitment on advancing children's participation in the digital space" and to show commitment to international obligations.[43] The authors called for a "Digital Participation Toolkit" to "collate information on the different digital tools available and how they can be used" as well as a "digital participation space", which the children

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33 *Ibid* at p 56.
34 *Ibid* at p 52.
35 *Ibid* at p 62.
36 *Ibid* at p 62.
37 *Ibid* at p 80.
38 *Ibid* at p 72.
39 *Ibid* at p 80.
40 *Ibid* at p 73.
41 *Ibid* at p 78.
42 *Ibid* at p 93.
43 *Ibid* at p 93.

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and young people who were consulted as part of the study were interested in, which could "host active deliberation on key policy topics that impact on children".[44] Finally, it was recommended that "a series of demonstrator projects to pilot new and innovative forms of children and young people's participation in decision-making processes" should be established.[45]

Recent academic research on issues relating to child participation and child protection is discussed in section 4.3.4 of this Report.

2.7 Addressing Historical Rights Violations

There was considerable activity in the reporting period in respect of addressing historical rights violations, including the Government's response to the report of the Special Rapporteur on Child Protection on illegal birth registrations; the announcement of the redress scheme for Mother and Baby Homes; and the opening of the revised *ex gratia* scheme for survivors of sexual abuse in schools. Each of these were discussed in detail in Chapter 1 above, and do not need to be considered separately here. It was noted in Chapter 1 that on all three issues, there was evidence of a willingness to address these violations up to a point; but that gaps remain in the Government's response in each case.

2.8 Discussion and Recommendations

Reports produced by Irish and international bodies during the reporting period of July 2021 to June 2022 provide a mixed picture of the current state of play in the Irish child protection system. There are positive stories to tell: the HIQA inspection reports provide extensive evidence of children and families reporting that they feel well looked-after and respected within the system. The expansion of the Barnahus/OneHouse project from a single pilot in Galway to include locations in Dublin and Cork is undoubtedly a positive move in the right direction, and will greatly improve the provision of services to victims of abuse. The new national strategy on domestic, sexual and gender-based violence contains many worthy objectives, albeit that the level of ambition regarding the increase in the provision of refuge places is arguably not quite as high as it should be.

At the same time, many challenges remain, and several of them appear greater now than they were 12 months ago. The trend in child homelessness has turned very much for the worse, just when it appeared to have begun to move in the right direction during 2020. Coupled with the significant increases in cost of living, there are worrying times ahead in respect of the impact on child protection of homelessness and child poverty. Recent revelations of failings in CAMHS are, on closer inspection, part of a longer and wider trend of under-resourcing that has left vulnerable children either waiting too long to receive a service they desperately need, or without any service at all. Pressure on this creaking service is likely to increase further in the coming years due to the fallout of the COVID-19 pandemic. A sustained period of investment and re-organisation is necessary to match the capacity of CAMHS to the needs of the service users.

Ireland's response to child trafficking has been the subject of in-depth criticism by

44 *Ibid* at p.94.

45 *Ibid* at p 95.

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both national and international bodies, most particularly with respect to measures taken to identify victims of child trafficking, but also in respect of prosecution rates and supports provided to victims. The risk of child trafficking occurring in Ireland has been significantly increased by the influx of refugees from Ukraine, as has the likely pressures on accommodation, CAMHS and other services in the medium term. The response to Ukrainian refugees also sheds light on inadequacies in provision made for refugees from other locations, and highlights the need for a non-discriminatory approach.

Child protection online is an area of weakness in Ireland at present, most particularly with respect to the lengthy and ever-increasing backlog in the forensic examination of ICT devices for evidence of child sexual abuse. Targeted investment and recruitment is urgently needed to rectify this difficulty. The pressures in this regard are likely to increase further if the proposed EU Regulation laying down rules to prevent and combat child sexual abuse becomes law, as this will likely increase detection rates. The absence of an individual complaints mechanism from the Online Safety and Media Regulation Bill 2022 gives rise to a clear incompatibility with CRC and Council of Europe standards.

Notwithstanding the many positive findings in HIQA inspection reports, it must be acknowledged that the reports also highlight shortcomings in aspects of Tusla's service provision. Issues highlighted as needing attention include the management of referrals and safety plans; care planning and child-in-care reviews; aftercare; and staffing levels. Tusla has recently published a new strategic plan relating to its provision of residential care; this will be considered in detail in Chapter 3 of this Report.

Finally, the Barnahus/OneHouse project and the new national strategy on domestic, sexual and gender-based violence will, over time, improve the provision made for victims of abuse. Nonetheless, significant challenges continue to arise in relation to the treatment of victims during the prosecution of child sexual abuse cases, as documented in the One in Four *Only a Witness* report discussed in section 2.5 above. Reforms in practice and procedure as recommended in this report and in the 2020 O'Malley Review should be progressed at the earliest opportunity; this would be entirely in line with the policy aims underpinning the national strategy on domestic, sexual and gender-based violence.

Key Recommendations

- A renewed focus by Government on child homelessness, including the enactment of a constitutional amendment on a right to housing, modelled on section 26 of the Constitution of South Africa.
- Sustained investment in CAMHS to meet both current and projected future needs.
- Heightened efforts aimed at combatting child trafficking, drawing (*inter alia*) on the recommendations of the IHREC report of June 2022.
- Targeted investment and recruitment aimed at addressing backlogs in forensic examination of ICT devices.
- The inclusion of an individual complaints mechanism in the Online Safety and Media Regulation Bill 2022.
- Reform of practice and procedure in child sexual abuse criminal cases, drawing on the recommendations of the One in Four *Only a Witness* report of June 2022 and the 2020 O'Malley Review.

CHAPTER 3

Private Residential Care

3.1 Introduction

When children enter the care of the State in Ireland, their care may be provided for through a number of means. The majority of children enter foster care, which may be arranged publicly through Tusla, or privately through an agency on behalf of Tusla. A minority of children in alternative care are placed in residential centres; these may be owned by Tusla, or owned by a community or voluntary organisation funded by Tusla, or owned by a private company registered and contracted by Tusla. It is with the last of these options that this chapter is concerned. As will be outlined in detail in Part 3.2 below, the early part of the 21st Century saw a large reduction in the reliance on residential care as a model of alternative care in Ireland; whereas the last seven years have seen a significant increase in reliance on private residential care, with associated pressures on costs. This trend gives rise to concerns due to evidence from the international literature regarding risks associated with reliance on private residential care; section 3.4 will examine this body of literature, and correlate it against the experience in Ireland to the extent that Irish evidence is available (which, it should be stated at the outset, is quite limited). Section 3.5 will examine Tusla's recently published *Strategic Plan for Residential Care Services for Children and Young People 2022-2025*[1] in the light of the evidence considered in section 3.4, and section 3.5 will conclude with some brief discussion and recommendations.

1 Tusla, *Strategic Plan for Residential Care Services for Children and Young People 2022-2025* (May 2022), available at https://www.tusla.ie/uploads/content/STRATEGIC_PLAN_FOR_RESIDENTIAL_CARE_SERVICES_FOR_CHILDREN_AND_YOUNG_PEOPLE_2022-25.pdf

3.2 Background: Usage of Residential Care in Ireland

Historically, alternative care in Ireland relied heavily on residential care in institutions, most of which were run by religious orders.[2] From the early 1990s onwards, revelations of widespread and systemic abuse in these institutions during the middle part of the Twentieth Century led to a series of high-profile investigations and reports over the following two decades.[3] This period coincided with a policy shift towards a strong preference for foster care over residential care. At the end of 2004, 442 children in alternative care were placed in residential care, accounting for 9% of the total number of children in alternative care.[4] This figure continued to fall, reaching a low of 316 (5%) at the end of 2016.

With the move to overwhelming reliance on foster care, residential care plays a much-reduced role in the Irish care system, which Gilligan describes as "a 'fall-back' to foster care … serving children regarded as extreme or on the margins in some way".[5] Branigan and Madden have stated that "[t]here can be a wide range of reasons why residential care might be in the best interests of the child", including (but not limited to):

- when a foster care placement breaks down or is no longer suitable;
- as a respite placement or until a more suitable placement is found;
- to provide an opportunity for assessment in order to inform the child's care plan for onward placement;
- diagnosed mental health issues, as well as presentations as yet undiagnosed and requiring further assessment …;
- if the behaviour of the young person is considered to be too challenging, disruptive or dangerous to be managed in another care setting;
- older children who are clear they do not wish to be placed in a family setting;
- if the child has a complex physical or intellectual disability requiring additional care;
- young people in care who turn 18 who remain in care to complete second level education, or while they wait for a suitable and appropriate after care placement;
- unaccompanied children seeking asylum, and separated refugee children, who are placed in a residential setting for assessment and specialist support purposes.[6]

Writing in 2008, Gilligan noted:

> Overall, this most recent period seems to be characterized by a growing disillusionment because of revelations about earlier failings in the care system and about more current limitations that have been exposed. The period has also witnessed efforts to regulate/standardize provision of care, and despite the influence of [the Convention on the Rights of the Child] it is possible to discern

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2 R Gilligan, "Residential Care in Ireland" in M Courtney and D Iwaniec (eds), *Residential Care of Children – Comparative Perspectives* (Oxford University Press, 2009) at pp 3-4.

3 See, eg, S Ryan, *Commission to Inquire into Child Abuse Report* (2009), available at http://childabusecommission.ie/?page_id=241.

4 Gilligan (n 2 above) at p 9.

5 *Ibid* at p 15.

6 R Branigan and C Madden, *Spending Review 2020: Tusla Residential Care Costs* (Department of Children and Youth Affairs, October 2020) at pp 18-19, available at https://assets.gov.ie/200040/6158bb04-893c-456e-9bd7-37660ebc15b0.pdf.

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> a drift from a system that strives to be child-centered toward one that very often finds itself "child preoccupied" in relation to hard-to-serve children and young people. Rather than serving (or aspiring to serve) the needs of children in a proactive, holistic child-centered way, the residential care system finds itself increasingly trapped in responding *reactively* and possibly suboptimally to the needs of young people who present challenging behavior that many residential centers have proven unable to accommodate (this, of course, reflects at least as much on the nature of the center as on the children's behavior).[7]

Challenges in the residential care sector highlighted by Gilligan include difficulties in recruiting and retaining suitably qualified staff, particularly in centres catering for children with more significant needs; providing frontline staff with sufficient opportunity for training, reflection and supervision; securing "sufficient scale, capacity, diversity, and commitment to child-centered approaches in the providers of residential child care"; and generating adequate knowledge about the experiences of and outcomes for Irish children in residential care in a context where data collection was minimal and little published research was available.[8]

Since the establishment of Tusla in 2014, new trends have begun to emerge. Figures from Tusla's Quarterly Integrated Performance and Activity Reports[9] indicate that the number of children in residential care has begun to slowly (but steadily) increase from a low of 5% in 2016; at the end of 2021, it stood at 459 (7.8%). A trend of gradual and steady increase is evident, although it must be acknowledged that the figure remains very low by international standards.[10] There are currently 177 Residential Care Centres, comprising Tusla-owned Centres, Community and Voluntary Centres, and Private Centres. These Centres are "a mix of domestic style homes in housing estates, in villages, in towns, in cities, and in rural areas across Ireland", and "typically have between 2 to 6 children/young people being cared for".[11] As a result of the recent increases, residential care has become a key cost pressure for the Agency, resulting in regular overspends and requiring a supplementary estimate of €15 million in 2019.[12]

Recent inspection reports by HIQA on residential care centres have been largely positive. In 2020, HIQA conducted 20 inspections, and noted that:

> … the vast majority of children received good quality care in a safe and nurturing environment. Their rights were promoted and their health and educational needs were being met. It was evident that these centres were working collaboratively with social work departments and specialist services, to plan and deliver care to

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7 Gilligan (n 2 above) at p 7.

8 *Ibid* at pp 14-15.

9 Available at https://www.tusla.ie/data-figures/.

10 See *Better data for better child protection systems in Europe* (UNICEF/Eurochild, 2021), available at https://eurochild.org/uploads/2022/02/UNICEF-DataCare-Technical-Report-Final-1.pdf. At pp 66-67, figures show that at the time of publication, out of 26 EU Member States, only Malta had a lower rate than Ireland of children in residential care as a proportion of children in alternative care. The average figure among 26 EU Member States was 39.8%.

11 Tusla (n 1 above) at p 18.

12 Branigan and Madden (n 6 above) at p 35.

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> children, which provided them with opportunities to reach their full potential, either as children or as young adults.[13]

It was also noted that "[l]eadership, governance and management of residential centres has continued to improve year on year",[14] and that "most centres were well staffed by skilled and experienced staff teams, or with a proportionate mix of new and existing team members. These teams were well established and contributed to a stable environment for the children placed there."[15] Challenges arising in a minority of centres included the needs of some children could not be met; finding alternative placements for these children was challenging, and "resulted in some children feeling unsafe and lacking the attention they needed from staff members for unnecessarily lengthy periods"; leadership structures in some centres were "severely challenged", and managerial systems were "not being implemented consistently or effectively".[16] More generally, HIQA found that there was "a lack of strategic planning for the provision of residential services by Tusla to children who require it".[17]

The most striking recent trend in the residential care sector is that the vast majority of the recent increase has been catered for through the use of private residential care providers.[18] Table 1 below provides figures from Tusla's Quarterly Integrated Performance and Activity Reports that indicate that the number of children in private residential care as a proportion of the total children in care almost doubled between Q4 2016 and Q3 2021 (2.6% to 5.1%). The absolute number increased by 75% in the same period (168 to 295), even though the total number of children in care fell by almost 10%. There was a slight decrease between Q3 2021 and Q4 2021 (5.1% (295) to 4.6% (271)). Table 1 below illustrates these trends in detail:

13 HIQA, *Overview Report: Monitoring and Regulation of Children's Services in 2020* (July 2021) at p 47, available at https://www.hiqa.ie/sites/default/files/2021-07/Childrens-Overview-Report-2020.pdf.

14 *Ibid* at p 48.

15 *Ibid* at p 49.

16 *Ibid* at pp 47-49.

17 *Ibid* at p 50.

18 Total residential care figures have increased by 116 (from 343 to 459) between Q4 2015 and Q4 2021, while private residential care figures have increased by 96 (from 175 to 271) in the same period.

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Table 1

Period	Total Children in Care	Total Foster Care	Private Foster Care	Total Residential Care	Private Residential Care
Q4 2015	6388	5932 (93%)	308 (4.8%)	343 (5.4%)	175 (2.7%)
Q4 2016	6258	5817 (93%)	361 (5.8%)	316 (5%)	168 (2.6%)
Q4 2017	6189	5702 (92%)	395 (6.4%)	338 (5.5%)	203 (3.3%)
Q4 2018	6029	5556 (92%)	390 (6.5%)	379 (6.3%)	239 (4%)
Q4 2019	5985	5461 (91%)	405 (6.8%)	409 (6.8%)	255 (4.3%)
Q4 2020	5882	5346 (91%)	412 (7%)	421 (7.2%)	273 (4.6%)
Q3 2021	5841	5271 (90%)	431 (7.5%)	447 (7.6%)	295 (5.1%)
Q4 2021	5863	5266 (90%)	455 (7.7%)	459 (7.8%)	271 (4.6%)

Issues with the manner in which data is collected and recorded means that the above figures, while strongly indicative, might not be fully accurate.[19] Separate recent analysis by Tusla quantifies the increase as being even larger than described above:

> From 2015 to 2021, there has been a 131% increase in the number of Private Residential Care Services in all Regions (excluding 'Other', Special Care and SCSIP) during this period. In the same period, Tusla and Community & Voluntary provided Residential placements has decreased by 16%.[20]

Factors identified as driving this increase include "lack of multi-annual budgets to enable strategic planning, inadequate investment in capital infrastructure, challenges in recruiting Social Care and Social Work Staff and a lack of specialist therapeutic residential services in the statutory sector."[21]

The recent trend of increased reliance on private residential care has generated a number of expressions of concern. EPIC has reported that children in private residential care worry about the use of agency staff who frequently change positions, making it difficult to build relationships; and have characterised the different models of care operated in Tusla-owned and privately owned residential care centres as a "two-tier system of residential

19 Tusla provided me with the following clarification: "The data captured on the numbers of children in residential care placements is gathered from two main databases: 1) the National Child Care Information System (NCCIS) 2) Financial data bases. The data captured by the two systems is captured for different purposes and at different timepoints and for these reasons there are often anomalies between the data sources. However, the Agency is developing a set up metrics to improve the data captured on all performance activity across the board and to strengthen access to more real-time data systems."

20 Tusla (n 1 above) at p 22.

21 *Ibid* at p 29.

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care".[22] An anomalous situation pertains regarding inspections, with Tusla-owned centres inspected by HIQA, whereas privately-owned centres are inspected by Tusla;[23] this has been criticised by the Ombudsman for Children on the ground that it "does not provide sufficient level of independence in relation to inspection as the Child and Family Agency is responsible for the planning, commissioning and procurement of these services."[24] Private operators may close centres in circumstances where the operator goes out of business, or decides that a particular centre is not profitable, or where losing out in a tender process impacts on the sustainability of existing centres; this creates a risk of "serious disruption to the vulnerable young people living in the homes, who would be 'ripped' from their communities and carers if relocated".[25] Tusla CEO Bernard Gloster has described the proportion of children in private residential care as "more than I would want it to be."[26]

In May 2022, Tusla published a new Strategic Plan for Residential Care Services for Children and Young People 2022-2025 (hereafter referred to as the "Tusla Strategic Plan");[27] this will be discussed in further detail below. In order to inform the analysis of the Strategic Plan, this chapter will first examine the existing literature on private residential care, with a view to identifying its strengths and weaknesses as a medium of alternative care, and the experiences of other countries in utilising private residential care. Questions that fall to be considered include the capacity of private residential centres to meet the needs of children placed in them; staffing issues, including recruitment, qualifications, retention, supervision and development; inspection, regulation and quality assurance within the private sector; the relative cost of public and private residential care; and the generation of robust data that can inform the direction of future policy.

3.3 Rationale for Use of Private Residential Care

In short, the main claims made in favour of reliance by public authorities on private residential care for children and young people are that it can be a more flexible and cost-effective medium of delivering residential care services. Sellick explains that "in outsourcing public services to private agencies, several commentators, across countries, have pointed to a common rationale … transfer in service delivery 'presumes efficiency and cost savings, increased flexibility in service development, greater professionalism and

22 N Baker, "For-profit companies playing bigger role in residential care for vulnerable children", *Irish Examiner*, 27 September 2021

23 Branigan and Madden (n 6 above) at pp 24-25; Tusla (n 1 above) at p 35.

24 Office of the Ombudsman for Children, *Own Volition investigation into the HSE's (now Tusla – the Child and Family Agency) registration, inspection and monitoring service for private and voluntary children's residential centres* (February 2015) at pp 17-18, available at https://www.oco.ie/app/uploads/2017/10/Priv-Vol-Centres.pdf.

25 J Power, "Concern over possible closure of homes for children in care", *Irish Times*, 31 March 2022, quoting Sharon Kenneally, manager of a private residential unit operated by Positive Care. Baker (n 22 above) quotes Bernard Gloster, CEO of Tusla, as saying: "The bigger risk of that level of dependency on private care is private operators can leave the market, they can leave quickly, they can sell on, company structures can become very complex, and the reality is that if you have a private provider in a house with four young people, if that private provider left the market, the state has only one option and that is for us to take over that provision there and then, and you are into very complex matters of employment law and transfer undertaking and lots of other things."

26 Baker (n 22 above).

27 Tusla (n 1 above).

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less bureaucracy'".[28] Lundström *et al* note that in Sweden, "[o]ne of the motives for letting for-profit providers enter the field of residential care was to encourage innovation in terms of treatment settings and to create variation on the supply side".[29] In England, Carey states that "one crucial argument made to support the extension of the private sector within quasi-markets of social care has remained that of making care services more flexible to better meet more diverse needs and promote better choices".[30]

To the same effect, Gharabaghi, writing about Ontario, argues that "[t]he great strength of private enterprise is its flexibility and the transcendence of bureaucracy that often becomes debilitating within the public sector."[31] In Ireland, Branigan and Madden have highlighted the adaptability of provision type as a "key benefit" of private residential care services, making it responsive to demand so that it can be scaled up or down as needed; this has cost-saving potential, since Tusla can pay for placements "based on placement numbers (by occupancy and not capacity)."[32]

3.4 Weaknesses of Private Residential Care

While there are some acknowledged strengths in the private residential care sector, a large volume of literature attests to challenges experienced in the use of private residential care. That is not to say that private residential care, when properly run, regulated and utilised, might not have a valuable contribution to make. Nonetheless, the available evidence collectively speaks to significant risks associated with over-reliance on private residential care due to consistent tendencies that have been documented in a range of jurisdictions.

3.4.1 Meeting the Needs of Children

The primary goal of any residential centre must be to meet the care needs of the children placed there. The State's constitutional and legal obligation to adequately provide for the needs of children in alternative care is no different when children are catered for through private residential care than when they are catered for through public residential care or foster care. Some commentators take the view that outsourcing private residential care is a perfectly adequate way for the State to discharge this obligation; for example, in his 2016 independent review of children's residential care in England, Sir Martin Neary argued that he has "seen nothing to justify the view that private companies think only of profit and there is no evidence to support the … assertion that the quality of care in privately run homes is poorer than that in local authority or voluntary sector homes".[33] As against this, a more detailed review of the international literature regarding the overall

28 C Sellick, "Privatising Foster Care: The UK Experience within an International Context" (2011) 45 *Social Policy & Administration* 788 at p 791.

29 T Lundström, M Sallnäs and E Shanks, Stability and change in the field of residential care for children. On ownership structure, treatment ideas and institutional logics" (2018) *Nordic Social Work Research* at p 10.

30 M Carey, "Some Ethical Limitations of Privatising and Marketizing Social Care and Social Work Provision in England for Children and Young People" (2019) 13 *Ethics and Social Welfare* 272 at p 283.

31 K Gharabaghi, "Private Service, Public Rights: The Private Children's Residential Group Care Sector in Ontario, Canada" (2010) 27 *Residential Treatment for Children and Youth* 161 at p 177.

32 Branigan and Madden (n 6 above) at p 84.

33 M Neary, *Residential Care in England* (July 2016) at p 17, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/534560/Residential-Care-in-England-Sir-Martin-Narey-July-2016.pdf.

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capacity of private operators to make adequate provision on behalf of the State for the needs of children placed in residential care (who, it must be recalled, are often some of the most vulnerable children with the most complex needs) gives pause for thought.

Shaw and Greenhow, reporting the findings of a recent study of practitioners working within multi-agency settings in England (including focus groups with social workers and youth offending team workers), state that "[c]ertainly, there was a feeling that the welfare of the young people was not the primary motivating factor for the establishment of some private homes, a number of which are owned by foreign private equity companies, specifically focused on financial gain".[34] They argue that "one cannot dismiss as groundless, the perceptions that have been expressed in both the current study and other empirical research … by practitioners with experience of working with children in care, perceptions which can be supported in certain respects by inspection results."[35] They cite the fact that in Ofsted inspections in 2016-2017, only 14% of privately-owned homes were given an overall effectiveness judgement of 'outstanding' by Ofsted, compared to 25% for local authority-run homes and 19% for voluntary-run homes.[36] Shaw and Greenhow argue that "[w]hile there are undoubtedly individual examples of good or excellent private sector practice, taken as a whole, these data highlight how private homes as a group are falling behind their local authority counterparts in terms of the quality of care provided to children, which in turn lends support to the perceptions of the research participants this study."[37]

Other commentators place a different emphasis on the Ofsted inspection results in the UK. Neary notes that between March and September 2015, while "[a] greater proportion of local authority homes (18%) than private sector (10%) or voluntary sector homes (15%) were rated as outstanding … a smaller proportion of private homes (5%) were judged to be inadequate compared with 7% of homes in the local authority or voluntary sectors."[38] The Children's Commissioner for England considers more recent figures for March 2019, and concludes that:

> On average, variation in quality of care—as measured by Ofsted ratings—between local authority and large private children's homes is small. There is evidence, however, that smaller private providers have lower Ofsted ratings than larger private providers or local authority provision, suggesting potential problems with quality. But at the same time, the overwhelming majority of provision is rated "Good" or "Outstanding" regardless of whether it is publicly or privately owned.[39].

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34 Shaw and Greenhow, "Professional perceptions of the care-crime connection: Risk, marketisation and a failing system" (2021) *Criminology & Criminal Justice* 472 at p 478.

35 *Ibid* at p 479.

36 *Ibid*.

37 Shaw and Greenhow (n 34 above) at p 479.

38 Neary (n 33 above) at p 17.

39 Children's Commissioner, *Private provision in children's social care* (November 2020) at p 4, available at https://www.childrenscommissioner.gov.uk/wp-content/uploads/2020/11/cco-private-provision-in-childrens-social-care.pdf. See further *ibid* at p 22.

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While there is some disagreement about whether (and the extent to which) private residential centres compare unfavourably to public centres, what can be stated with more certainty is that they have not succeeded in outperforming public centres. Carey states that "[d]espite higher payments and overall costs, there is limited evidence to suggest that subsequent support services for children within social care have improved the level of care available".[40] Sellick cites a "meta analysis of studies of US outsourcing projects by Riccucci and Meyers (2008)" and concludes that the "picture ... in respect of child outcomes following privatization in the USA is a mixed one".[41] In Kansas, for example, "more children were placed for adoption in a shorter timeframe yet other foster children 'had more moves to new placements and ran away more from placements after child welfare services were contracted to the non-profit sector'"; in Florida, "performance outcomes were the same amongst counties which retained or outsourced their child welfare responsibilities; and in Milwaukee, outcomes for children receiving state services were better than those whose care was delivered by non-profit contractors".[42]

The location of private residential centres provides a particular manifestation of a focus on profitability in private residential care being incompatible with the needs of children. Private residential centres are often located at a considerable distance from home places of the young people who live in them, a factor that is partly driven by high costs in some areas. Kirkpatrick *et al* have documented how "a combination of high real estate prices and organized residents' opposition to new children's homes made the development of new services (either by the independent sector or the local authority) almost impossible" in certain areas of the country.[43] They note that the findings of their study indicated that "there was often a contradiction between the policy goal of placing children close to their local community and the decision to contract out":

> One outcome of this was that greater distances between social workers and clients made the task of monitoring and progressing individual care plans increasingly difficult. Not only did this mean a higher likelihood of "drift" but, in some cases, providers were also "dictating what the care plan should be for that particular child rather than the social workers dictating to them after some negotiation" ...[44]

This analysis has some resonance in an Irish context. The geographic distribution of residential centres generally is uneven;[45] while the largest concentration is unsurprisingly situated in Dublin and surrounding areas, there are relatively few located in or around other population centres such as Cork or Limerick. No residential centres (public or private) are located in Counties Galway and Mayo, which are two of the three largest counties in the country (and are adjacent to each other, leaving a large swathe of the

40 Carey (n 30 above) at p 279.

41 C Sellick, "Privatising Foster Care: The UK Experience within an International Context" (2011) 45 *Social Policy & Administration* 788 at p 795.

42 *Ibid*.

43 I Kirkpatrick, M Kitchener and R Whipp, "'Out of Sight, Out of Mind': Assessing the Impact of Markets for Children's Residential Care" (2001) 79 *Public Administration* 49 at p 57.

44 *Ibid* at p 62.

45 See Tusla (n 1 above) at p 19 (Diagram 8).

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country with no centres at all). The Tusla Strategic Plan acknowledges that "[d]ue to a lack of local placements, a significant number of children and young people are placed in Residential Care away from their local communities and support networks. This can be very disruptive for the children and young people and challenging for Social Workers to maintain relationships with them when they must travel significant distances to meet them."[1] It notes that 36% of children in residential care are in a region that is different from their home region, and that "this does not paint a complete picture as the child or young person, whilst placed within their region, may still be geographically distant from their family, friends, school, and communities."[2]

While the above-mentioned difficulty is not exclusive to private residential care, it has most likely been exacerbated by the heavy reliance on private operators. Whereas Tusla and voluntary centres are for the most part clustered around the major population centres (which account for the large majority of children entering the care system), private residential care centres in Ireland are overwhelmingly located in rural areas (with notable clusters located in Donegal, Monaghan, Laois and North Cork, for example).[3] The locations of private residential centres, coupled with the preponderance of such centres within the residential care system, essentially guarantees that a significant number of children in residential care will be placed at a significant distance from their homeplace. Carey argues that the effect of this is that it "detaches children or young people from established familial and social ties, thus adding to their sense of dislocation, isolation or stress. Emotionally and psychologically this is likely to be deeply traumatic and poses significant risks, including potentially undermining their capacity to develop and learn or making children more vulnerable to further neglect or abuse."[4]

Moreover, placing children in residential care at a distance from their homeplace and family is arguably in violation of Ireland's obligations under Article 8 of the European Convention on Human Rights (ECHR). In *Olsson v Sweden*,[5] a violation of Article 8 was found on the basis that the children were placed in care in separate locations at a significant distance both from their natural parents and from each other, with the result that access was frustrated. The Court found that it could not be excluded that this contributed to the failure of the family to establish a harmonious relationship, and was contrary to the principle that the ultimate aim of any care placement should be the reunification of the family.[6] It should be recalled that Tusla has a statutory obligation under section 3 of the European Convention on Human Rights Act 2003 to perform its functions in a manner compatible with Ireland's ECHR obligations. Operating a system of residential care in which a significant number of children are placed in centres that are distant from their family and community networks is difficult to reconcile with this obligation.

1 *Ibid* at p 24.
2 *Ibid*.
3 *Ibid* at p 19 (Diagram 8).
4 Carey (n 30 above) at p 278.
5 *Olsson v Sweden (No 1)* (10465/83, 24 March 1988).
6 *Ibid* at [81].

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A separate criticism sometimes directed at private residential centres is that they can engage in "picking and choosing" which children or young people they accommodate, and are reluctant to cater for children who present with more challenging behaviour. Abamovitz and Zelnick argue that "[t]he pressure to 'succeed' forces some agencies and/or practitioners to adopt exclusionary practices such as favoring easier to serve clients ('cherry picking' or 'creaming'), providing minimal services to those with more complex problems".[7] In the Irish context, an issue brought to my attention on several occasions in discussions with practitioners is that private residential operators struggle to obtain insurance cover at affordable levels (or at all), and that pressure from insurers makes them risk-averse and unwilling to work with more challenging young people. Since teenagers exhibiting more challenging behaviour are more likely to experience placement breakdown and require new placements, a system that relies heavily on private operators risks creating significant challenges in identifying a new placement (and makes it even less likely that that placement will be located close to the young person's homeplace).

Related to this is the increased likelihood (relative to foster care) that police will be involved when young people in residential care exhibit challenging behaviour. Shaw and Greenhow identify this problem as follows:

> … the inappropriate criminalisation through police and court involvement as a response to challenging behaviour or minor offending committed at children's home premises is 'one of the main concerns about the placement of young people in residential care' … Many sources have identified a particularly low threshold for police involvement … often as a result of incidents which would in all likelihood not have been labelled as criminal acts if the resident had lived in a family home.[8]

They cite research by the Howard League for Penal Reform indicating that "when homes deal with minor incidents by calling the police and assisting in the criminalisation of the child, rather than trying to understand and support them, they add to the child's feelings of rejection, compounded by feelings of unfairness and isolation".[9] Admittedly, the evidence presented in the literature from England identifies this as a disadvantage of residential care in general rather than of private residential care in particular. Nonetheless, it is not difficult to see the risk that acts such as criminal damage of a care home are more likely to be reported to the police by private operators whose profitability is affected by such acts than by Tusla.

A further issue reported by Shaw and Greenhow is that private residential care centres, with their focus on profitability, are more likely than public centres to put insufficient thought into how the introduction of a new young person to a residential setting might impact on behaviour of other residents. Young people may be accepted into a centre for

7 M Abramovitz and J Zelnick, "Privatization in the Human Services: Implications for Direct Practice" (2015) 43 *Clinical Social Work* 283 at p 288.

8 Shaw and Greenhow (n 34 above) at p 475.

9 *Ibid* at p 477, citing Howard League for Penal Reform, *Ending the criminalisation of children in residential care: Briefing two: Best practice in policing* (2017), available at https://howardleague.org/wp-content/uploads/2017/12/Ending-the-criminalisation-of-children-in-residential-care-Briefing-two.pdf.

reasons related to maintaining occupancy levels and profitability “regardless of whether they were equipped to cope with their needs”.[10] Lundström *et al* have also raised concerns that “the privatisation of out-of-home care, based on economic theory, is potentially harmful to care quality since it risks providing economic incentives for organisations to, for example, enrol children that they are not capable of treating, to exaggerate children’s needs and to keep them in care longer than necessary.”[11]

Finally, perhaps the biggest risk associated with private residential care centres by comparison to public residential care centres is that they will close down if their operators go out of business or if profits do not materialise, leaving gaps in services and forcing a disruptive and de-stabilising re-location for vulnerable children and young people. It was noted above that concerns have been expressed in Ireland about this possibility; and the international evidence corroborates that the risk is real and may materialise. As argued by Jones:

> … surely there are some state responsibilities and services which should never be exposed to the market with the overwhelming motive and focus of those providing the services being profit. These services then become insecure and vulnerable. Firstly, in the drive for profit, costs and corners are cut. Secondly, if the profit is not quick or large enough the providers close down the service and cash in what profit they have already made, leaving those who are dependent on the service stranded.[12]

Jones cites the example of Sedgemoor, a private residential care provider owned by a private equity firm which was refinanced and ultimately closed following a re-financing arrangement aimed at securing a pay-out for investors. Jones observes that “[i]f Sedgemoor was a widget factory, its demise might be described as mere bad luck. But it was one of the UK’s largest residential care businesses looking after vulnerable children, and its financial difficulties caused more heartache than just fears about redundancies.”[13]

3.4.2 Staffing Issues

Staffing is a challenge in the residential care sector in general; research shows that “[s]taff members in child and adolescent residential care are frequently confronted with aggressive behaviour, which has adverse effects on their stress levels and work satisfaction”.[14] Tusla has reported the following in respect of its own centres:

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10 *Ibid* at p 478.

11 T Lundström, D Pålsson, M Sallnäs and E Shanks, “A Crisis in Swedish Child Welfare? On Risk, Control and Trust” (2021) 19 *Social Work and Society* at p 9 available at https://d-nb.info/1234652137/34.

12 R Jones, “The end game: The marketisation and privatisation of children’s social work and child protection” (2015) 35 *Critical Social Policy* 447 at p 449.

13 *Ibid* at p 461.

14 K van Gink, K Visser, A Popma, R RJM Vermeiren, L van Domburgh, B van der Stegen and L MC Jansen, “Implementing Non-violent Resistance, a Method to Cope with Aggression in Child and Adolescent Residential Care: Exploration of Staff Members Experiences” (2018) 32 *Archives of Psychiatric Nursing* 353 at p 353.

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> It is widely acknowledged that staff working to support children and young people in Residential Care have an extremely challenging and critical role, working with the most vulnerable children and young people, many of whom have complex care needs, traumatic backgrounds and challenging and sometimes aggressive behaviour.
>
> Staff can be exposed to occupational hazards, in particular violence, harassment, and aggression in the workplace. In 2021, there were 1038 incidence reports of Violence, Harassment and Aggression relating to staff in Residential Care.
>
> Retention rates in Children's Residential Services have met the target for staff retention (94.6%) outlined in the 2021-2023 Corporate plan in four of the past six years. However, the absenteeism rate for Residential Care staff has remained consistently high over the last 5 years, despite several targeted interventions.[15]

Given the inherently challenging nature of the work involved in residential care, it follows that it is essential that the staff involved are suitably trained and qualified to take on this work, and have the opportunity to develop professionally through supervision, ongoing training and reflection. Harris and Leather comment that:

> Given the damage done by exposure to client violence, action to tackle it remains a high priority, whether it is aimed at preventing incidents occurring, improving skills for handling episodes as they unfold or supporting staff afterwards. Such action includes many organisational processes and functions, including management and supervision, counselling, staff welfare and safety, selection, training and workplace design.[16]

It is thus a significant source of concern that the international evidence consistently indicates that private residential care compares unfavourably to public residential care on each of these issues. On average, staff in private residential care tend to have lower qualifications than their public counterparts. Liljegren *et al* reviewed 700 articles in Swedish professional social work journals between 1985-2003 debating the issue of privatisation; they found that "[t]he level of professional education among the personnel in private institutions is ... lower than corresponding public centres with only a small minority holding a relevant university degree."[17] Gharabaghi made the following findings in respect of Ontario:

> The pre-service qualifications of staff in the private sector vary much more so than those in the public sector. While nearly 50% of front line staff in group care programs operated by [public centres] are child and youth workers with child

15 Tusla (n 1 above) at p 36.

16 B Harris and P Leather, "Levels and Consequences of Exposure to Service User Violence: Evidence from a Sample of UK Social Care Staff" (2012) 42 *British Journal of Social Work* 851 at p 866. See also Y Smith, L Colletta and AE Bender, "Client Violence Against Youth Care Workers: Findings of an Exploratory Study of Workforce Issues in Residential Treatment" (2021) 36 *Journal of Interpersonal Violence* 1983.

17 A Liljegren, P Dellgran and S Höjer, "The heroine and the capitalist: the profession's debate about privatisation of Swedish social work" (2008) 11 *European Journal of Social Work* 195 at p 197.

> and youth care diplomas or degrees that is only the case for approximately 30% in the private sector. Similarly, the percentage of staff with no post-secondary qualifications is significantly higher in the private sector than in the public sector, where this is becoming quite rare …[18]

Abamovitz and Zelnick note similar issues in New York City:

> Some agencies hire workers with different and possible fewer qualifications to undertake tasks previously reserved for social workers … Others replace senior social workers with managers who audit performance and/or to replace highly trained social workers with less trained practitioners assigned to coordinating the work of others rather than engaging in direct work with clients …[19]

The evidence regarding the lower average qualifications of staff in private residential care when compared with public residential care make it unsurprising that the evidence also indicates that private residential care experiences retention difficulties and a transient labour force (with a higher turnover of staff compared to the public sector), creating instability for the children being cared for. As noted by Carey:

> Increasing privatization within state social work … has helped to encourage a low wage and transient labour market within social care. As a result, many areas either within or around state social work have faced a recruitment crisis for some years now … Privatization has also encouraged labour migration elsewhere, including of professionals in sectors of the social care industry. For example, there is now much more reliance on temporary 'agency' staff (including care/case managers) … reliance upon flexible yet transient staff helps to further increase the possibility of establishing unstable and insecure support environments for vulnerable adults and children who might receive social care services …[20]

Similar issues are reported by the Children's Commissioner for England, who notes that that staff may leave where there is a change of ownership due to pay cuts or changes to their responsibilities, and this can create instability for children and also leave staff with less time to spend with the children.[21]

3.4.3 Maintaining Standards: Licensing, Inspection and Oversight

The legal framework governing the registration and inspection of private residential centres for children and young people in Ireland is set down in Part VIII of the Child Care Act 1991 and the Child Care (Standards in Children's Residential Centres) Regulations, 1996. Tusla is required to maintain a register of centres,[22] and centres may not be operated

18 Gharabaghi (n 31 above) at p 174.

19 Abramovitz and Zelnick (n 52 above) at pp 288-299.

20 M Carey, "The Privitization of State Social Work" (2008) 38 *British Journal of Social Work* 918 at p 929.

21 Children's Commissioner (n 39 above) at pp 20-21.

22 Child Care Act 1991, s 61.

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unless registered once every three years.[23] Tusla may decide not to register a centre,[24] or to remove a centre from the register,[25] on one of a number of prescribed grounds;[26] the centre has a right of appeal to the District Court against such decisions.[27] Although private centres are inspected by Tusla rather than HIQA, the HIQA standards published in 2018 are applied by Tusla.[28]`

Challenges in the frameworks for the licensing, inspection and oversight of private residential care providers is a recurring theme in the international literature, with multiple studies raising concerns about the ability of public authorities to adequately ensure that standards are met in private residential centres. For example, in Sweden, Pålsson observes that "the licensing system can be interpreted as primarily being about weeding out manifestly unreliable applicants … These results raise questions about the role of state licensing when it comes to promoting the quality of residential care."[29] He concludes that the licensing system "cannot be perceived as a solid barrier against unreliable providers" and that "the existence of a licensing system does not forcefully reduce the need for ex-post audits such as the following-up of the social services and state inspections".[30] Challenges also arise in the inspection and oversight of facilities that have already been licensed. Lundström *et al* note that care standards in Sweden are primarily geared towards preventing risks in care, and that these standards are, at best, only able to secure a basic level of care. Revoking a licence and thus preventing substandard entrepreneurs from offering their services seems to be a rare occurrence.[31]

In England, Jones has expressed similar concerns about an absence of proper oversight and accountability in the private sector.[32] These are echoed by Kirkpatrick *et al*, whose findings from a study of purchasing practices for children's residential care in twelve local authorities in England and Wales include the following:

> In most cases, contract monitoring was generally limited, described as "ad hoc" (disability manager, Shire 3) or even "haphazard" (resource manager, Unitary 1). A major difficulty with monitoring was the cost of conducting regular visits to homes, especially those located "out of area". A further problem was the lack of clarity on the part of visiting field social workers over what the contract monitoring task

23 Child Care Act 1991, ss 60 and 61(3)(b).

24 Child Care Act 1991, s 61(3).

25 Child Care Act 1991, s 61(4).

26 Child Care Act 1991, ss 61(5). These include a failure to comply with the regulations; that the applicant or registered proprietor has been convicted of an offence render them unfit to run a residential centre; failing to furnish information, or furnishing misleading information; or failure to comply with a condition set down under s 61(6).

27 Child Care Act 1991, s 62.

28 HIQA, *National Standards for Children's Residential Centres* (2018), available at https://www.hiqa.ie/reports-and-publications/standard/national-standards-childrens-residential-centres.

29 D Pålsson, "Entering the Market: On the Licensing of Residential Homes for Children and Youth in Sweden" (2018) 48 *British Journal of Social Work* 843 at p 856.

30 *Ibid* at pp 856-857.

31 Lundström (n 56 above).

32 Jones (n 57 above) at p 448.

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> actually involved. As a development officer in Shire 2 explained: "we rely on the social worker when they go to the review [of a child's care plan] but, I suppose, they go to the review with a different intention really. And that is, 'Is it working for the child' … I don't think staff go with a monitoring/quality assurance perspective". The above problems were partly caused by the fact that few authorities had invested in contract management systems. The majority relied heavily on, often over-worked, fieldwork staff with little specific training or experience …[33]

The same study notes that difficulties in operating an effective inspection regime are compounded by significant problems that have been encountered due to "'poor information gathering' and 'partial information' held by most authorities on the range, or quality, of independent sector provision".[34] This point is echoed by Shanks *et al* in the Swedish context, who state that "there is an obvious lack of information about the results of monitoring of the children's situation during and after care":[35]

> Providers have more information about services than purchasers, and the outcomes and quality of services are difficult to measure. These circumstances mean that there is an opportunity, and perhaps a financial incentive, for providers to misrepresent the characteristics of their services in marketing and other impression management activities …[36]

Some studies have found that social issues such as status, trust and reputation may be more important to purchasing decisions within the residential care market than price.[37] However, that is not to say that purchasing decisions are always guided by the quality of the care on offer. One difficulty noted in the literature is the issue of "distress purchasing", where social services take on a private placement out of desperation, reducing the checks on quality: "Friday afternoon who is not going to raise questions?"[38] This may also give rise to a tendency to gloss over issues due to a reluctance to move children and young people from centres, since a change of provider can be challenging and may have adverse effects.[39] Related to this is the phenomenon of large private operators becoming "too big to fail" and continuing to get contracts even after failing to deliver.[40]

It was noted in section 2.2 above that the inspection regime for private residential care centres in Ireland is anomalous, in that Tusla-owned are subject to independent inspection by HIQA, whereas private centres and voluntary centres are inspected by Tusla. The absence of independent inspection of private residential centres creates a risk of conflict of interest in circumstances where Tusla is under pressure to identify sufficient

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33 Kirkpatrick *et al* (n 43 above) at p 60.

34 *Ibid* at p 58.

35 E Shanks, T Lundström, G Meagher, M Sallnäs and S Wiklund, "Impression management in the market for residential care for children and youth in Sweden" (2021) 55 *Social Policy Administration* 82 at p 94.

36 *Ibid* at p 84.

37 R Mannion and P Smith, "How purchasing decisions are made in the mixed economy of community care" (1997) 13 *Accountability & Management* 243.

38 Kirkpatrick *et al* (n 43 above) at p 65.

39 Shanks *et al* (n 80 above) at p 84.

40 Jones (n 57 above) at pp 448-449. The same point is made by Carey (n 30 above) at p 279.

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placements for children; as noted above, the absence of an independent inspection regime has been criticised by the Ombudsman for Children for this reason. In 2015, the Office of the Ombudsman for Children published a report based on an own-volition investigation focused on the registration, monitoring and inspection of private and voluntary residential centres by Tusla (and by the HSE prior to its establishment). The report made a number of findings that were critical of registration and inspection practices, including long gaps between initial registration and full inspection to confirm registration;[41] centres being re-registered without conditions for periods in excess of one year in spite of inspections finding failures to meet a substantial number of standards;[42] and large variation in frequency of monitoring visits and reports in between inspections, with some centres not monitored due to a shortage of posts, leaving children vulnerable since inspections only occurred once every three years.[43] The investigation concluded that the HSE's and Tusla's administrative actions in relation to registration, inspection and monitoring of residential services for children and young people had or may have adversely affected a child; had been based on an undesirable administrative practice, and were contrary to fair and sound administration.[44] It was found that a "clear gap in the approach to inspections of these centres has developed between HIQA and the Child and Family Agency" and recommended that the inspection of these centres and their registration should transfer to HIQA without delay.[45]

Seven years later, although Tusla are supportive of these responsibilities transferring to HIQA, the necessary legislative measures have not yet been taken. Branigan and Madden note that between 2016 and end Q1 2020, four private residential care services closed due to "registration and inspection restrictions", or due to the "revoking of a contract" by Tusla.[46] Thus, there is evidence that in recent years Tusla is willing to act in situations where it has concerns about the quality of care being provided. Nonetheless, the fact that some services have been closed does not mean that the risk of "distress purchasing" or any of the other difficulties mentioned above in respect of the inspection and oversight of private residential centres can be dismissed. The most obvious measures that could be implemented to mitigate these risks are to reduce the level of reliance on private residential care, and to transfer oversight responsibility for all residential centres to HIQA.

3.4.4 Costs

Efficiency is an oft-quoted justification for the outsourcing of public services to the private sector, with the recently-published Spending Review by Branigan and Madden arguing that "[u]nlike with privately procured services, there are direct additional cost considerations for Tusla-owned residential care services such as capital costs, and pay and pension responsibilities relating to permanency of staff".[47] Notwithstanding this, research

41 Office of the Ombudsman for Children (n 24 above) at p 14.

42 *Ibid*.

43 *Ibid* at pp 25-26.

44 *Ibid* at p 27.

45 *Ibid* at pp 27-28.

46 Branigan and Madden (n 6 above) at p 26.

47 Branigan and Madden (n 6 above) at p 85.

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on residential care has shown that the costs of private care have been on par with those of local authorities and the voluntary sector, although it has been reported that staff in private providers are paid "significantly less" than those in local authorities.[48]

Similarly, the Spending Review by Branigan and Madden documented that in "mainstream" centres (ie excluding special care), the average weekly cost per child in Tusla centres (€6,388) was actually marginally less expensive than "mainstream" care in private centres (€6,737).[49] The authors of the review note that the profit-based business model of private providers is a potential drawback of reliance on them, and "[w]hile this may be beneficial in terms of cost efficiencies, supply issues may arise in response to loss of profitability."[50] Moreover, "residential care costs are based on capacity, as opposed to occupancy, with an investment risk where demand falls short of supply."[51]

3.4.5 Other Challenges

The literature on private residential care also attests to a range of miscellaneous challenges that arise in systems which rely on private operators to a significant extent. Lundström *at al* note that privatisation in Sweden "has resulted in the establishment of many new care producers and hence, led to the fragmentation of the care landscape"; this has made it "difficult for social services and clients to gain an overview of the market."[52] Kirkpatrick *et al* have argued that if public authorities do not actively stimulate the market and send clear messages about future demand for highly specialised services, private providers have to guess what is needed, making it difficult to establish effective services.[53] Finally, Carey has documented pressure on social work managers in public authorities to become procurement officers rather than social workers:

> The quasi-market system has also helped to create a complex administrative system based around the management of contracts, assessments, care plans and a seemingly infinite variety of bureaucratic regulations and procedures. Most such tasks are relentlessly processed by often perplexed care/case managers, many of whom quickly begin to question any initial motivations to enter "social work" …[54]

In summary, therefore, it can be seen that the use of private residential care (especially as a high proportion of overall residential care provision) gives rise to a multiplicity of challenges evidenced in the international literature. To the extent that data is available, these challenges appear to have been replicated in the Irish experience. These include risks that private operators might not always be best placed to meet the needs of children placed in their centres; lower levels of qualifications and retention among staff; difficulties in ensuring quality through inspection and oversight; and risks of "distress purchasing", or operators becoming too big to fail. At best, the quality of care is unlikely to be better than

48 Neary (n 33 above) at pp 10 and 16-17.

49 *Ibid* at p 51.

50 *Ibid* at p 84.

51 *Ibid* at p 85.

52 Lundström *et al* (n 56 above) at pp 8-9.

53 Kirkpatrick *et al* (n 43 above) at p 58.

54 Carey (n 65 above) at pp 929-30.

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in the public sector; at worst, it may be markedly inferior. Crucially, all of the above risks arise in a context where privitisation fails to meet two of its own claimed advantages: it has not lowered costs, and international evidence suggests that it has also failed to reduce bureaucracy. As such, the case for reversing the recent trend in Ireland of increased reliance on private residential care is clear. The next section will analyse Tusla's recently published plans to do exactly that.

3.5 Tusla Strategic Plan for Residential Care Services

The new Tusla Strategic Plan for Residential Care Services is not focused solely on the issue of private residential care; it has a broader scope, encompassing a holistic vision of all forms of residential care and the ancillary policy measures and services necessary to make residential care successful. Nonetheless, a key theme running through the plan is an acceptance that the recent increased reliance on private residential care has reached the point where it is excessive and needs to be rolled back. The Strategic Plan states:

> The current model of Residential Care, including the expansion of Private Residential Care is not designed to effectively provide the best local support to children and their families. The first day in Residential Care should be the first day of the plan to get the child to transition to a family structure, either parents, extended family, or foster/adoptive family, thus enabling every child to grow and flourish in the safety of a family environment and experience the sense of belonging that comes with being part of a family.[55]

In response to this, the Plan commits to reversing the recent trend of increased reliance on private residential care, and to making public centres a clear majority within the system by 2027:

> Whilst recognising the positive contribution of many private residential care providers, the Agency must reverse our disproportionate dependency on private residential care, incrementally increasing our public residential capacity by an additional 104 beds, to reduce our dependency on residential care from our current position of 60:40 private:public provision, to a ratio of 50:50 public:private provision by 2025.
>
> To achieve this, assuming private expenditure remains constant, an investment of €67.5m in capital and revenue funding (capital and recruitment of an additional 284 WTE +10% for attrition) will be required, a significant dependency on government funding.
>
> The longer term ambition will be to reduce the spend of private provision, and rebalance reliance on private provision in favour of public provision to a ratio of 60:40, public:private by 2027.[56]

55 Tusla (n 1 above) at p 37.

56 *Ibid* at p 6.

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More broadly, the Plan makes a number of recommendations; the discussion here will focus on those which are of most relevance to the issue of private residential care. These include:

- Increase capacity across Tusla & Community & Voluntary Residential Care Services by 110 beds by 2025;
- Improved governance, accountability and integrated decision making for Residential Care placements (including Special Care placements);
- Implement a standardised, evidence-based model of care in all Residential and Special Care centres, with a specific focus on integrated care planning and permanency planning;
- Strengthen recruitment of, support for, and retention of Residential Care Staff;Promote consistent external regulation of all Residential Care Centres;
- Promote longitudinal research and follow-up of children and young adults discharged from Residential and Special Care to inform evidence based future care planning and provision;
- Improve data collection, validation, monitoring and reporting on key metrics in Residential and Special Care; and
- Develop and implement integrated ICT systems and infrastructure across Children's Residential Services.

A complementary Strategic Plan in relation to foster care is due to be published by Tusla later in 2022. There is an obvious complementarity between foster care provision and residential care; reversing the recent trend of increased reliance on residential care is dependent on increasing the supply of foster carers. As such, concerted efforts will be needed to recruit and support foster carers in the coming years. Solicitor Gareth Noble has called on the Government to significantly increase the foster care allowance in light of recent increases in the cost of living.[57]

3.6 Discussion and Recommendations

The analysis in this chapter has demonstrated how reliance on private residential care as a mode of out-of-home care in Ireland has increased substantially over the past seven years. This has happened notwithstanding a large shift away from reliance on residential care in the preceding decade, and came at a time when the overall number of children entering care was falling. While private residential care has a potentially valuable contribution to make to a care system that is equipped to meet the diverse needs of the most vulnerable children, the international literature and limited Irish evidence demonstrates that it has not always delivered on claimed advantages such as reducing costs or bureaucracy; while at the same time, it creates significant risks around its capacity to meet the needs of children and young people; the qualifications of its staff; the ability of State agencies to oversee service provision in private centres; and the risk of "distress purchasing". For all of these reasons, the recent trend of increased reliance on private residential care is a cause of concern. It is most welcome that this concern has been identified by Tusla and that a detailed Strategic Plan has been drafted with the stated intention of reversing the trend.

57 A Murphy, "Children's rights lawyer calls for foster carer rate to be doubled", *Irish Examiner*, 28 June 2022.

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The following conclusions and recommendations are offered for consideration:

Key Recommendations

- Tusla's *Strategic Plan for Residential Care Services for Children and Young People 2022-2025* is endorsed as a positive step in the right direction and should be implemented in full and on schedule. Tusla should be supported by Government with the necessary resources and other measures to facilitate this.
- Proposed legislation giving HIQA the power and duty to inspect private residential centres for children and young people be enacted as soon as possible, and within the next 12 months at the latest. HIQA should be given whatever additional resources are necessary to ensure that this task can be completed effectively without impacting adversely on existing obligations.
- Plans to strengthen recruitment of, support for, and retention of residential care staff should ensure that high-quality training and supervision opportunities are available to all staff working in residential care, whether public or private.
- During consultation with children and young people in the course of inspections, HIQA should seek to gather data that helps to inform analysis of the relative merits of public and private residential centres, and publish this in its inspection reports.
- The Tusla Strategic Plan should be kept under ongoing review, making full use of information from HIQA inspection reports and the improved data collection and longitudinal research outlined in the Strategic Plan.
- Increased efforts should be made to recruit and support foster carers to ensure that sufficient foster care places are available for all children for whom foster care is a better fit than residential care. The foster care allowance should be reviewed in light of cost of living increases.
- At the end of the lifespan of the Strategic Plan, detailed consideration should be given to the viability of further reducing reliance on private residential care beyond the 60:40 public:private ratio targeted for 2027.

CHAPTER 4

Case Law and Research Update

4.1 Introduction

Chapter 4 will provide an update on case law in the broad field of child protection from Irish and international courts during the reporting period of July 2021 to June 2022. This will include decisions of the European Court of Human Rights in the areas of domestic violence, bullying and harassment and the protection of social workers presenting evidence of alleged child sexual abuse (section 4.2.1); the European Committee of Social Rights on the treatment of migrant children (section 4.2.2); and a notable decision of the UK Supreme Court on the application of the proportionality test in care order decisions (section 4.2.3). Decisions of the Irish courts addressed topics such as the constitutionality of the statutory rape law (section 4.2.4.1); the adoption of children in the care system (on which there were multiple significant judgments, discussed in section 4.2.4.2); and a range of other issues affecting children in the care system and children at risk (see generally section 4.2.4). Chapter 4 will also provide an update on notable academic research published during the reporting period, with issues including children's rights in the child protection system (section 4.3.1); a wide range of research on alternative care (section 4.3.2), and numerous other issues relating to child protection (see generally section 4.3). Emerging evidence of the impact of the COVID-19 pandemic on the child protection system features in much of the academic research, including on domestic abuse, home schooling and other issues. Chapter 4 will conclude with discussion and recommendations based on the case law and research that has been examined (section 4.4).

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4.2 Case Law

4.2.1 European Court of Human Rights

De Giorgi v Italy[58] concerned a woman who filed seven complaints over a four-year period regarding ill-treatment of her and her children by her husband following their separation. Public prosecutors decided not to act on several of the complaints on the basis that the applicant's testimony was not sufficiently detailed or reliable. In addition, although social services had filed a report with the court during the judicial separation proceedings indicating that the children were in distress, no investigation was conducted into the offence of ill-treatment allegedly committed against the children.[59] The European Court of Human Rights (ECtHR) found that the applicant had suffered violence at the hands of her husband which had been documented by the authorities. Her husband's threatening behaviour had put her in fear of repeated violence over a long period. She had made multiple complaints of controlling and coercive behaviour including monitoring of her movements, harassment in front of her home and threats to kill her in front of the children.[60]

The Court noted that "[t]he attitude of the authorities, which had viewed the situation as a conflict typical of certain separations and had not afforded the applicant any protection, must have compounded the feelings of anxiety and helplessness which the applicant experienced on account of her husband's threatening behaviour."[61] Although the Italian legal framework was adequate to protect her from this, and the *carabinieri* had conducted an adequate risk assessment and had sought protective measures in the light of a real and immediate risk to the lives of the applicant and her children, the public prosecutor "had not displayed the special diligence required in the immediate response to the applicant's allegations of domestic violence."[62] The risks of recurring violence were not properly assessed or taken into account, with the result that no protective measures were put in place. The failure of the prosecutor to act created "a situation of impunity" in circumstances where the national authorities knew or ought to have known about the risk of violence facing the applicant and her children.[63] Accordingly, it was found that the Italian authorities had violated the right to freedom from inhuman and degrading treatment under Article 3 of the ECHR both due to the failure to protect the applicant and her children from the acts of domestic violence committed by the husband, and the failure to carry out an effective investigation into the credible allegations of ill-treatment and to ensure that the perpetrator was prosecuted and punished.[64]

The judgment in *De Giorgi* is the latest in a growing body of ECtHR case law that emphasises the positive obligation of State authorities to take active measures to protect children from ill-treatment at the hands of private actors, whether in the context of domestic abuse or

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58 23735/19, 16 June 2022. The judgment is only available in French; the summary above relies on the Court press release.

59 *Ibid* at pp 1-2.

60 *Ibid* at pp 2-3.

61 *Ibid* at p 2.

62 *Ibid* at p 3.

63 *Ibid*.

64 *Ibid*.

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otherwise.[65] This obligation includes both the substantive obligation to protect children from ill-treatment, and the procedural obligation to investigate complaints of ill-treatment. The substantive obligation is triggered in circumstances where State authorities either know or ought to know that a risk arises that children (whether identified or unidentified) will experience ill-treatment, in which case an obligation arises to take reasonable measures to mitigate that risk. The procedural obligation arises in every case where a complaint is made to State authorities, and is independent of the question of whether ill-treatment contrary to Article 3 actually occurred. Once a complaint is made, it must be investigated promptly and thoroughly, in a manner that takes account of the specific needs of child victims. The obligations set down in *De Giorgi* are of particular relevance in an Irish context given the ongoing concerns surrounding the cancellation by An Garda Síochána of 999 calls related to domestic abuse (discussed at section 2.2.4 of this report.) The judgment in *De Giorgi* reinforces that all complaints of domestic abuse must be investigated; cancelling 999 calls without taking any further action would fail to discharge the State's obligations under the ECHR.

Špadijer v Montenegro[66] concerned a prison guard who complained that she was subject to bullying at work which was not adequately addressed by the relevant domestic bodies, thereby violating her rights under Articles 3 and 6 ECHR. The applicant acted as a "whistle-blower", reporting "five of her colleagues for indecent behaviour at work on New Year's Eve".[67] Following this, she was subject to a threatening call by a colleague; her front windscreen was broken; she was treated with hostility by colleagues or ignored by them; she was no longer allowed to organise duty shifts, and she was physically assaulted outside of the workplace (although it was not established whether this assault was connected to her work colleagues). Overall, the applicant "complained of continuous insults and humiliation at work which were causing health problems".[68]

The ECtHR found "that the treatment complained of by the applicant reached the threshold of applicability of Article 8".[69] In this regard, the Court reiterated that "States have a duty to protect the physical and moral integrity of an individual from other persons" under Article 8 and that States "are to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals … including in the context of harassment at work".[70] The Court observed that while "domestic law provided for possibilities for the applicant to seek protection against harassment at work", in practice, this was subject to shortcomings.[71]

The ECtHR emphasised that "States' positive duty under Article 8 to effectively apply in practice laws against serious harassment takes on a particular importance in circumstances

65 For a detailed discussion, 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.

66 31549/18, 9 November 2021.

67 *Ibid* at [6].

68 *Ibid* at [18].

69 *Ibid* at [83].

70 *Ibid* at [87].

71 *Ibid* at [93].

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where such harassment may have been triggered by 'whistle-blowing' activities".[72] The Court found that there was a violation of Article 8 as there was a "lack of assessment of all the incidents in question" and a "failure to take account of the overall context, including the potential whistle-blowing context".[73] Judge Yudkivska issued a concurring judgment commenting that "[o]ur society today with its increased sensitivity requires us to see bullying as a human rights abuse" and that the ECtHR must "reflect these societal changes".[74] The *Špadijer* judgment reinforces previous case law of the ECtHR such as *Dordevic v Croatia*,[75] in which the Court has held that States have a positive obligation under Articles 3 and 8 of the ECHR to take steps to mitigate bullying and harassment committed by private individuals in circumstances where the State authorities are aware of this behaviour, or ought to be aware.

Another judgment of relevance to the child protection system is *SW v United Kingdom*,[76] which concerned a social worker who acted as a professional witness in Family Court proceedings concerning alleged child sexual abuse. The presiding judge in the Family Court "rejected the allegations of sexual abuse" and "criticised the local authority and the professionals involved in the case"; in particular, the judge criticised the applicant as "the principal instigator in a joint enterprise to obtain evidence to prove the sexual abuse allegations, irrespective of the underlying truth and the relevant professional guidelines".[77] The judge found that the applicant "had lied to the court about important aspects of the investigation; and that she had subjected one of the children involved to a high level of emotional abuse in the course of their interaction".[78] The Family Court judge directed that his findings be shared with the local authorities where the applicant worked and with the professional bodies. The applicant's work with the local authority was terminated as a result of the judgment.[79]

The applicant took issue with the fact that the judge in the Family Court did not give her "notice" of the findings "until he gave his oral 'bullet point' judgment at the conclusion of the hearing" and complained that this "violated her rights under Article 8 of the Convention".[80] The applicant had previously brough her case to the Court of Appeal, and although it had "expressly acknowledged that the process by which the Family Court judge arrived at his criticisms was 'manifestly unfair to a degree which wholly failed to meet the basic requirements of fairness' under both Article 8 ECHR and the common law",[81] the applicant claimed that "the inability of the domestic courts to award her damages for the alleged breach of her rights under Article 8 of the Convention denied her an effective

72 *Ibid* at [97].

73 *Ibid* at [101].

74 31549/18, 9 November 2021.

75 41526/10, 24 July 2012.

76 87/18, 22 June 2021.

77 *Ibid* at [8].

78 *Ibid*.

79 *Ibid* at [13].

80 *Ibid* at [41].

81 *Ibid* at [40]

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remedy as required by Article 13 of the Convention".[82]

The ECtHR reiterated that "[a] person's right to protection of his or her reputation is encompassed by Article 8 as part of the right to respect for private life, since a person's reputation is part of his or her personal identity and psychological integrity".[83] The Court cited the case of *Vicent Del Campo v Spain*, stating that "the adverse portrayal of an applicant's conduct in an authoritative judicial ruling could, by the way it stigmatised him, have a major impact on his personal and professional situation, as well as his honour and reputation".[84] It was found that the judge's decision "first to criticise the applicant in such strong terms without giving her an adequate opportunity to respond, and then to direct that those criticisms be shared with the local authorities where she worked and with the relevant professional bodies, significantly affected her ability to pursue her chosen professional activity" and that this "in turn would have had consequential effects on the enjoyment of her right to respect for her 'private life' within the meaning of Article 8".[85] The ECtHR stated that as the applicant "did suffer prejudice, both personally and professionally … which the Court of Appeal judgment did not remedy … the applicant can still claim to be a 'victim' of the alleged violation".[86]

The Court held that there was a violation of Article 8 as the Family Court judge directed "that his adverse findings be sent to the local authorities and relevant professional bodies without giving the applicant an opportunity to meet them in the course of the hearing".[87] The Court also held that "the applicant did not have access to an effective remedy at the national level capable of addressing the substance of her Article 8 complaint", thereby violating her rights under Article 13 ECHR, in conjunction with Article 8.[88] The Court ordered that the applicant be awarded €24,000 for damages as well as €60,000 for costs and expenses.

4.2.2 European Committee of Social Rights

The International Commission of Jurists (ICJ) and the European Council for Refugees and Exiles (ECRE) filed a complaint with the European Committee of Social Rights that Greek law, policy and practice violates the rights of both unaccompanied migrant children in Greece and accompanied migrant children on the Greek islands to "housing, health, social and medical assistance, education, and social, legal and economic protection under the European Social Charter ("the Charter")".[89] The European Committee of Social Rights ("the Committee") stated that the children concerned in this case are mostly refugees who have come from Afghanistan, Syria and Somalia and have "mainly …sought asylum … within the regular asylum procedure in Greece", having arrived "at the Eastern Aegean islands, where

82 *Ibid* at [42].

83 *Ibid* at [45].

84 *Ibid* at [46], citing *Vicent Del Campo v Spain* (25527/13, 6 November 2018) at [48].

85 *Ibid* at [47].

86 *Ibid* at [55].

87 *Ibid* at [54].

88 *Ibid* at [73] to [74].

89 *International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v Greece* (173/2018, 26 January 2021) at [140].

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they stay in reception and identification centres (RICs) while their asylum application or that of their parents is being examined".[90] Some children are moved to mainland Greece.

The Committee emphasised the applicability of the rights under the Charter to refugees, and accordingly to the children in this case.[91] It commented that "there is a systemic problem of overcrowding" in some of the RICs, along with "substandard living conditions", a "lack of privacy, insalubrious conditions (water shortages, insufficient sanitation) and violence".[92] It further noted that "a significant number of unaccompanied children are homeless or live in informal/insecure housing conditions" and that according to some reports, "between 40% and 45% of the children who end up in hostels after months on a waiting list have serious mental health problems and require special care".[93] The Committee also commented on the importance of adequately resourcing guardianship roles for migrant children[94], and criticised the use of protective custody, observing that "[d]etention in police stations or in closed facilities, even for short periods of time, cannot be an alternative to proper shelter and accommodation suited to the age and the needs of such children".[95]

In addition, the Committee remarked that there was a "persistent failure/incapacity to provide appropriate accommodation and care to migrant children (whether or not accompanied by their families)" and that this "has the effect of exposing the children in question to very serious physical and moral hazards, resulting from life on the street, which can include trafficking, exploitation through begging and sexual exploitation".[96] With respect to education, the Committee stated that the evidence suggested that "more than 85% of all migrant children on the islands do not attend primary or secondary education", and that while the Greek State offered specific education programmes such as the Reception Units for the Education of Refugee Children, the State did not provide data detailing the number of children attending such programmes.[97] With regard to access to health care, the Committee reiterated that the living arrangements of these migrant children disadvantaged their health and that there was also a "lack of vulnerability assessment and a lack of access to primary, preventative and in some cases, emergency health care".[98]

In making its decision, the Committee acknowledged that Greece "has been faced in recent years with a situation of extreme difficulty as a result of the high flow of migrant persons and asylum seekers arriving at its land and sea borders".[99] Despite this, however, the Committee referenced various international law sources outlining obligations on the Greek State, including case law of the ECtHR; the UN Convention on the Rights of the Child (CRC); General Comments of the UN Committee on the Rights of the Child; the Charter of

90 *Ibid* at [80].

91 *Ibid* at [82] and [83].

92 *Ibid* at [126] and [127].

93 *Ibid* at [142] and [144].

94 *Ibid* at [166] to [168].

95 *Ibid* at [176].

96 *Ibid* at [186].

97 *Ibid* at [203].

98 *Ibid* at [224].

99 *Ibid* at [133].

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Fundamental Rights, and Recommendations of the Parliamentary Assembly of the Council of Europe and the Committee of Ministers of the Council of Europe, among others. The Committee found multiple violations of the Charter including Article 31(1) because of "the failure to provide adequate accommodation to refugee and asylum-seeking children on the islands" and "the lack of sufficient long-term accommodation for unaccompanied refugee and asylum-seeking children on the mainland".[100] A violation of Article 31(2) was identified because of "the inappropriate accommodation of accompanied and unaccompanied migrant children on the islands" and "the lack of provision of a shelter to unaccompanied migrant children on the mainland".[101]

Further, the Committee found a violation of Article 17(1) due to "the inadequate accommodation situation of accompanied and unaccompanied migrant children", "the lack of an effective guardianship system for unaccompanied and separated migrant children" and "the detention of unaccompanied migrant children under the 'protective custody' scheme" while Article 7(10) was also violated "due to the failure to take the necessary measures to guarantee accompanied and unaccompanied migrant children the special protection against physical and moral dangers".[102] A violation of Article 17(2) was found "due to the lack of access to education for accompanied and unaccompanied migrant children on the islands" and a violation of Article 11(1) and Article 11(3) of the Charter was found because of "the failure to provide appropriate accommodation and sufficient health care to accompanied and unaccompanied migrant children on the islands" as well as "the failure to provide appropriate shelter to unaccompanied migrant children on the mainland".[103]

This decision is of increasing relevance to Ireland. As noted in section 2.2.9 of this Report, the recent influx of refugees from Ukraine will see Ireland put under strain to meet the needs of refugee children on a scale that we have not previously encountered. The decision of the European Committee of Social Rights reinforces that even in circumstances where the number of children in need of assistance is very large and the system is under significant strain, States nonetheless remain obliged to ensure that the rights of those children, as recognised in a range of international law instruments, must be met. The finding of a violation in respect of the lack of an effective guardianship system for separated children is particularly noteworthy.

4.2.3 UK Supreme Court

Although not binding on Ireland, the decision of the UK Supreme Court in *Re H-W (Children)*[104] is of considerable comparative interest. The case involved an appeal against a care order granted in a case in which the trial judge had found that the parents of the three children involved were unlikely to adequately protect the children against a risk of repeat sexual abuse by an adult son of the children's mother. The basis of the appeal was that the trial judge had not properly applied the proportionality test, due to his failure to properly

100 *Ibid* at [161].

101 *Ibid*.

102 *Ibid*.

103 *Ibid*.

104 [2022] UKSC 17.

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balance the risk of harm occurring to the children if they remained at home against the risk of harm that might occur due to the separation of the children from their parents (in circumstances where the children had indicated their preference to stay at home).

In upholding the appeal, the Court cited the following statement of the correct approach to applying the proportionality test in child care proceedings from the decision of MacFarlane LJ in *Re G (A Child)*:

> … the judicial task is to undertake a global, holistic evaluation of each of the options available for the child's future upbringing before deciding which of those options best meets the duty to afford paramount consideration to the child's welfare … What is required is a balancing exercise in which each option is evaluated to the degree of detail necessary to analyse and weigh its own internal positives and negatives and each option is then compared, side by side, against the competing option or options.[105]

Noting this test, the Supreme Court stated that "[i]f, on appeal, it is found that a judge has unduly telescoped the process, and has not made the side-by-side analysis of the pros and cons of each alternative to a care order, then the likely conclusion is that his decision is, for that reason, flawed and ought to be set aside."[106]

In the case at hand, it was found that the trial judge had received and referred to comprehensive papers from the social work department examining the options considered in the case; however, "on close inspection … [he] simply set out the options and there is in fact no analysis of the competing options and the issue of mitigation."[107] The judgment had not considered the efficacy of injunctions, non-molestation orders or supervision orders as less intrusive measures that might have mitigated the risk of sexual abuse faced by the children.[108] Because of these failings, the Supreme Court held:

> The judge's treatment of the facts and the evidence was thorough. He undoubtedly directed himself that his orders were required to be proportionate. However that is not the end of the matter. The difficulty is that one looks in vain for the critical side-by-side analysis of the available options by way of disposal, and for the evaluative, holistic assessment which the law requires of a judge at this stage. Whilst the judge has identified the risk of sexual harm as satisfying the threshold criteria for intervention, there is no evaluation of the *extent* of the risk of significant harm by way of sexual harm, nor of any available means by which the risk might be reduced for each child. Nor is there any comparison of the harm which might befall the children if left at home with the harm which would be occasioned to them if removed, and separated not only from the parents but from each other. It follows that the decision was insufficiently founded on the necessary analysis and comparative weighing of the options. In the absence of the evaluative analysis

105 [2013] EWCA Civ 965 at [50] and [54], cited by the Supreme Court at [2022] UKSC 17 at [47].

106 [2022] UKSC 17 at [51].

107 *Ibid* at [57].

108 *Ibid* at [58] to [59].

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> which is required this appellate court cannot determine whether the orders made were proportionate and necessary … the process adopted by the judge is flawed as it did not adequately assess the prospects of various options to mitigate the risk of sexual harm.[109]

The Supreme Court remitted the case for re-hearing by a different judge.[110]

In assessing the relevance of this judgment to the Irish context, regard should be had to both the differences and the similarities in the legal framework governing care proceedings in England and Wales when compared to Ireland. On the one hand, there is no Irish decision that has formulated the proportionality test in quite the same manner as it was formulated by MacFarlane LJ in *Re G (A Child)* and applied by the Supreme Court in *Re H-W (Children)*. At the same time, the provisions of the Child Care Act 1991 in Ireland and the Children Act 1989 in England and Wales, particularly in respect of threshold conditions for taking children into care, have much in common. Most importantly, the requirement of proportionality in any State intervention into family life applies equally in both jurisdictions; it is influenced in both England and Wales and in Ireland by Article 8 of the ECHR, and is expressly stated to be a part of the constitutional threshold for State intervention set down in Article 42A.2.1° of the Irish Constitution.

The classic statement of the proportionality test in Irish constitutional law comes from the case of *Heaney v Ireland*[111] (the test was discussed and applied in section 1.5 of this Report). However, the *Heaney* formulation of the test was devised in the context of challenges to the constitutionality of legislation; it does not necessarily provide a comprehensive guide as to how the test might be applied in the context of other forms of State action restricting constitutional rights, such as child care proceedings. An example of how the test can be elaborated upon by the Irish courts in a child protection case can be seen in section 4.2.4.2 below, in the discussion of the recent High Court decision in *Child and Family Agency v Adoption Authority of Ireland and Ms A*[112] (which concerned a compulsory adoption order).

As such, the decision in *Re H-W (Children)* may be argued before Irish courts in the coming years as a persuasive authority on the appropriate approach to be taken by the District Court in deciding whether to grant a care order—and, in particular, in the manner in which it gives reasons supporting that decision. The exacting standard in relation to the proportionality analysis to be provided by a judge in support of the decision to take a child into care would have considerable implications for the operation of District Court child care proceedings if *Re H-W (Children)* were to be followed by an Irish court, since most care order judgments in Ireland are not given in the form of written or reserved judgments.

109 *Ibid* at [60] to [62].

110 *Ibid* at [63] to [65].

111 [1994] 3 IR 593 at 607.

112 [2022] IEHC 304.

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4.2.4 Irish Case Law

4.2.4.1 Sexual offences against children

In *CW v Minister for Justice*,[113] the High Court declared that section 3 of the Criminal Law (Sexual Offences) Act 2006 (as substituted by section 17 of the Criminal Law (Sexual Offences) Act 2017) is invalid as contrary to Article 38.1 of the Constitution. Section 3 established the offence of "defilement of a child", which is more commonly referred to as statutory rape. Under section 3, it was an offence to engage or attempt to engage in a "sexual act" (as defined in the Act) with a child who is under the age of 17. Section 3(3) provided a defence if the accused person was reasonably mistaken that, at the time of the alleged commission of the offence, the complainant had attained the age of 17 years. Section 3(3) placed the onus of proving the reasonable mistake on the defendant, while section 3(5) provided that the standard of proof required was "that applicable in civil proceedings"—ie the balance of probabilities.

The defence of reasonable mistake as to age was introduced following the decision of the Supreme Court in *CC v Ireland* in 2006, in which the previous incarnation of the statutory rape offence[114] was declared unconstitutional due to the absence of any possibility of arguing reasonable mistake as to age.[115] In that case, the Supreme Court had found that the strict liability nature of the offence allowed for a person to be convicted of a serious criminal offence without mental guilt, and that this was contrary to Article 40 of the Constitution.[116]

The issue that arose in *CW* regarding the revised provision was whether the Constitution permits a defence to a criminal offence to be subject to discharging a burden of proof on the balance of probabilities. The default position in criminal trials is that defendants enjoy the presumption of innocence, and the burden of proof rests on the State to demonstrate guilt beyond reasonable doubt. The plaintiff argued that due to his constitutional presumption of innocence, he should only have to raise a reasonable doubt in the mind of the jury as to whether he was reasonably mistaken as to the age of the child (an "evidential burden"); the requirement to establish on the balance of probabilities that a certain state of facts existed went further and was incompatible with the constitutional presumption of innocence.[117]

Stack J cited the following passage from the judgment of Charleton J in the Court of

113 [2022] IEHC 336.

114 Criminal Law (Amendment) Act 1935, section 1(1).

115 [2006] 4 IR 1.

116 *Ibid* at p 80.

117 See [2022] IEHC 336 at [2], where Stack J cited the distinction between "evidential burden" and "burden of proof" set down in Chapter 2 of D McGrath, *Evidence* (Round Hall, 2014), and adopted by O'Malley J in *People (DPP) v Forsey* [2019] 2 IR 417: "The 'legal burden' is a burden of proof 'properly so called' and is the burden fixed by law on a party to satisfy the tribunal of fact as to the existence or non-existence of a fact or matter. Where the legal burden is borne by a party in relation to an issue, he or she is required to persuade the tribunal of fact to the criminal or civil standard of proof, as appropriate … An 'evidential burden' is the burden borne by a party who contends that a particular issue should be put before the decision-maker. It is discharged by adducing (or by pointing to relevant evidence adduced by the other party) sufficient evidence for that purpose, to the point that the trial judge is satisfied that it should be left for consideration."

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Criminal Appeal in *People (DPP) v Smyth:*

> The construction of a criminal statute requires the court to presume that the core elements of an offence must be proven beyond reasonable doubt; otherwise the accused must be acquitted. A special defence, beyond the core elements of the offence, may carry a different burden; insanity and diminished responsibility are examples of such a defence which casts a probability burden on the accused. Where, however, in relation to an element of the offence itself, as opposed to a defence, a burden is cast upon the accused, the necessary inference that the accused must discharge that burden on the balance of probability is not easily made. The Court notes that bearing the burden of proving a defence as a probability could have the effect that in respect of an element of the offence an accused person might raise a doubt as to his guilt, but not establish it as a probability. This might lead to a situation where the charge was not proven as to each element of the offence beyond reasonable doubt, but nonetheless the accused could be convicted. That would not be right. Proof of a guilty mind is integral to proof of a true criminal offence, in distinction to a regulatory offence.[118]

She proceeded to cite O'Malley J in the Supreme Court from *People (DPP) v Forsey*:

> There is no doubt as to the constitutional status of the presumption of innocence, and the fundamental nature of the concomitant principle that it is for the prosecution to prove the guilt of an accused person beyond reasonable doubt. Equally, it is clear that a reverse burden of proof that imposes an obligation on the accused to disprove a core element of the offence, that would otherwise fall to be proven positively by the prosecution, is capable of amounting to a violation of the presumption of innocence and would, therefore, violate the guarantee of a trial in due course of law protected by Article 38.1.[119]

In light of these authorities, Stack J stated that "it is now quite clear that Article 38.1 of the Constitution … means that, at least in relation to the constituent elements of an offence, a reverse onus provision such as that in subs. 5 can only place an onus on the accused to create a reasonable doubt in the minds of the jury as to his or her guilt." The question to be determined was "whether subs. 5 can be regarded as a 'special defence or exception' … or whether subs. 5 relates to a core element of the offence of defilement of a child".[120]

Although the statute referred to reasonable mistake as to age as a "defence", Stack J held that "the mere fact that the statute refers to it as such does not prevent the issue as to whether the accused was reasonably mistaken as to the age of the complainant from being a core element of the offence."[121] Crucially, she found that not only is it a core element of the offence that the complainant be under the age of 17, but also that the accused was culpably aware of the age of the person engaging in sexual activity:

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118 [2010] IECCA 34, cited by Stack J at [2022] IEHC 336 at [20].

119 [2019] 2 IR 417, cited by Stack J at [2022] IEHC 336 at [29].

120 [2022] IEHC 336 at [30].

121 *Ibid* at [32], citing *People (DPP) v Heffernan* [2017] 1 IR 82 in support.

> The *ratio* of *CC* was that a "guilty mind", that is, some form of moral culpability, was a necessary element for the imposition of criminal liability in the case of a serious criminal offence such as was contained in s. 1(1) of the 1935 Act. It is clear from the legislative history of the "reasonable mistake" defence, now contained in s. 3(3) of the 2006 Act, that it is an amendment of a defence originally introduced so as to meet the constitutional requirement identified by the Supreme Court in *CC* that the offence could not provide for those without culpability in relation to the key element of the offence, that is, the age of the child, and therefore I find it difficult to see how the "reasonable mistake" defence, when it is invoked, is not a critical component in establishing the guilt of the accused.[122]

On this basis, Stack J held that the defence of "reasonable mistake" relates to a necessary element of the offence of defilement. As such, where the defence is invoked, the presumption of innocence applies and the prosecution is required to prove beyond a reasonable doubt that the accused did not make a reasonable mistake as to the age of the complainant. It is "constitutionally impermissible to impose more than an evidential burden on an accused who wishes to invoke that defence and the imposition on the accused of a standard of proof to the civil standard, i.e., on the balance of probabilities, is contrary to Article 38.1."[123]

Stack J also addressed an argument made by the State that section 3(5) amounted to a proportionate restriction of the accused's fair trial rights under Article 38. Having reviewed relevant case law, Stack J held that while some safeguards in a trial may be subject to proportionate restriction, the presumption of innocence may not:

> … the presumption of innocence is of such fundamental importance to the fairness of a trial that it is not subject to proportionate restriction as are individual rules of evidence relating to admissibility, the drawing of inferences or reverse onus provisions. The requirement that the prosecution prove guilt beyond all reasonable doubt is an essential requirement of any trial in due course of law and therefore abrogation of it must be regarded as a breach of Article 38.1. Put simply, a trial which permits conviction where there is a reasonable doubt as to the guilt of the accused is not a fair trial.[124]

Because reasonable mistake as to age was a core element of the offence, the presumption of innocence applied; as such, "proportionality cannot be applied so as to dilute the obligation on the prosecution to prove beyond reasonable doubt all essential elements" of the offence.[125]

Notwithstanding her finding that the presumption of innocence was not subject to proportionate restrictions, Stack J proceeded to consider the State's arguments on proportionality. In short, she held that while section 3(5) pursued a legitimate objective, it could not be said to impair the presumption of innocence as little as possible, and that

122 *Ibid* at [36] to [37].

123 *Ibid* at [38].

124 *Ibid* at [47].

125 *Ibid* at [59].

"[i]t is difficult to avoid the impression that subs. 5 was included simply to make it more likely to get a conviction".[126] As such, "even if it [ie the proportionality test] were applicable, subs. 5 would be a disproportionate restriction on the presumption of innocence".[127] Stack J further held that the test in *Touhy v Courtney*[128] regarding the deference to be afforded to legislation balancing competing constitutional rights was not applicable, since "[t]here is no constitutional right or interest to the conviction of a person in respect of whom there is a reasonable doubt as to guilt. Such a conviction is generally regarded as unsafe and it is not clear why such a conviction would be thought to advance the constitutional rights of others."[129] Although Article 42A was referenced in submissions, Stack J noted that "no specific right protected by that provision was identified".[130]

CW is a complex and multi-layered judgment that merits close attention. It spans a range of important constitutional concepts including the scope of the right to a fair trial; the applicability of the proportionality test to Article 38 of the Constitution; and the degree of deference to be afforded to the Oireachtas in legislation governing the criminal law in general and sexual offences against children in particular. A further subplot concerns the extent to which reports of Oireachtas Committees can be relied on by courts as an interpretive aid when considering the constitutionality of legislation.[131] It is beyond the scope of this Report to analyse all of these issues in depth.

As in any case where a provision of legislation is declared unconstitutional, an appeal is a strong possibility; at the time of writing, I cannot confirm whether one has been brought. Should such an appeal be unsuccessful, it is recommended that section 3(5) of the Criminal Law (Sexual Offences) Act 2006 be replaced to clarify the nature of the burden placed on an accused party seeking to avail of the defence of reasonable mistake as to age, and accounting for the findings of the High Court in *CW* that applying the civil standard of proof is contrary to Article 38 of the Constitution. Irrespective of the outcome of any appeal, it is further recommended that the opportunity be taken to re-name the offence established by section 3. The term "defilement" (which is defined in most dictionaries as "spoiling", "marring" or damaging purity) has negative connotations *vis-à-vis* the victim which are likely to reinforce the shame and stigma already experienced by victims of this offence. Section 17 of the Criminal Law (Sexual Offences) Act 2017, which substituted an entirely new section 3 of the Criminal Law (Sexual Offences) Act 2006 for the original, was entitled "Sexual act with child under 17 years of age". This title should be carried through to the 2006 Act in place of the outdated and problematic title of "Defilement of child under the age of 17 years".

4.2.4.2 Adoption

The reporting period saw the Irish courts deliver a number of significant judgments on adoption, including in cases with significant child protection dimensions. In *Child and Family*

126 *Ibid* at [74] and [88].

127 *Ibid* at [89].

128 [1994] 3 IR 1.

129 *Ibid* at [101].

130 *Ibid* at [97].

131 See *ibid* at [78] to [87] and [93].

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Agency v Adoption Authority of Ireland and Ms A,[132] an application was made under section 54 of the Adoption Act 2010 (as amended) for an order authorising the Adoption Authority to make an adoption order in respect of a child (D) and dispensing with the consent of any person whose consent to the adoption order would otherwise be required. The child's father was consenting to the adoption;[133] so the case focused on the mother's objection to it. D was stated to be "a few years short of ten years old", and had been in foster care since one month after his birth.[134] His mother (A) has had issues with drug use and addiction (including while pregnant with D, who was born with symptoms of withdrawal; this was noted to have "severely damaged" his development).[135] Her addiction spiralled after she was raped in 2013, shortly after which both of her grandparents died. She was in prison for all bar a few months between March 2017 and August 2020.[136] All four of her children are in care; access with them over the years was described as "sporadic" as A was "unable to commit to access despite continuous supports and assistance". However, there were no proposals to seek adoption orders in respect of the other three children.[137]

A had been drug free in prison and described prison as a "blessing in disguise". She sought access with D while in prison, but this was not granted.[138] Once out of prison, she engaged in occasional drug use.[139] Around nine months after her release, she met with the social work department and said she was not yet in a position to be involved with her children.[140] She later sought access, and following some postponements, this eventually happened in December 2021 and was described as "positive for all concerned".[141] Access was sought again in January 2022, but A was told it would not happen until Easter.[142]

Although A was not seeking re-unification and was satisfied that D should remain in care,[143] she resisted the application for the adoption order as she was concerned that she would not be able to apply for access if an adoption order was made; that sibling access (which up to that point was occurring four or five times a year) might not occur following adoption; that her sister (who has regular access with the other three children) would not be able to have access with D; and that she was concerned that if D's family placement broke down, it would be experienced by him as a "double loss".[144] The foster parents expressed a strong desire to secure D's status and relationship within his family. At the same time, they indicated that he knew that they were not his birth parents and that he had siblings, and indicated that they would support all efforts to maintain contact

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132 [2022] IEHC 304.
133 *Ibid* at [13].
134 *Ibid* at [2].
135 *Ibid* at [2] and [7].
136 *Ibid* at [2].
137 *Ibid*.
138 *Ibid*.
139 *Ibid* at [7].
140 *Ibid*.
141 *Ibid* at [2].
142 *Ibid*.
143 *Ibid* at [13].
144 *Ibid* at [2].

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with his birth family in future.[145]

The evidence presented by the social work department was that D's parents "have failed to fulfil any parental responsibilities in any meaningful way or to exercise their parental rights to date in respect of the…child and there is no reasonable prospect of them doing so now or into the future."[146] Intensive support and extensive access had been offered to A between 2007 and 2017 to enable her to re-establish a relationship with her children, but this was unsuccessful due to her limited engagement.[147] As a result, "with the exception of a small number of infrequent access visits, Master D has never spent time in the company of his natural mother."[148] Moreover, he has significant additional needs; "inconsistent and irregular, unplanned actions have very negative consequences for him and serve to set back his progress."[149] It was noted that the social work department had discussed the possibility of the foster parents being appointed as guardians to D rather than adoption; however, "it is the considered and professional opinion of those involved in his care, including the social work department, that this will not meet his needs and that adoption is the proportionate measure to provide the security he requires."[150] The Adoption Authority was also of the view that "the proposed adoption will give Master D long-term security, having regard to his difficult early childhood experiences", and that "the evidence indicates that the child's best interests are strongly served by the adoption order being made".[151]

In finding that the case met the conditions set down in the Constitution and in the Adoption Act 2010 for the making of an adoption order without the consent of the mother, Barrett J made a number of interesting observations, including the following:

> … I note the distinction between parental duties and parental rights that was drawn by McGuinness J. in *Northern Area Health Board v. An Bord Uchtála*, [2002] 4 I.R. 25. In this case, following on Master D being taken into care immediately after his birth Ms A has never fulfilled, nor even sought to fulfil any of her parental *duties*. Her occasional efforts at access involved the exercise of parental *rights*. I do not see how the complete *non*-exercise of parental duties could not yield a likelihood (in truth a certainty) of prejudicial effect (which effect has only been minimised through the intervention of the Child and Family Agency and, more particularly, the fosterers).[152]

Barrett J also noted "Ms A's own satisfaction that care orders should remain in place for Master D until he attains the age of majority", which "suggests most strongly … that she herself does not consider" that there is a reasonable prospect of her being able to care for D in a manner that would not prejudice his welfare.[153] Because A "has never fulfilled, nor

145 *Ibid* at [3].
146 *Ibid* at [9].
147 *Ibid* at [11].
148 *Ibid* at [13].
149 *Ibid* at [11].
150 *Ibid* at [9].
151 *Ibid* at [12].
152 *Ibid* at [20].
153 *Ibid* at [22].

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even sought to fulfil any of her parental duties, nor has she ever shown an ability to parent Master D", Barrett J found that "must unfortunately conclude that "*abandonment*" in its legal sense presents".[154]

Barrett J proceeded to consider in detail the question of whether the adoption order sought was a proportionate measure in the best interests of the child. In examining this question, he cited case law from the European Court of Human Rights, including *Strand Lobben v Norway*[155] and *R and H v United Kingdom*.[156] From these cases, he formulated a three-stage test for proportionality in adoption order cases:

1. Are the reasons being advanced by the applicants as a justification for the orders sought rational and *not* arbitrary, unfair or based on irrational considerations?
2. Do "*exceptional circumstances*" of the type contemplated by the European Court of Human Rights in *Lobben* present?
3. Is the proposed adoption motivated by an overriding regard for the best interests of the prospective adoptee?[157]

Barrett J stated that "[i]f the answer to any of the above questions is 'no', I do not myself see how a finding of proportionality could properly ensue.". However, "[i]n this case the answer to each of these three questions is 'yes'."[158] As such, the order sought was granted; Barrett J found that "adoption gives [D] an unequivocal legal place with his foster (soon to be adoptive) parents as their adopted child, will yield a related sense of identity, and will allow the full exercise of parental rights and duties in respect of him by his adopters".[159]

This judgment contains a number of passages that offer a significant guide to future practice in applications for compulsory adoption orders under section 54 of the Adoption Act 2010. First, it confirms the influence of ECHR case law on the approach of the Irish High Court. As noted in previous reports of the Special Rapporteur on Child Protection,

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154 *Ibid* at [24] (emphasis in original).

155 37283/13, 10 September 2019 (Grand Chamber). The following passage of the judgment was cited by Barrett J at [2022] IEHC 304 at [42]: "As regards replacing a foster home arrangement with a more far-reaching measure such as deprivation of parental responsibilities and authorisation of adoption, with the consequence that the applicants' legal ties with the child are definitively severed, it is to be reiterated that 'such measures should only be applied in exceptional circumstances and could only be justified if they were motivated by an overriding requirement pertaining to the child's best interests'....It is in the very nature of adoption that no real prospects for rehabilitation or family reunification exist and that it is instead in the child's best interests that he or she be placed permanently in a new family".

156 35348/03, 31 May 2011. The following passage of the judgment was cited by Barrett J at [2022] IEHC 304 at [37]: "[I]t is in the very nature of adoption that no real prospects for rehabilitation or family reunification exist and that it is instead in the child's best interests that she be placed permanently in a new family. Article 8 does not require that domestic authorities make endless attempts at family reunification; it only requires that they take all the necessary steps that can reasonably be demanded to facilitate the reunion of the child and his or her parents.... Equally, the Court has observed that, when a considerable period of time has passed since a child was originally taken into public care, the interest of a child not to have his or her de facto family situation changed again may override the interests of the parents to have their family reunited".

157 [2022] IEHC 304 at [43] (emphasis in original).

158 *Ibid* at [44].

159 *Ibid* at [40].

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there is a growing body of such case law, and it is incumbent on all parties—including Tusla and the Adoption Authority of Ireland in particular—to remain appraised of developments in Strasbourg and to incorporate them into their policies and practice (as they are obliged to do by section 3 of the European Convention on Human Rights Act 2003). Second, the three-stage proportionality test applied by Barrett J, infused by ECHR case law, may emerge as a key form of guidance for future courts in determining whether this aspect of the constitutional and statutory thresholds for making an adoption order have been met. Finally, Barrett J's comments on "abandonment" suggest that efforts made by a parent to maintain access for the purposes of maintaining a relationship, but with no view to reunification, do not establish a barrier to an adoption order being made even in the face of objection by the parent.

Another significant adoption judgment during the reporting period was *Child and Family Agency and K and C v Adoption Authority of Ireland and A and J*, which concerned an application for the adoption of a minor, shortly turning 18 years of age.[160] The minor was in the care of his foster parents for most of his life and made it clear to the Court that he "wishes the adoption to proceed".[161] While the birth mother (A) agreed with the adoption, she took issue with the late application for the adoption by the Child and Family Agency. Jordan J agreed with the birth mother in this regard and stated that he was "expressing a very real concern about delay in the timing of applications such as this and the utterly unfair position and inequality of arms that exists for the birth mother as a result of the last minute application".[162] The judge also commented about the lack of efforts made to facilitate contact between the birth mother and child: "[i]t may be that a reunification could not have been achieved but it is striking when looking at the evidence in the case that there is or appears to be an absence of effort certainly in the early years in that regard".[163] Taking these two points together, Jordan J stated that despite the minor's views in support of the adoption, the Court was also obliged to consider the birth mother's position:

> But, and there is a but in this judgment, if the Court goes back to the rights of A in looking at other matters, any other matters which the court considers relevant to the application, I have to say that I am very much in two minds about whether or not to grant the approval which is sought in this application because of the very valid arguments put forward by A from the outset in relation to the lateness of this application, the fact that it is a rushed application, the fact that she is placed between a rock and a hard place because of the manner in which it has come about against the backdrop of the history of her interaction with the Child and Family Agency and against the backdrop of the obligations of the Child and Family Agency in relation to children in care and in circumstances where this Court cannot ignore the importance which is placed on efforts being made to reunite

160 [2021] IEHC 677.

161 *Ibid* at [29].

162 *Ibid* at [26].

163 *Ibid* at [30].

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children in care with their biological parents.[164]

Jordan J concluded that the adoption should be granted but emphasised the point for the Child and Family Agency that such late applications should not be brought before the Court.

The previous two judgments in which adoption orders under section 54 of the Adoption Act 2010 were granted can be contrasted with the judgment by Barrett J in *Child and Family Agency and Ms A v Adoption Authority of Ireland and Ms C*, in which the application for an order was refused.[165] The child in this case (Ms B) was 17 years old (about 10 weeks short of her eighteenth birthday), and had been in the care of the foster carer since she was four months old. The judge noted that the foster carer had done a "remarkable" job, clearly loved the child and "that love is returned".[166] Neither natural parent consented to the adoption.[167] The child's mother, C, had endured prolonged domestic abuse at the hands of the child's father, and alleged that she had been raped by him and that her eldest daughter had been sexually abused by him. She turned to alcohol abuse as a coping mechanism.[168] Miss B was born prematurely and had heart difficulties and foetal alcohol syndrome, while her mother endured a very difficult birth and took several months to recover from it. Unable to care properly for Miss B due to her health difficulties and alcohol issues, she signed a consent to voluntary care.[169]

C entered a residential addiction treatment programme in 2005, at which point her other two children also entered care. C's cousin had offered to stay in the house to look after the children, but the social work team declined this, and indicated that they would seek a care order if C did not consent to a voluntary care placement; she consented, but complained that she did not feel that she had a real choice. A care order was later granted, and the two children were placed with in foster care; it subsequently emerged that one of the foster carers had had a sexual abuse allegation made against him.[170]

C's alcohol addiction treatment was successful and she has not consumed alcohol since then. She completed follow-up treatment, parenting courses and a psychological assessment.[171] In 2006, the older children were returned to her care, following allegations that one of the foster carers has sexually abused another child in his care. The care order was discharged in 2007; no further orders were ever sought in respect of them, and their social work files were closed.[172]

C also wanted Miss B returned; on her account, she was told that Miss B would die in her care and that she would never get her back. In 2007 (the same year in which the care order

164 *Ibid* at [47].

165 [2022] IEHC 389.

166 *Ibid* at [2].

167 *Ibid* at [1].

168 *Ibid* at [3](11) to [3](19).

169 *Ibid* at [3](22) to [3](25).

170 *Ibid* at [3](27) to [3](28).

171 *Ibid* at [3](29).

172 *Ibid* at [3](32) to [3](33).

in respect of her other children was discharged), a care order up to age 18 was granted in respect of Miss B. C consented to this care order; she states that she "felt pressurised and riddled with guilt" in respect of the role that her alcohol consumption during pregnancy had played in Miss B's health difficulties.[173]

In 2008, C moved to be closer to her family and to prevent her children being exposed to comments at school about their family situation. This increased the distance between her and Miss B, with the result that access (which had been weekly up to that point) became gradually less frequent, especially after the financial crisis made it harder for C to afford to travel.[174] C averred that things became more difficult because she was reliant on the foster carer to bring Miss B to Dublin; C felt "very excluded" from Miss B's life, but wanted to "keep on fighting to have a relationship with my child."[175] In response to this, Barrett J (citing the judgment of the ECtHR in *Strand Lobben v Norway*)[176] stated: "The choice of verb in the last sentence is telling. Why should a mother have to be "fighting" to have a relationship with her child? That is something which the State should be actively facilitating."[177]

From 2014, there was no social worker allocated to Miss B's case for three years, with the result that C was not notified of child-in-care reviews, and access became even more difficult as no one from the Child and Family Agency was working as a medium between C and the foster carer.[178] Barrett J described the approach of the Child and Family Agency of leaving it to C and the foster carer to work out access arrangements as a "regrettable *laissez-faire* stance".[179] He was strikingly critical of several other failings in the case, including the scheduling of child-in-care review meetings at a time when C would inevitably struggle to arrive on time due to her reliance on public transport, and the failure to provide her financial support to allow her to travel more frequently for access visits.[180] He admitted to "a degree of scepticism that even at the very worst lows of the financial crisis there was not the money in the national 'kitty' for a couple of return tickets for Ms C from Dublin to County X",[181] and observed:

> … the State is supposed to protect the poor and the weak (for the rich and the strong can look after themselves). Ms C should not have been required to get up and go to battle every day to get what she wanted. Better access and a close/r relationship with her child, and more active involvement in the child's rearing is something which the Child and Family Agency … should have been seeking to cultivate … In this case, Ms C has and had shown herself to be a perfectly competent mother *vis-à-vis* her other children, yet the Child and Family Agency (through carelessness, not calculation) did not engage in that type of 'rebuilding'

173 *Ibid* at [3](31) and [3](34).

174 *Ibid* at [3](35) to [3](42).

175 *Ibid* at [3](46).

176 37283/13, 10 September 2019 (Grand Chamber).

177 [2022] IEHC 389 at [3](46).

178 *Ibid* at [3](47).

179 *Ibid* at [6].

180 *Ibid* at [3](45) to [3](47).

181 *Ibid* at [3](45).

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> which the [European] Court of Human Rights contemplates as appropriate and required.[182]

The judge met with Miss B, who expressed a desire to be adopted by her foster carer; but Barrett J stated that he was "not *entirely* persuaded that she fully understood the significance of what adoption means in terms of her legal relationship with her natural mother", and that she had a concept of adoption "that one might perhaps associate with a considerably younger child."[183]

From a legal perspective, Barrett J held that even though there was no question of Miss B returning to C's custody in the 10 weeks before she turned 18, there was no reason why she could not do so, since C had proven herself to be a capable mother. As such, two elements of the test set down in Article 42A of the Constitution were not met: there was no question of there being no reasonable prospect that the parents will be able to care for Ms C in a manner that will not prejudicially affect her safety or welfare, and it was not necessary for the State to supply the place of the parents; it would be "over-reach by the State" to do so.[184] The main focus of Barrett J's legal reasoning was that the adoption would not be in Miss B's best interests:

> … I do not see what adoption at this time (roughly 10 weeks before Miss B turns 18 years of age) will achieve. As is clear from Ms A's affidavit evidence, Miss B is genuinely loved by her wider foster-family and that love patently does not rest on Miss B's standing as a foster-child rather than an as an adopted child. If Miss B wants the surname of her foster-family she can change her name by deed-poll when she turns 18 years of age. And if Ms A wants to bequeath property to Miss B, her adult children are now raised and 'gone from the nest' and no longer dependants so she can bequeath her property however she wants. So all that adoption would undoubtedly achieve at this time is to cut the legal link between a loving natural mother and a much-loved natural child with whom the natural mother has fought and sought to retain the closest contact over the years (with a disappointing want of assistance from the Child and Family Agency). I do not see that to cut that 'natural mother-natural child' legal link at the very moment when a child is about to enter adulthood, when I can see no particular advantage to the adoption, and when that adoption seems unlikely to have the slightest effect on Miss B's day-to-day existence is somehow in Miss B's best interests—and I note that those interests, while paramount, are not the sole interests at play.[185]

The finding on best interests in turn led the judge to find that the adoption was not a proportionate measure.[186] The judge distinguished the case on its facts from *Child and Family Agency v ML*,[187] noting that unlike in that case, Miss B knew her mother following

182 *Ibid* at [3](47).
183 *Ibid* at [12] and [13].
184 *Ibid* at [21].
185 *Ibid* at [23].
186 *Ibid* at [27].
187 [2020] IEHC 419.

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frequent access, and Miss B had significantly greater capacity to care for the child than the mother in that case.[188] Having found that multiple elements of the test for granting an adoption order had not been met, Barrett J refused the order sought.[189]

Aside from the various criticism levied at the approach taken by the Child and Family Agency to this case over the years, the judgment in this case is notable for its treatment of several legal points. First, it is a very clear example of how failures to make adequate efforts towards reunification of children in care might contribute to a refusal by the High Court to make an adoption order, even in circumstances where a child has been with the same foster carers since birth and will clearly not leave the foster home before turning 18. Section 54(1)(a) of the Adoption Act 2010, as amended, stipulates that the Child and Family Agency must be "satisfied that every reasonable effort has been made to support the parents of the child" before making an application for an adoption order. Barrett J's ruling was clearly heavily influenced by ECtHR case law finding violations of Article 8 of the ECHR in cases where adoption orders were granted without sufficient support having been offered towards reunification. It comes quite close to converting the meaning and effect of section 54(1)(a) from an onus on the Child and Family Agency to satisfy itself of a state of affairs before making an application to an onus on the court to satisfy itself of that state of affairs before granting the order sought (or, at least, a power for the court to refuse an order on the basis that it is not so satisfied.) Although Barrett J sought to dispel this impression, stating that "this is not a judicial review application and I merely note that the Child and Family Agency is (strangely) so satisfied",[190] the repeated references in the judgment to the failures of the Agency, and the possibility that reunification might have occurred if different steps had been taken, make it difficult to avoid the feeling that he would not be minded to grant an adoption order in any case in which sufficient efforts towards reunification had not been made. (Recent Irish research on challenges in working towards reunification for children in care will be discussed in section 4.3.2.5 below.)

The following passage from Barrett J's judgment is also noteworthy:

> … it is not appropriate for the Child and Family Agency to operate what might be called an 'Open Sesame' style approach to the issue of reunification, *i.e.* that a natural parent should have expressly to use the verb 'reunify' or expressly to contemplate reunification before the Child and Family Agency will consider reunification … it is all very well for the Child and Family Agency to state 'Ms C never sought a discharge of the care order.' Ms C is a financially poor woman who was liaising with the Child and Family Agency, trying to get what she wanted. In the real world, most people do not have the money to be running off to court and most people do not want to get involved in financially and emotionally draining court proceedings in any event.

This emphasises that the onus to take steps towards reunification rests on the Child and Family Agency and not on the parent(s); the Agency cannot wait for the parent(s) to take

188 [2022] IEHC 389 at [27].

189 *Ibid* at [30].

190 *Ibid* at [20].

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steps indicating that reunification is desired before putting the necessary supports in place. This is in line with the consistent case law of the ECtHR which indicates that reunification is, in principle, the desired endpoint of all cases where children enter State care, and that there is a positive obligation on State authorities to support the parties in reaching this outcome.

Finally, the judgment quotes a number of statements from the mother (C) indicating that she consented to voluntary care placements in circumstances in which she felt she had little real choice, having been informed that an application for a care order would otherwise be brought.[191] The risk that voluntary care placements are not always based on free and informed consent was discussed in detail in Chapter 3 of the 2020 Annual Report of the Special Rapporteur on Child Protection, which made detailed recommendations in respect of reforms to law, policy and practice aimed at mitigating this risk. As noted in section 1.2.1 of this report, the Government has indicated its intention to enact reforms broadly in line with these recommendations, but no progress has yet been made in developing the detail of these reforms.

In a separate case, the Adoption Authority sought an order under either section 30(3) or section 30(5) of the Adoption Acts 2010-17, in circumstances where the child was placed with a foster mother at a young age following the death of the natural mother, and the identity of the natural father was unknown.[192] The child is now a teenager and also wishes to be adopted by the foster mother. Section 30(3) provides:

> Where the Authority is satisfied that, having regard to—(a) the nature of the relationship between the relevant non-guardian of a child and the mother or guardian of the child, or (b) other than in a case where the relevant non-guardian of the child is a person referred to in paragraph (b), (c) or (d) of the definition of 'relevant non-guardian', the circumstances of the conception of the child, it would be inappropriate for the Authority to consult the relevant non-guardian in respect of the adoption of that child, the Authority may, after first obtaining the approval of the High Court, make the adoption order without consulting the relevant non-guardian concerned.

Section 30(5) provides:

> After counselling the mother or guardian of the child under subsection (4) , the Authority may, after first obtaining the approval of the High Court, make the adoption order without consulting that father if—(a) the mother or guardian of the child either refuses to reveal the identity of that father of the child, or provides the Authority with a statutory declaration that he or she is unable to identify that father, and (b) the Authority has no other practical means of ascertaining the identity of that father.

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191 *Ibid* at [3](25) and [3](27).

192 *In The Matter of An Application By The Adoption Authority of Ireland (The Applicant Herein) Under Section 30 Of The Adoption Acts 2010 To 2017 And In The Matter Of A Proposed Adoption Of AB (A Minor, Born On -----)* [2021] IEHC 829.

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Barrett J considered the working of sections 30(3) and (5), as well as section 30(4) which was deemed relevant in light of section 30(5), and concluded that an order could be made under both sections 30(3) and 30(5) for the adoption of the Child without consulting the natural father. The judge made this decision based on "the rights and interests of the parties in the determination of the application", as well as "the age, views and needs of the child" and "the requirement that the Child's best interests be regarded as the paramount consideration".[193] The judge also referenced "the limited information concerning the relationship between the Father and Mother" and "the absence of any relationship between father and child throughout the Child's life to this time (and, so far as same may be predicted, likely for all time)".[194] As part of the decision, the judge confirmed that "s.30(5) falls to be construed as though the words: "After counselling the mother or guardian of the child under subsection (4)" and item (a) that follows had been excised from that provision. Otherwise s.30(5), in such circumstances, would rest on the performance of an impossibility".[195]

4.2.4.3 Access

In *CG v Child and Family Agency*, the applicant was the mother of a young baby and was seeking an order quashing part of an order made in the Circuit Court that the baby's father (JF) was not to have unsupervised access with the child.[196] JF was known to the Child and Family Agency (CFA) for matters including a conviction of false imprisonment and sexual assault of a 14 year old female, for which JF was given a four-year prison sentence and was placed on the sex offenders register indefinitely.[197] The applicant was also known to the social work department having experienced chronic neglect, physical abuse, and sexual abuse as a child.[198] The CFA gave evidence that the applicant and JF did not cooperate with the pre-birth assessment and it was concluded that "JF posed a risk of sexual abuse to the child".[199]

The CFA did not oppose the order sought; the core issue was whether, if part of the Circuit Court order was struck down, the entirety of the order should be set aside and the matter remitted to the Circuit Court for a rehearing of the appeal.[200] Barr J held that "the Circuit Court judge did not have jurisdiction to make the direction that she did", namely that JF "is not to have unsupervised access with the said child".[201] The judge explained that "the jurisdiction of a court hearing an application under the 1991 Act to make orders in relation to access to a child, which jurisdiction is set out in sections 37(1); 37(2); 13(7)(a) and 17(4) [of the Child Care Act 1991], is only intended to apply where a care order has

193 *Ibid* at [11].

194 *Ibid*.

195 *Ibid* at [9].

196 [2021] IEHC 812 at [4].

197 *Ibid* at [17].

198 *Ibid* at [13].

199 *Ibid* at [18].

200 *Ibid* at [5].

201 *Ibid* at [24] and [43].

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been put in place”.[202] Barr J made an order of *certiorari* quashing the entirety of the order of the Circuit Court and remitted the matter back to the Circuit Court for a rehearing of the appeal brought by the CFA against the order made by the District Court.[203]

4.2.4.4 Voluntary care; choice of school

A District Court case considered an application by a mother to choose which primary school her child can attend. The child, and a sibling, are in voluntary care with foster parents.[204] Judge Keane ordered that the child attend the primary school chosen by Tusla which is in the foster family’s community. While the child’s older sibling attends the mother’s preferred primary school, Judge Keane stated that the decision was based on the “best interests” of the child, and also supported by evidence from the child’s guardian *ad litem* and consented to by the child’s father. Reasons for the court’s decision include that the child has already attended a playschool on the primary school grounds and therefore already has friends and is known in that environment. This is important as the child has “significant developmental delays and challenges” which would make it more difficult for the child to adapt to a new school, namely the mother’s preferred school, and any issues which the child has may be identified sooner. The judge agreed with the mother’s complaints about Tusla’s “late application” in this case and also understood her concerns that the choice of school may impact future decisions about the child’s care. The judge also ordered that the child have an urgent cognitive assessment.

4.2.4.5 Child in care; COVID-19 vaccination

The District Court also considered whether a 15-year-old disabled child who was in care since the age of 4 could receive a Covid-19 vaccination in circumstances where the child’s mother opposed it.[205] The child had requested the vaccine and the child’s GP stated that the child was “at risk of serious and potentially fatal complications should he contract the Covid 19 infection”. The child’s social worker informed the court that the child’s “whole life is centred around the house and it has affected his mental health” and stated that the child was hoping to get out more once vaccinated. The child’s foster parents were supportive of the child receiving the vaccine and the child “does not see his biological parents”. Larkin J. referenced medical data, as well as the child’s own preference to have the vaccine, and gave a direction under section 47 of the Child Care Act 1991 that the vaccine be administered.

4.2.4.6 Teaching Council registration of sex offender

The Teaching Council sought an order from the High Court under section 44(5) of the Teaching Council Act 2001 “confirming the decision of the panel of the … disciplinary committee that the name of the respondent be removed from the register and that he be ineligible to apply, under s. 31 of the Act, to be restored to the register for a period of 30

202 *Ibid* at [45]

203 *Ibid* at [57].

204 G Deegan, “Judge rejects mother’s request for choice of school for son”, *Irish Times*, 18 August 2021.

205 “Judge rules boy in care can receive Covid-19 vaccine”, *RTE News*, 22 October 2021, available at https://www.rte.ie/news/2021/1022/1255422-covid-vaccine-court/.

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years beginning with the date of removal".[206] The Teaching Council also sought an order enabling it to communicate the terms of the orders to relevant bodies.[207] The respondent was convicted of several sexual offences with respect to a child under 15 years, and the panel stated "that the respondent's fitness to teach was affected by reason of both the serious nature of the offences and the respondent's admission that it affected his fitness to teach".[208] Irvine J noted that "the Court must confirm the decision of the applicant unless it sees good reason to the contrary".[209] The judge stated that the "respondent's wrongdoing could hardly have been more egregious" and that finding, coupled with "the protection of the public and the maintenance of trust and confidence in the teaching profession", meant that the court found the sanction to be "proportionate and fair".[210]

4.2.4.7 Assessment of need

In *J O'SS (A Minor) v Health Service Executive*,[211] the Court of Appeal considered "the issue of the chronological/geographical order in which the Health Service Executive ... must process applications for assessment of needs as provided for by s. 8 of the Disability Act, 2005" as well as "the meaning of the phrase 'process applications for assessment'" in regulation 5 of S.I. No. 263/2007 Disability (Assessment of Needs, Service Statements and Redress) Regulations, 2007.[212] The minor's mother had sought an assessment for the minor when he was five years old but no assessment was carried out for over two and a half years, highlighting a "geographical lottery" which exists when seeking an assessment. As this case demonstrates, it can take several years to obtain assessments in some Community Health Organisation regions and significantly less time in other regions.

Donnelly J upheld the High Court's decision that "the correct and proper interpretation of regulation 5 is that it requires the respondent to process the carrying out of assessments of needs in a strict chronological order".[213] Donnelly J stated that "[t]he plain and ordinary meaning is a direction to the respondent ("the Executive") to carry out these assessments in the order that the applications are received by the respondent as a body. Nothing in any other legislation points to any other interpretation of that; operating in functional areas is permissive but not mandatory".[214] The judge commented that "the creation of strict geographical boundaries with huge time differentials based upon geographic location appears absurd when one considers that children are being affected by these delays".[215]

In the related case of *CM (A Minor) v Health Service Executive*, the plaintiff sough to determine "whether he is entitled to an assessment of his educational needs under s. 8(3)

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206 [2022] IEHC 30 at [1].
207 *Ibid*.
208 *Ibid* at [7] and [10].
209 *Ibid* at [15].
210 *Ibid* at [21] and [22].
211 [2021] IECA 285.
212 *Ibid* at [1].
213 *Ibid* at [37].
214 *Ibid* at [58].
215 *Ibid* at [59].

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of the Disability Act".[216] This case was "a test case for many other children with disabilities" and addressed "whether the Disability Act provisions regarding assessment of educational needs also apply to children with disabilities".[217] In considering these questions, the Court examined linkages between the Disability Act and the EPSEN Act and concluded that there was a "lack of express linkage between the Acts".[218] Donnelly J found that the "applicant" referred to in s. 8(3) includes adults as well as children.[219] The judge made a distinction between section 8(3) and section 8(9), finding that "the referral under s. 8(9) appears, on the face of the subsection, to only take effect after the assessment has identified the education need".[220] According to the judge, "[t]his will provide a pathway for the child either to an education plan under s.3 of the EPSEN Act, or to have access to a statement of services (s. 4(6) the EPSEN Act), which would be otherwise denied to a child (s. 11(6) of the Disability Act)".[221]

4.3 Academic Research

4.3.1 Children's Rights and the child protection system

Shore and Powell describe the approaches taken to deal with child abuse in Ireland over many decades, tracing child abuse inquiries, the response from the State with the children's referendum, legislation and policies, as well as public perceptions and reactions.[222] The authors highlight repeated failures in the child protection system and state that "each further inquiry generated more and more predictable recommendations focusing on similar failures".[223] They give examples including "the need for better communication between and within agencies, improved recording measures, increased resourcing, strengthened governance, full implementation of policies and guidelines, greater attention given to the voice of the child, and enhanced statutory protection of children's rights".[224] It is observed that "[t]wenty years after [the] Kilkenny [Incest Investigation], a government commissioned review identified 29 major inquiries, culminating in 551 recommendations"; the authors cite Buckley and O'Nolan, who "noted a 'critical mass' of recommendations had now been reached, whereby 'the benefits from inquiries have succumbed to the law of diminishing returns'".[225]

Shore and Powell highlight that while early intervention is central to the ethos of the Child Care Act 1991, in practice this does not occur.[226]They comment that "[t]he failure of society as a whole to recognise and respond to child abuse and neglect has never received

216 *Ibid* at [3].

217 [2021] IECA 283 at [2].

218 *Ibid* at [52].

219 *Ibid* at [61].

220 *Ibid* at [80].

221 *Ibid* at [106].

222 C Shore and F Powell, "The social construction of child abuse in Ireland: public discourse, policy challenges and practice failures" in K Biesel, J Masson, N Parton and T Poso (eds), *Errors and Mistakes in Child Protection: International Discourses, Approaches and Strategies* (Bristol University Press, 2020) at pp 55-74.

223 *Ibid* at p 62.

224 *Ibid*.

225 *Ibid*, citing H Buckley and C O'Nolan, *An Examination of Recommendations from Inquiries into Events in Families and Their Interactions with State Services, and Their Impact on Policy and Practice* (2013).

226 *Ibid* at p 64.

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the public critique and analysis that it deserves".[227] The authors fully acknowledge the role of the church and state in committing "often unimaginable horrors against children and vulnerable adults in their care", but also comment that "[i]ngrained cultural norms, including a 'look away' attitude and 'othering' of the poor and socially marginalised, contributed to the Irish 'cultures of denial' … which in part allowed the horrors unearthed by the Ryan Report to continue unchallenged in plain sight for so long".[228]

Child protection risks for children living in direct provision are repeatedly highlighted, and it is observed that "State responses to changing demographics in modern Ireland have illuminated contemporary child protection failings that have contributed to the creation of a newly stigmatised group within society: immigrant and asylum-seeking children".[229] It is concluded that despite much legislative and policy reform, as well as the children's referendum, "fairly consistent numbers of children living within our communities continue to experience abuse and neglect, and the state response to this has frequently been found to be lacking".[230]

Bruning and Doek discuss the features of an effective child protection system from a children's rights law perspective, drawing on the CRC, General Comment No. 13 (2011), UN Children's Fund (UNICEF) documents, as well as publications from the European Union (EU) and the Council of Europe (CoE) and obligations established in caselaw of the ECtHR.[231] With regard to the CRC, the authors note that the CRC Committee has urged States Parties to ensure "the coordination of activities of different agencies, the provision of the necessary human and financial resources, and the importance of data collection" as well as commitments "to eliminate by 2030 of all forms of violence and (commercial and sexual) exploitation of children as specified in the targets … of the Sustainable Development Goals (SDGs)".[232] With regard to European policies, the authors note that there is a call for "an integrated child protection system", which involves a "national legislative and regulatory framework", an " institutional framework" as well as "[a]ccountability and monitoring systems".[233] The authors also consider positive obligations stemming from case law of the ECtHR regarding Articles 3 and 8 of the ECHR which include that States must "take legislative action to protect children from violence both in the family and in the public domain such as in schools and in institutions", "effective implementation" is necessary with regard to "official investigations … multi-agency cooperation and information-sharing, effectively responding to child abuse reports and a monitoring system in case state responsibilities are delegated".[234] Further, the importance of ensuring contact between removed children and their parents as well as ensuring participation of all parties in decision-making processes is also emphasised in the caselaw.

227 *Ibid* at p 66.

228 *Ibid*.

229 *Ibid* at p 60.

230 *Ibid* at p 67.

231 MR Bruning and JE Doek, "Characteristics of an Effective Child Protection System in the European and International Contexts" (2021) 4 *International Journal on Child Maltreatment: Research, Policy and Practice* 231.

232 *Ibid* at p 237.

233 *Ibid* at p 241.

234 *Ibid* at p 252.

Having reviewed law and policy in Europe and internationally, the authors make a number of recommendations including that "the CRC Committee, the EU/FRA, and the CoE provide specific guidance for professionals in the child protection field in their efforts to find in concrete cases a balance between the right of the child to effective protection and her/his right and that of her/his family to privacy".[235] They also recommend that an integrated child protection system should pay more attention to "vulnerable children" and those with "mental health problems",[236] and that "[t]he mapping of the performance of the Member States of the EU and the CoE should take place at least every 5 years".[237] The EU and CoE should "develop a guide in which the rights of the child and the parents as recognized in the CRC and the ECHR and the caselaw of the ECtHR are presented with adequate elaborations of their relevance for the practice of all actors in the child protection system. A child-friendly and parent-friendly guide should be made available".[238] To conclude, the authors recommend that "systematic attention" be given to the elimination of violence against children as set out in the UN Sustainable Development Goals.[239]

Berrick *et al* consider the public perception of balancing children's rights as against parents' rights in child protection matters, focusing on differences and similarities which exist in Norway and California.[240] The authors begin with a focus on the CRC, noting that it has been part of national law in Norway since 2002; the Convention has not yet been ratified by the US, and "the Norwegian system allows for greater state intervention with universally available family support services".[241] It has been observed that in the US, "in matters of the family, parents' rights frequently prevail".[242] The authors state that public attitudes about children's rights and parents' rights are unclear, and seek to improve knowledge in this area by examining public attitudes about "the impact of risk to a child on the balance between children's rights and parents' rights" through a vignette.[243] 1031 respondents from Norway and 1117 respondents from California were surveyed through public opinion research firms in those jurisdictions.

The authors found that "[r]egardless of severity of risk, respondents tilted toward a children's rights or equal rights orientation more so than a parents' rights orientation".[244] Further, while "respondents from Norway were significantly more likely to privilege children's rights", "[r]espondents from California were more likely than respondents from Norway to privilege parents' rights".[245] When considering demographic variables, "immigration status and age … accounted for some of why Norwegian respondents gave

235 *Ibid* at p 253.

236 *Ibid* at p 254.

237 *Ibid*.

238 *Ibid*.

239 *Ibid*.

240 JD Berrick, M Skivenes and JN Roscoe, "Children's rights and parents' rights: Popular attitudes about when we privilege one over the other" (2021) *International Journal of Social Welfare*, https://doi.org/10.1111/ijsw.12523.

241 *Ibid* at p 2.

242 *Ibid* at p 3.

243 *Ibid* at p 5.

244 *Ibid* at pp 7-8.

245 *Ibid* at p 8.

less weight to parents' rights compared to CA respondents".[246] The research showed that "Norwegians were less likely to favor parents' rights partially because they were less likely to be immigrants than CA respondents, and immigrant respondents favor parents' rights more than non-immigrant respondents".[247] Further, "Norwegian respondents were less likely to favor parents' rights partially because they were more likely to be older than CA respondents, and older respondents were less likely than younger respondents to favor parents' rights".[248] The authors conclude that their findings "suggest that public understanding about fundamental rights may be context specific; that they are likely historically, politically, and culturally molded".[249] They caution, however, that "this study cannot determine whether the public is guided by public policy, or whether public policy serves as a lever to shift public opinion".[250] It is observed overall that any differences "in the public's orientation toward rights between the two countries are indicative of underlying cultural conditions to which legislators and, ultimately, child protection staff must respond".[251]

Höfte *et al* examine the law, policy and practice around secure residential care for children and young people in the Netherlands from a children's rights perspective.[252] The authors carried out quantitative and qualitative research and consider "whether the care delivered in secure residential youth care, as experienced by children, meets the requirements as described in the Articles of the UNCRC and the (Dutch) Youth Act".[253] It is reported from the quantitative research that "the correctional juvenile justice institutions had a more open and positive group climate for the child than secure residential facilities. The level of support, growth and atmosphere in the secure residential facility was not higher and the level of perceived repression lower than in a juvenile justice institution", and this finding was also supported in the qualitative research.[254] When considering specific rights under the UNCRC such as the right to express views under Article 12, several issues were identified, including that children reported not being listened to. With regard to the right to health under Article 24 UNCRC, some children commented on the "stress of imprisonment" and the impact which this has on their physical health, including an inability to sleep, while some children also stated "that they were receiving inadequate psychological aid, because—according to them—a wrong diagnosis had been made".[255] Concerning the right to education under Articles 28 and 29 UNCRC, it was said that the "formal education did not always fit the educational level of the child, as limited possibilities for (lower) education were usually offered, and staff members sometimes abused their power, which resulted

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246 *Ibid*.

247 *Ibid*.

248 *Ibid*.

249 *Ibid* at p 12.

250 *Ibid*.

251 *Ibid*.

252 SJC Höfte, CHZ Kuiper, GHP van der Helm, SM de Valk and GJJM Stams, ‘Children's Rights in Secure Residential Youth Care in the Netherlands’ (2021) 29 *International Journal of Children's Rights* 946.

253 *Ibid* at pp 952-953.

254 *Ibid* at pp 963-964.

255 *Ibid* at p 961.

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in repression"[256], and concerning the right to leisure and play under Article 31, children commented that they have "nothing to do" with no access to sports, for example.[257] It was observed that "[r]eduction of repression is the most important issue that the facilities should address, which calls for de-escalation tactics instead of force", and that "policies are not explicit enough about children's rights and violations against (inter)national law".[258]

Finally, an article by Krutzinna argues that there has been insufficient focus on "who the child is" when considering the child's best interests and proposes a three step "method of evaluation" providing "a child-centric perspective suitable to guide decision-making within a wide range of contexts, including healthcare and child protection, by public agents".[259] This "model of the individual child (MIC) … conceptualises 'the child' as an entity made up of three spheres: a) the Universal Child; b) the Categorical Child; and c) the Individual Child".[260] The Universal Child covers "basic physiological needs" while the Categorical Child covers "group-specific characteristics of the child" such as "a status as an ethnic minority in one country".[261] The individual child is concerned with any "additional vulnerabilities … as well as any features of the child which are characteristics rather than vulnerabilities" including "the child's preferences and interests".[262] Krutzinna states that the MIC "avoids presumptions about child-typical needs and insists on an assessment of the child's individual qualities, making it the only conceptualisation fully meeting the child centrism criterion required by children's rights".[263]

4.3.2 Alternative Care

4.3.2.1 Characteristics of children entering care

The link between child poverty and children entering care was explored in a longitudinal study by Bennett *et al* of 147 local authorities in England between 2015-2020.[264] The authors note that the rate of children in state care increased significantly between 2008 and 2020, from 53 children per 10,000 to 67 children per 10,000.[265] Their analysis indicates that rising child poverty rates might be contributing to an increase in children entering care; over the study period, 8.1% of the total number of children under the age of 16 entering care were linked to rising child poverty, equivalent to 10,351 additional children.[266] Local authorities that saw a greater rise in child poverty had greater increases in the rate of children entering care, while the same local authorities also had greater increases in rates

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256 *Ibid* at p 964.

257 *Ibid* at p 963.

258 *Ibid* at pp 965-966.

259 J Krutzinna, "Who is 'The Child'? Best Interests and Individuality of Children in Discretionary Decision-Making" (2022) 30 *International Journal of Children's Rights* 120 at p. 122.

260 *Ibid* at pp 124-125.

261 *Ibid*.

262 *Ibid* at p 125.

263 *Ibid* at p 126.

264 DL Bennett, DK Schlüter, G Melis, P Bywaters, A Alexiou, B Barr, S Wickham and D Taylor-Robinson, "Child poverty and children entering care in England, 2015–20: a longitudinal ecological study at the local area level" (2022) 7 *Lancet Public Health* e496.

265 *Ibid* at e496.

266 *Ibid*.

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of children becoming subject to a child protection plan.[267] The authors note:

> Children's needs are likely to increase with increasing child poverty. But the provision of child-in-need services might not, supporting concerns about an underfunded, risk-averse child protection system, increasingly focused on acute, investigatory statutory interventions at the expense of prevention and family support. These findings underscore the need for an approach to child protection that explicitly addresses the socioeconomic conditions of families' lives.[268]

They conclude that "child poverty is a modifiable risk factor for care entry, which is highly amenable to policy intervention, where there is political will."[269]

Anthony *et al* carried-out research examining the impact of early adversity on children adopted from care and its connection with the development of post-traumatic stress symptoms.[270] The study examined 374 social worker records along with a questionnaire in a longitudinal study completed by 58 children over 4 years post adoption from care. Similar to other research, the authors found that "neglect was the most prevalent form of maltreatment, with over half of all children adopted in Wales in a 13-month period recorded as having experienced neglect, followed by verbal abuse, physical abuse, and a small percentage recorded as experiencing sexual abuse".[271] Exposure to domestic violence, parental drug abuse, parental separation, incarceration, at least one parent with a learning difficulty and pre-natal exposure to toxic substances also featured in the early lives of the children adopted from care in this study.

With regard to symptoms of post-traumatic stress, the authors found that "between 7 and 14% of children displayed symptoms scoring within the clinically significant range for all subscales, suggesting that our sample may have higher rates of PTS symptoms than the general population".[272] They note, however, that given the children's loss of relationships with their birth families and foster carers, "it is encouraging to note the absence of PTS symptomology for many children".[273] One group of children "appeared to have experienced relatively lower exposure to our indices of early adversity .... All the children in this group were removed from their parents' care at birth".[274] The authors note that the group of children with "the highest probabilities of all types of abuse, neglect, and household dysfunction, particularly witnessing domestic violence" had significantly higher scores for PTS intrusion symptoms, "which includes nightmares, flashbacks, fear in response to trauma-reminiscent events, and being upset by traumatic memories".[275] The children who experienced both "pre-natal substance exposure and the neglectful and abusive parenting"

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267 *Ibid* at e500.

268 *Ibid* at e502.

269 *Ibid*.

270 R Anthony, AL Paine, M Westlake, E Lowthian and KH Shelton, "Patterns of adversity and post-traumatic stress among children adopted from care" (2021) *Child Abuse & Neglect*, https://doi.org/10.1016/j.chiabu.2020.104795.

271 *Ibid* at pp 7-8.

272 *Ibid* at p 8.

273 *Ibid* at p 8.

274 *Ibid*.

275 *Ibid* at p 9.

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had significantly higher scores than any other groups of children in the study "for PTS avoidance symptoms, which includes emotional numbing, as well as PTS arousal symptoms such as jumpiness, tension, attention and concentration and sleep problems".[1] The study findings "highlight the need for evidence-based trauma-informed pre-adoption services … and continuity of interventions from an adequately resourced professional network to meet the needs of children with respect to their mental health post-adoption".[2] The authors also recommend "the provision of appropriate supports" for parents with learning difficulties or for those who may expose their children to neglect in an effort to "mitigate the risk of harm" to children.[3]

4.3.2.2 Informal carers

An article by Varadan discusses the important role which informal carers can play in children's lives, and points to the lack of recognition which they are afforded in the CRC, questioning whether this has an impact on their ability to care for children.[4] Varadan begins by detailing the attention which informal carers received in the drafting process of the CRC and notes that the final draft and current convention makes just one reference (in Article 5) to "members of the extended family or community". According to Varadan, the wording of Article 5 reflects the fact that "children grow up in a diversity of parenting structures, often relying on carers beyond their biological or legal parents".[5] Varadan notes the disappointment expressed by NGOs and other delegates who were critical of the limited recognition which was afforded to extended families and communities overall "which does not reflect the lived realities of parenting and family structures in most parts of the world".[6]

Varadan considers General Comments of the UN Committee on the Rights of the Child, noting that "there are at least 37 instances … in which the CRC Committee has adopted a wider reading of 'parent' … 'family' … or 'family environment', relying in some measure on article 5 to take into account the role of extended family and community as informal carers".[7] She found that "the CRC Committee has increasingly referred to informal carers either jointly or interchangeably with parents", yet despite this willingness "to acknowledge the role of informal carers through a broad reading of 'parent' and 'family', it has been less willing or able to extend direct support and assistance to informal carers particularly where parents or legal carers remain primarily responsible for the child".[8] Varadan concludes that the CRC Committee should provide "clearer guidance specifically on how informal carers should be recognised and supported, and what protections should be accorded to informal care arrangements under the CRC".[9]

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1 *Ibid*.

2 *Ibid*.

3 *Ibid*.

4 S Varadan, "There's No Place Like Home: The Role of Informal Carers under the UN Convention on the Rights of the Child" (2021) 35 *International Journal of Law, Policy and The Family*, https://doi.org/10.1093/lawfam/ebab049.

5 *Ibid* at p 7.

6 *Ibid* at p 8.

7 *Ibid* at p 9.

8 *Ibid* at p 12.

9 *Ibid* at p 21.

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4.3.2.3 Care for new-born babies

A study by Broadhurst *et al* presents the results of qualitative research carried out in eight local authority areas and health trusts in England and Wales concerning urgent care proceedings for new-born babies, which are carried out under section 31 of the Children Act 1989.[10] The research involved focus groups and interviews with both parents and professionals "to probe the context and experience of infant removals at birth".[11] The authors explain that while "there is clear recognition of the need to protect new-born babies at risk of harm", issues of concern include "notice to parents, general transparency of practice, lack of inclusion of wider family networks, disproportionate impacts on marginalised communities, the quality of evidence put before the courts … the checks and balances within justice systems, and the impact of emergency action on mothers in the immediate postpartum period".[12] With regard to the notice that is given to parents, Broadhurst *et al* detail that some "cases are heard with as little at 1–2 days' notice, and indeed, new evidence is of an increasing number of cases issued and heard the same day" which can have serious consequences for parents' procedural rights under Articles 6 and 8 ECHR.[13] Further, where there is an order for the "immediate separation of mother and baby", the authors emphasise that this is "a particularly severe interference with the right to family life under Article 8, because evidence before the court is inevitably incomplete"; they cite Jackson LJ in the Court of Appeal, who stated that 'the separation of mother and child at such a crucial developmental stage would, apart from its serious impact on the child and on the mother/child bond, risk skewing the final decision'".[14] A review of decisions made is vital "as soon as is practical" given that the evidence base may have been incomplete.[15]

The study found that "professionals … said that *on too many occasions* practitioners and parents were on the back foot, babies had been born, and local authority planning had neither been finalised nor shared with parents", with one GAL commenting that "I've had too many cases where it's a shock to the Mum, what the plan of the local authority is … she might be told that they are going for removal, you know 2 days before she is going to give birth".[16] A social worker commented that although many babies are born prematurely, there are sometimes no plans in place to deal with this: "the mother gave birth 11 days early, it was all really rushed, we didn't have the birth plan ready, we didn't have the court work ready, it was the complete opposite of good practice".[17] Parents meanwhile explained that they were contacted by social workers via phone call while the mother was being induced, and only informed at that point that an application would be made to court

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10 K Broadhurst, C Mason and H Ward, "Urgent Care Proceedings for New-born Babies in England and Wales – Time for a Fundamental Review" (2022) 36 *International Journal of Law, Policy and the Family*, https://doi.org/10.1093/lawfam/ebac008.

11 *Ibid* at p 4.

12 *Ibid* at p 7.

13 *Ibid* at p 8.

14 *Ibid*.

15 *Ibid* at p 9.

16 *Ibid* at p 14.

17 *Ibid* at p 16.

for their baby to be removed from their care: "I said, 'Mary, don't ring me, you're stressing me out. Goodbye.'".[18]

The authors identified issues with the quality of legal representation afforded to parents, including that inexperienced lawyers provide advice in a "complex legal process" where the parents may have "learning needs" and require "sufficient time to digest" the court proceedings.[19] They pointed out that "asking women to participate in care proceedings within a day or days of birth was unjust".[20] Having considered all of these issues, the authors call for "a more fundamental review … of women's legal and procedural rights in the immediate post-partum period, and what more might be done to strengthen urgent decision-making for babies".[21]

4.3.2.4 Outcomes for children

Sariaslan *et al* conducted a study in Finland examining "the risk of experiencing adverse social and health outcomes in adulthood among children and adolescents placed in out-of-home care".[22] This was a "cohort and cosibling study of all children born in Finland between 1986 and 2000", involving more than 885,000 people, and the researchers "monitored each person from their 15th birthday either until the end of the study period (December 2018) or until they migrated, died, or experienced the outcome of interest".[23] It was found that the "risk of adverse social and health outcomes in adulthood were elevated 1.4- to 5-fold among children placed in out-of-home care compared with their siblings who had never been placed in out-of-home care".[24] The authors explain that "[b]y comparing differentially exposed siblings, the study was able to account for shared genetic and environmental preplacement factors".[25] It was noted that "[c]ompared with their peers who had never been placed in out-of-home care, children who had been placed in out-of-home care experienced more psychosocial adversities and socioeconomic disadvantages".[26] The authors suggest that while "it may be necessary to remove children from parents who expose them to severe maltreatment, neglect, or abuse, out-of-home care placement is associated with important outcomes that need careful review".[27] The authors also stated that "foster care placement should be prioritized and the quality of care improved".[28] Importantly, the research also pointed out that "[e]ach additional placement episode was associated with an increased risk of many of the examined outcomes, whereas the duration of placement was not", and accordingly, "[r]educing the risks of placement

18 *Ibid*.

19 *Ibid* at p 18.

20 *Ibid* at p 19.

21 *Ibid* at p 31.

22 A Sariaslan, A Kääriälä, J Pitkänen, H Remes, M Aaltonen, H Hiilamo, P Martikainen and S Fazel, "Long-term Health and Social Outcomes in Children and Adolescents Placed in Out-of-Home Care", (2021) 176 *JAMA Pediatrics* 1.

23 *Ibid* at pp 1-2.

24 *Ibid* at p 2.

25 *Ibid*.

26 *Ibid* at p 3.

27 *Ibid* at p 2.

28 *Ibid* at p 8.

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instability should therefore be considered".[29] This finding reinforces the desirability of avoiding moving children in care to multiple new placements, which has been an issue faced by a significant number of children in the care system in Ireland.

4.2.3.5 Reunification

Section 4.2.4.2 above discussed a number of recent Irish cases concerning the adoption of children from the care system, in which the issue of reunification was a key concern of the courts. In this regard, the publication by O'Connor, Funcheon and Brady of a study of the experiences of the reunification of children in out-of-home care with their birth parents in Ireland is timely.[30] The authors conducted semi-structured interviews with 12 participants, including "foster carers, social workers, social care workers and legal professionals … who hold, or potentially hold, key positions relevant to the reunification process in Ireland".[31] This under-researched area has had a "a limited focus … in practice" and participants reported that "[t]he process around reunification lacked clarity and was considered 'grey' and described by some as being practitioner or area dependent".[32] The lack of attention which reunification has received has consequences for children, including that some children appear to be "'drifting' and remaining in the care system. When children are placed in care, limited emphasis is placed on exploring/preparing for their return, subsequently resulting in children, birth parents and families getting caught in the system".[33] The authors reported that the participants felt that "more needed to be done to support parents", including an "increased focus on working with birth parents … to ensure a full understanding of their rights as birth parents, to empower them to remain connected to their children and explore options in relation to reunification".[34]

The authors call for "a comprehensive research agenda in this area to investigate many issues related to the reunification process to assess what is happening" as well as "the need for a deeper understanding as to why reunification has been neglected from a policy and practice perspective in the Irish context and an examination of the reasons why barriers to reunification exist".[35] Further, "more checks and balances are required within the system to ensure all legislative requirements in the reviewing process for children in care are fulfilled and that questions and possibilities regarding reunification, are sufficiently explored, in the best interest of every child".[36] The need for "an independent component within the system, whose purpose is to explore possibilities and provide supports to enable reunification, is required".[37] In light of the recent High Court case law on adoption, these recommendations are well made and require close attention.

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29 *Ibid*.

30 S O'Connor Funcheon and E Brady, "An exploration of professional and practice-based perspectives on reunification of children in out-of-home care in Ireland: The road less travelled?" (2021) 122 *Child Abuse & Neglect* 105336.

31 *Ibid* at p 5.

32 *Ibid*.

33 *Ibid* at p 6.

34 *Ibid* at p 8.

35 *Ibid* at p 9.

36 *Ibid*.

37 *Ibid*.

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4.3.2.6 Youth justice and children in care

A study by Shaw and Greenhow presents research "focused on participants' perceptions of the key issues that precipitate the youth justice involvement of children in care", drawing on focus groups and interviews with professionals working in social work and criminal justice in the North West of England.[38] The authors estimate that children in care in England are "currently five times more likely to be cautioned or convicted of an offence than other children" but explain that "these data are limited … meaning that the true figure is unknown".[39] They outline that children placed in residential care are the most likely to face criminalisation; their research also confirmed findings in previous studies that "residential care was overwhelmingly perceived to be the more problematic environment" with care home staff having "a particularly low threshold for instigating police involvement for relatively minor instances of assault and criminal damage and that as such, police involvement becomes normalised".[40] With regard to foster care, this "was seen was as an altogether more positive environment by most participants", with comments describing it as "a home type setting" with an "opportunity for attachment".[41] Despite this, some issues were flagged with respect to criminalisation, including comments that foster carers are being "criticised … for not phoning the police", which the authors state "runs directly counter to the prevailing ethos that children in care should not be unnecessarily criminalised".[42] It is surmised that there is an "impression … of a workforce preoccupied with considering potential future harm rather than focusing on how best to work with the young people in positive ways to overcome problems they might currently be experiencing".[43]

4.3.3 Disclosure of Child Sexual Abuse

Research by Gewehr *et al* discusses predictors of disclosure latency in child sexual abuse cases—ie "the time interval between the first incident and the first informal disclosure of the abuse.[44] The authors reviewed files of 124 cases of child sexual abuse and found that the average amount of time that it took for children to disclose abuse was 2.8 years, and that "intrafamilial abuse is disclosed 4.65 times later than extrafamilial abuse".[45] They found that "younger children delay disclosure longer than older children", and that "the considerable disclosure latencies found for young children in the current sample of substantiated cases … underline the notion that young children indeed also face difficulties in disclosing abusive experiences".[46] Gewehr *et al* state that their "results support recommendations to further develop or implement sex education and abuse prevention programs already

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38 J Shaw and S Greenhow, "Professional perceptions of the crime-care connection: Risk, marketisation and a failing system" (2021) 21 *Criminology & Criminal Justice* 472 at p 476.

39 *Ibid* at p 473.

40 *Ibid* at p 477.

41 *Ibid* at p 480.

42 *Ibid* at p 481.

43 *Ibid* at p 483.

44 E Gewehr, B Hensel and R Volbert, "Predicting disclosure latency in substantiated cases of child sexual abuse" (2021) 122 *Child Abuse & Neglect* 105346 at p 7.

45 *Ibid* at p 7.

46 *Ibid* at pp 8-9.

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for young children … if those programs have proven effective and are sensitive to the issue of false allegations" but also note that "more research on age-specific barriers and facilitators of disclosure is needed in order to tailor such programs to the needs of different age groups".[47] The authors conclude that there is a "need for large samples, systematic reviews, or meta-analyses in order to reliably reassess or aggregate the many effects on disclosure latency detected so far".[48]

Mooney presents research based on an online survey concerning adults' experiences of disclosing child sexual abuse to child protection services, in which 29 people participated.[49] The survey, which was co-designed by Mooney and colleagues from One in Four, Dublin Rape Crisis Centre, and the Rape Crisis Network Ireland, was used to explore issues such as the impact of the EU Victim's Directive in practice, data protection, and the "facilitators and barriers" to disclosing child sexual abuse to child protection services.[50] The results show that "the majority" of participants "disclosed over ten years after their experiences of abuse";[51] the "most prominent category of persons to whom the participants first disclosed were professionals (26%)".[52] Mooney reports that, of those who responded, "a majority … either disagreed (n=2) or strongly disagreed (n=6) with the statement that they understood the process of what would happen regarding the assessment of their disclosure".[53] The author recounts his previous research which showed that a "lack of information or clarity" following disclosure to child protection services has been "described as a black hole, a void, falling off a cliff".[54]

With respect to the EU Victims Directive, Mooney states that "the assessment of disclosures of childhood sexual abuse … could benefit from similar provisions to those laid down in the Directive" (a recommendation also made in the 2020 *Annual Report of the Special Rapporteur on Child Protection*).[55] Accordingly, survey questions focused on the extent to which "individuals are currently experiencing some of this positive practice" from the Directive.[56] The survey results showed that "three of the twelve were offered information in relation to how to make a complaint, only one person was supplied with information regarding available sexual abuse support services, and eight responded that they had received none of the above".[57] With respect to data protection law, "most participants were not informed that their personal information would be shared with a third party. When asked specifically about whether or not they were informed if details of

47 *Ibid* at p 9.

48 *Ibid* at p 10.

49 J Mooney, *Barriers or Pathways? Aiding retrospective disclosures of childhood sexual abuse to child protection services* (2021), available at https://irishsocialwork.files.wordpress.com/2021/10/barriersorpathways_-1.pdf.

50 *Ibid* at p 6.

51 *Ibid* at p 20.

52 *Ibid* at p 21.

53 *Ibid* at p 25.

54 *Ibid* at p 38. See further J Mooney, "How Adults Tell: A Study of Adults' Experiences of Disclosure to Child Protection Social Work Services" (2021) 30 *Child Abuse Review* 193.

55 Mooney (n 267 above) at p 39. See also C O'Mahony, *Annual Report of the Special Rapporteur on Child Protection 2020* at pp 55-56.

56 Mooney (n 267 above) at p 39.

57 *Ibid* at p 39.

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their disclosure would be shared, a similar amount (77%, n=17) stated that they were not advised of this".[58] Mooney concludes that "the adult victim and survivors themselves … remain in the dark about how their disclosures will be managed, how their experiences will be cared for, when they come forward to disclose either to seek help or to protect current or future children, or both".[59] Core recommendations put forward by Mooney include that practitioners responding to disclosures of childhood abuse and trauma "must develop professional knowledge of the dynamics of abuse and disclosure"; communication with the person disclosing "should be clear, regular, accurate, and timely … understandable and sensitive to dynamics of abuse" and "[c]larity should be a key component".[60]

4.3.4 Child Participation

Toivonen *et al* discuss children's participation in the decision-making process in child welfare removals in Estonia and Finland.[61] They explain that children in the care system may "lack the experience of being heard in the family, which negatively affects their capacity to participate" and accordingly, professionals and decision-makers "should pay special attention to their rights".[62] Professionals' views were garnered as part of a survey conducted through the IDEA project (Improving Decisions through Empowerment and Advocacy: Building Children's Rights Capacity in Child Protection Systems), a five country project involving Ireland, Sweden, Finland, Estonia and Hungary, from 2017-2019.[63] Some 107 professionals in Estonia (89 social workers and 18 lawyers) and 115 professionals in Finland (42 social workers and 67 lawyers) participated in the research. The authors found that "most of the Finnish (n = 58) and Estonian participants (n = 60) had received education or training on children's rights and listening to children" yet many stated that they needed more training such as "to learn more about developing child-friendly legal documents, ways to secure the participation of children from minority groups".[64] It was found that "Finnish lawyers were significantly less comfortable communicating with children under 12 years of age … than the Finnish and Estonian social workers".[65] Also, while a "majority of the participants usually met the child involved in a child-welfare case … Finnish lawyers were significantly the least likely to meet the child".[66] The authors explain that the professionals in these countries were subsequently provided with training on children's participation and that further research is required to examine "the impact of this training and the extent to which it improved the professionals' understanding of the child's right to participate and their ability to enforce it".[67]

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58 *Ibid* at p 32.

59 *Ibid* at p 45.

60 *Ibid* at p 44.

61 V Toivonen, J Muhonen, L Kalliomaa-Puha, K Luhamaa and J Strömpl, "Child Participation in Estonian and Finnish Child Welfare Removals – Professionals' Perceptions and Practices" (2021) 29 *The International Journal of Children's Rights* 701.

62 *Ibid* at p 702.

63 This project was coordinated by Professor Conor O'Mahony and Dr Kenneth Burns, University College Cork. See further https://ideachildrights.ucc.ie/.

64 Toivonen *et al* (n 279 above) at p 714.

65 *Ibid* at pp 714-716.

66 *Ibid* at p 718.

67 *Ibid* at p 725.

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Höjer *et al* share the results of a Swedish survey (also part of the IDEA project) of 173 child protection practitioners examining "how the study participants perceive their knowledge of legal frameworks concerning children's right to participate as well as their ability to communicate with children".[68] Practitioners who participated in this study included "55 social workers, 12 lawyers, 103 laypersons (the latter from both administrative courts and social welfare boards) and 3 who did not report a role in the decision-making system".[69] Höjer *et al* report that while "[m]ore than 8 in 10 professionals believe they have good knowledge of the legal framework for child protection", "[p]erceived knowledge about human rights is not as high" and this is equally the case for "the process rules in the administrative court".[70] The authors explain that "the actual knowledge of how the processes are handled may be lower among first-line social workers" which "is not unproblematic since the social workers are the ones who meet the families and children most often and should be able to explain how the process is handled" and this may also inhibit "children's participation in the process if there is insufficient knowledge about it".[71] Further, it is reported that "almost half of social workers believe they need education" in "national legislation concerning the placement of children in care".[72]

With regard to communicating with children, while "8 in 10 lawyers and social workers" believed it was important to talk directly with children, just "3 in 10" laypersons viewed it as important; "there is a distinctive pattern … Social workers do so almost always, lawyers from time to time and laypersons seldom or never".[73] The authors commented that "there is room for development" in ensuring that practitioners feel "very confident" when communicating with children, and stated that "[a]lmost half of the respondents reported that building trust is one of the greatest challenges to communicating with children" while "[a]lmost 1 in 3 reported a lack of aids or instruments to help their communication with children".[74] It was also found that "[a]pproximately half of the lawyers adapt their language in documents to make them easier to understand for children, whereas only 1 in 4 social workers do so" and that there is an interest amongst these practitioners to develop their ability "to write in a more child-friendly way".[75] The authors conclude by raising questions about the role of laypersons in child protection decision-making processes in Sweden, and suggest the need for comparative research with Norway and Finland which previously had a similar system to Sweden.[76] They also raise a question as to laypersons perceived knowledge in this area, asking: "If laypersons think they have more expertise than they do, can it lead to wrong decisions?".[77]

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68 S Höjer, E Hultman and M Larsson, "What do actors in child protection processes in Sweden know about children's rights to participation and about talking to children?" (2022) *Nordic Social Work Research* 1 at p 6.

69 *Ibid*.

70 *Ibid* at p 8.

71 *Ibid*.

72 *Ibid*.

73 *Ibid*.

74 *Ibid* at p 9.

75 *Ibid* at p 10.

76 *Ibid* at p 11.

77 *Ibid* at p 12.

Massons-Ribas *et al* consider children's rights to participation under Article 12 of the UN Convention on the Rights of the Child in the context of the child protection system, examining domestic legislation in Spain, and focusing on "the right to be informed, the right to be heard and the right to be involved".[78] The authors found that "the current legislation does not guarantee that—in all cases—the will, desires or preferences expressed by CA (children and adolescents) will be valued and considered in the decision that is ultimately made".[79] They state that "a significant imbalance between the different legislation under analysis is noted, as some are very active and advanced (Valencia, Balearic Islands) in respecting and implementing the right to participation, compared to others whose respect is formal (Extremadura, Andalusia, Asturias, Galicia)".[80] With regard to the right to be informed, it is commented that "[d]espite being legislated", several "aspects are commonly not shared (or appropriately shared) with children when they start a fostering process".[81] Regarding the right to be heard, the need for training for professionals working with children and adolescents is flagged and, finally, concerning "the right to have the opinion that was expressed taken into consideration", it is "necessary to give reasons for the decision made, weighing the different interests at stake and, if it is not taken into consideration, stating the specific reasons why it diverges from the will declared".[82]

Gerdts-Andresen and Aarum Hansen discuss the weight that is afforded to the child's views in decisions of the Norwegian County Social Welfare Board regarding visitation and contact for children in care.[83] The authors consider 86 care orders from 2018 and 2019 concerning 107 children. It was found that "only ten of the children (N=16%) got their view assessed and elaborated in the written decisions", "[m]ost children either did not get their views mentioned in the Board's written decision (N=26%), or had their views briefly mentioned (N=37%)".[84] Further analysis shows that "[o]ut of 21 children aged from 4–7, only three children were offered the possibility to express their views on the matter of visitation rights. However, only two of the care orders presented the child's view in the care order".[85] With regard to the Board's decision not to ascertain the child's views, various statements have been outlined, such as "'(Boy, 5 years) has not been heard. He is too young to form an opinion in the case'".[86] As the authors point out, the Board's decision not to ascertain the child's views "refers solely to the child's age" but the Committee on the Rights of the Child makes clear that "age in itself should however not be understood as limiting" the child's participation.[87] Further, in two cases, children aged 6 and 10 years old were not given an opportunity to be heard due to their disability, which the authors

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78 A Massons-Ribas; M Àngels Balsells and N Cortada, "The Participation of Children and Adolescents in the Protection System: The Case of the Spanish Legislation" (2021) 10 *Social Sciences* 1.

79 *Ibid* at p 6.

80 *Ibid* at p 9.

81 *Ibid* at p 9.

82 *Ibid* at p 9.

83 T Gerdts-Andresen and H Aarum Hansen, "How the Child's Views is Weighted in Care Order Proceedings" (2021) 129 *Children and Youth Services Review* 106179, https://doi.org/10.1016/j.childyouth.2021.106179.

84 *Ibid* at p 11.

85 *Ibid* at p 12.

86 *Ibid*.

87 *Ibid*.

note as being contrary to Article 2 CRC and Article 14 ECHR.[88]

The authors also found that in cases where children's views were heard and where the children expressed a view that they wished to have limited contact with their parents, the "Board's weighting of aspects that led to the decisions, are however nowhere to be found in the care orders".[89] An example cited by the authors includes that "'Despite (boy, 13 years) opinion on visitation regulation, the Board is obligated to establish a visitation right for his mother'".[90] According to the authors, "the child's expressed view on not having contact with their parents appears secondary to the 'mutual right' to contact".[91] The authors present multiple examples of children's views either not being ascertained or given due weight and as a result, they call for "a professional elaboration on whether it is intended and accepted that children have a fundamental right to be heard in child welfare law proceedings according to CtRC standards (2009), or if the CtRC standard on child participation does not apply in such proceedings".[92] In particular, they highlight the need for clarity around the point as to "whether there is an age limit for children to be given the opportunity to express their views in such matters, but also what significance is expected to be attached to a child's view".[93] They also call for further research as to children's participation in legal proceedings.

Pösö explores the issue of children�s consent to child welfare services, observing the dearth of research considering children�s rights and experiences in this regard.[94] Pösö looks to the treatment of children�s consent in Finland where the law stipulates that "children aged 12 years or older are asked about their consent or objection to the care order proposal and their view has the same procedural implications as that of their parents, possibly resulting in a 'consensual removal'".[95] It is commented that "there are no statistics (or research) to demonstrate how frequently children give their consent and how often their view about the care order proposal differs from their parents' view".[96] The author led an empirical study of 22 young adults aged between 18 and 29 years old, in 5 separate group discussions between 2019 and 2020. All of the young adults were previously in care and 14 of the 22 young adults had consented to this care themselves. As to the results of this empirical research, the author reports that while the young adults stated that they were "informed", this was not always "in a personally meaningful way".[97] Further, the point was also made that their "consent or objection does not have any impact if the authorities wish to proceed in a certain way" and accordingly, "there were suggestions to involve the child as informing the authorities about her/his thoughts on the proposal instead of asking

88 *Ibid* at p 13.

89 *Ibid* at p 14.

90 *Ibid* at p 15.

91 *Ibid*.

92 *Ibid* at p 22.

93 *Ibid*.

94 T Pösö, �Children�s consent to child welfare services: Some explorative remarks� (2021) *Children & Society*, https://doi.org/10.1111/chso.12483.

95 *Ibid* at p 2.

96 *Ibid* at p 4.

97 *Ibid* at p 6.

for a binary view of consent or objection”.[98] In addition, the young adults spoke about the importance of having a good relationship with their social worker as this can give “the child the opportunity to speak freely and be heard”.[99] The young adults also discussed the influence of their parents’ views on their own views, as well as emotions such as fear that that they may have for their own safety, or indeed the safety of their parents, should they choose to leave parental care.[100] Pösö concludes that “the complexities of relations, interdependencies, emotions and power cannot always be reduced to the binary options of consenting or objecting to a proposal” and instead suggests that “‘non-views’” should be recognised, thereby indicating, where relevant, that a particular child does not know “which is not to consent or to object but to withdraw from expressing a view about the proposal”.[101] According to the author, a “non-view” option “should be included in formal decision-making procedures”.[102]

4.3.5 Children and Domestic Abuse

Morrison and Houghton consider the impact of policy introduced in Scotland during the COVID-19 pandemic on children’s rights in the context of domestic abuse.[103] The authors explore an independent Children’s Rights Impact Assessment/Evaluation carried out for the Commissioner for Children and Young People Scotland in May and June 2020.[104] Policies were examined in the light of the UN Convention on the Rights of the Child and the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (“the Istanbul Convention”) concerning four themes: “protection; prosecution; provision; and participation”.[105] With regard to the protection of children, the authors note that “‘[l]ockdown’ policies, or ‘stay at home orders’, in response to the pandemic threatened children’s rights to protection from domestic abuse”.[106] It is observed that “[m]ost children who experience domestic abuse are not known to services like social work or specialist domestic abuse services” and that the “closure of schools and early-years settings … breached children’s broader rights to protection”.[107] Further, while “‘vulnerable children’ … were permitted to continue to attend education and childcare settings” early on in the pandemic, this did not include those who are or may be experiencing domestic abuse; and while efforts were made to assist adult victims of abuse, no such efforts were made to specifically assist children.[108]

For those children who were known to social services and the police, it is shown that

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98 *Ibid* at p 7.

99 *Ibid* at p 8.

100 *Ibid* at p 9.

101 *Ibid* at p 10.

102 *Ibid*.

103 F Morrison and C Houghton, “Children’s human rights in the contexts of domestic abuse and COVID-19” (2022) *International Journal of Human Rights*, https://doi.org/10.1080/13642987.2022.2057963.

104 C Houghton, F Morrison and L McCabe, “Domestic Abuse: Children’s Rights Impact Assessment (CRIA)” (Commissioner for Children and Young People Scotland, 2020), available at https://www.cypcs.org.uk/wpcypcs/wp-content/uploads/2020/07/CRIA-appendix-domestic-abuse.pdf.

105 Morrison and Houghton (n 321 above) at p 5.

106 *Ibid* at p 6.

107 *Ibid*.

108 *Ibid*.

these professionals had limited direct contact with children due to physical distancing. A very limited number of "urgent" court proceedings were heard, and where virtual court hearings took place, children's participation may have been constrained if they were living with a domestic abuse perpetrator. With regard to prosecution, the authors highlight that many criminal trials were delayed, leading to uncertainty, fear and trauma for some children.[109] Further, with regard to provision, it is shown that the curtailment of domestic abuse support and advocacy had a real impact on children, and virtual services could not act as a substitute. Children made homeless during the COVID-19 pandemic as a result of domestic abuse were impacted by a housing shortage. Finally, with regard to children's participation, this was affected not only by the limited number of court hearings, but also by limited developments with pre-recorded evidence and limited participation "in national policymaking".[110] The authors suggest that a "Joint Protocol between the UNCRC and the Istanbul Convention" could "provide a means to make visible the protection, prosecution, provision, and participation rights of both child and adult victim survivors of domestic abuse, enable scrutiny of the implementation of these rights and a platform from which to address breaches to these rights".[111]

Birchall and Choudhry describe the results of empirical research focused on "the experiences of 72 survivors of domestic abuse and their children" in the family courts, carried out by Women's Aid Federation England and Queen Mary University of London.[112] The authors note that allegations of parental alienation are increasingly evident in domestic abuse cases in the family courts. By way of background, the authors discuss parental alienation as a term in itself and note the lack of reliable studies supporting its validity as a concept. In particular, it is observed that there are "gendered assumptions" underlying parental alienation and that it can be used to "undermine allegations of domestic abuse in child arrangements proceedings".[113] The authors note that participants in the research "reported an often unquestioning acceptance of and buy-in to theories of parental alienation from the professionals they encountered during their family court cases".[114] Birchall and Choudhry point out that the "unfortunate consequences of this" are that a parent or child refusing contact with the other parent "can be easily confused with justifiable behaviour used by survivors of domestic abuse to protect their children from harm, and behaviour exhibited by children who have a justifiable reason for not wanting to see a parent who is abusive".[115] Strikingly, the authors comment that "[o]ver a third of the women taking part in our focus groups and interviews had had their children removed to the perpetrator as a result of parental alienation allegations".[116] The authors also observe that children's voices can be silenced in these cases "as it is assumed that the 'alienating' parent has prevented the child from telling the truth".[117] It is concluded that

109 *Ibid* at p 8.

110 *Ibid* at p 11.

111 *Ibid* at p 12.

112 J Birchall and S Choudhry, "'I was punished for telling the truth': how allegations of parental alienation are used to silence, sideline and disempower survivors of domestic abuse in family law proceedings" (2021) 6 Journal of Gender-Based Violence 115.

113 *Ibid* at p 116.

114 *Ibid* at p 124.

115 *Ibid* at pp 124-125.

116 *Ibid* at p 126.

117 *Ibid* at p 127.

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theories of parental alienation "should not be considered without analysis of the impact they have on survivors of domestic abuse and their children".[118]

Overall, the research by Birchall and Choudhry adds to a growing body of research in this area, highlighting similar issues around domestic abuse and children's views in cases where allegations of parental alienation are made.[119] The Department of Justice has been engaging with this topic recently; it commissioned an independent research report on approaches to parental alienation in other jurisdictions in May 2021[120] (which has yet to be published at the time of writing), and announced an open consultation on parental alienation in May 2022.[121]

4.3.6 Home Learning during the COVID-19 pandemic

McMahon *et al* discuss how parents and children of primary school age navigated home learning during the COVID-19 pandemic in Ireland, with a particular focus on children's mental health.[122] Some 797 parents participated in an online survey in April and May 2020; the average age of their children was almost 9 years. Some 15.6% of the children were reported by their parents as having a special educational need.[123] The survey included questions regarding the amount of time a child was expected to do school work for every day, and the amount of time which was actually spent doing school work, as well as questions regarding whether the child had support from an adult or a friend.[124] The authors report that "the majority of families coped well with the transition and most students were reported to be in the normal range for mental health issues. However, … we found that parent ability to support their child to complete schoolwork was significantly associated with child mental health status and that parental psychological distress partially mediated the influence of this".[125] Of note, the authors state that "the study provides evidence that the additional burden of supporting children's learning during COVID-19 restrictions might increase the level of psychological distress in already overburdened parents, thereby affecting the mental health of children during the pandemic".[126] The findings showed a connection between children doing "lower amounts of schoolwork" in a day (such as less than two hours) and child mental health problems.[127] The authors emphasise the importance of "close cooperation between schools and parents" and observe that "parents should be provided with relevant and accessible resources and materials on what their child is

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118 *Ibid* at p 128.

119 See, for example, J Doughty, N Maxwell and T Slater, Review of research and case law on parental Alienation (Cafcass Cymru, 2018), available at https://gov.wales/sites/default/files/publications/2018-05/review-of-research-and-case-law-on-parental-alienation.pdf, and A Barnett, "A geneology of hostility: parental alienation in England and Wales" (2020) 42 Journal of Social Welfare and Family Law 18.

120 See https://www.justice.ie/en/JELR/RFT-Approaches-to-the-concept-of-parental-alienation-in-other-jurisdictions.pdf/Files/RFT-Approaches-to-the-concept-of-parental-alienation-in-other-jurisdictions.pdf.

121 See https://www.justice.ie/en/JELR/Pages/Parental_Alienation_Consultation.

122 J McMahon, E A Gallagher, EH Walsh and C O'Connor, "Experiences of remote education during COVID-19 and its relationship to the mental health of primary school children" (2021) 40 *Irish Educational Studies* 457.

123 *Ibid* at p 459.

124 *Ibid*.

125 *Ibid* at p 464.

126 *Ibid*.

127 *Ibid*.

learning and how best to teach it", such as "online written material or 'how-to' videos".[128]

Mohan *et al* present the results of a survey focusing on the resources and supports available to secondary school students while learning from home due to school closures during the COVID-19 pandemic in Ireland.[129] The survey was conducted with one-third of "second-level school leaders" in May and June 2020.[130] The researchers found that in excess of three-quarters of the school leaders reported that "school attendance worsened during the closures period" and "modelling results revealed that the probability of reduced student attendance … was lower in catchment areas with high levels of [parental/guardian] education".[131] Further, "overall student engagement was better in catchment areas with higher educational attainment".[132] In particular, "parental education was significantly associated with engagement among Junior Certificate students, though not so for Leaving Certificate students".[133] Qualitative research was also undertaken by the researchers, involving ten in-depth interviews with school leaders[134], and this indicated that the home learning environments "generally compounded pre-existing disadvantage, as well as throwing up new issues, including broadband access for a wide cross-section of rural students".[135] Students with special educational needs and students from socio-economically disadvantaged backgrounds were found to be particularly impacted.[136] In addition, "younger students" were reported to have been impacted more by school closures and "many third-year students" were aware at an early stage "that the Junior Certificate exams were unlikely to take place and disengaged from learning in part or in full as a result".[137] According to the authors, this "is important since evidence suggests that Junior Cycle experiences have a profound impact on trajectories through Senior Cycle and into post-school education and training".[138] The authors considered their survey findings "through a social reproduction lens" and commented that "the closure of school buildings has most likely strengthened the transmission of privilege through the different resources available to different families to respond to the crisis".[139] As a lesson to be taken from this, the authors note the need for "targeted supports within the classroom environment and efforts to make school a place where students want to be" and that "[f]uture policies need to address both enduring and new forms of inequality to promote learning for all students".[140]

Mallon and Martinez-Sainz considered children's education rights during the COVID-19

128 *Ibid* at p 465.

129 G Mohan, E Carroll, S McCoy, C MacDomhnaill and G Mihut, "Magnifying inequality? Home learning environments and social reproduction during school closures in Ireland" (2021) 40 *Irish Educational Studies* 265.

130 *Ibid* at p 266.

131 *Ibid* at p 267.

132 *Ibid*.

133 *Ibid*.

134 *Ibid*.

135 *Ibid* at p 271.

136 *Ibid* at p 269.

137 *Ibid* at p 271.

138 *Ibid*.

139 *Ibid*.

140 *Ibid*.

pandemic, as well as how education about children's rights and human rights has been affected.[141] The authors point to deficits in home learning given the varying "levels of access to devices, internet and even digital literacy",[142] and they also note that "the voice of children was often missing" from stakeholder engagement during discussions about managing the spread of COVID-19 and the impact of school closures on children.[143] Citing other research, they state that the "impact of COVID-19 has magnified and worsened children's rights in the Irish context almost in every aspect possible"[144], yet they endeavour to endorse children's and human rights education "to be transformative because it encourages children to build upon the past and present to develop new alternatives and possibilities in the future to promote social change".[145] The authors emphasise the value of teacher education supporting "practitioners to develop their confidence and expertise" in children's and human rights education and "which supports all children to learn about and experience their rights, and to explore and take action for the rights of themselves and others".[146]

Cahoon *et al* discuss the impact of public health restrictions on children's education in Northern Ireland during the COVID-19 pandemic.[147] The authors detail the results of a survey which they carried out with 173 parents or guardians who are responsible for 314 primary school children, aged between 4 years and 11 years. Questions in the survey focused on the amount of time that children spent on home learning and access to technology. Parents' experiences of home learning were also considered in the questions. Findings included that 75.2% of parents "reported that children spent between 1 and 3 h engaging in home learning activities", 87.7% of parents "reported that they had access to basic resources necessary for home learning (e.g. paper and books)", while 27.5% "reported that they did not have a printer at home".[148] The authors note however that children of lower social economic status were "more likely to not have access to their own piece of technology.[149] Cahoon *et al* observe that "the digital inconsistencies of school provision as a result of teachers' variability in skills, confidence and usages of Information and Communications Technology (ICT)" was also an issue, contributing to "the digital divide and learning gap of pupils".[150] The authors also point to the challenges which teachers faced including "the balance of supporting pupils online, preparing physical learning materials for home schooling and face-to-face teaching the small number of key workers' children".[151]

Regarding parents' experiences of home learning, although "the majority … reported

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141 B Mallon and G Martinez-Sainz, "Education for children's rights in Ireland before, during and after the pandemic" (2021) 40 *Irish Educational Studies* 285.

142 *Ibid* at p 289.

143 *Ibid* at p 290.

144 *Ibid*.

145 *Ibid* at p 291.

146 *Ibid*.

147 A Cahoon, S McGill and V Simms, "Understanding home education in the context of COVID-19 lockdown" (2021) 40 *Irish Educational Studies* 443.

148 *Ibid* at pp 447 and 449.

149 *Ibid* at p 446.

150 *Ibid* at p 449.

151 *Ibid*.

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at least moderate enjoyment while supporting their children's learning", "many parents reported wanting additional support … in different subjects; maths (52.6%), science (49.1%), literacy/reading (46.2%) and art (35.1%)".[152] The authors also found that parents and guardians expressed concern about children's development of their social skills in the absence of in-person school attendance. The authors make a number of recommendations, including that "Government should … have access to the necessary information to calculate the financial remuneration required for schools to address technological deficiencies or teacher professional learning education required to ensure equity of education provision across schools nationally".[153] In addition, given the particular challenges highlighted by parents with regard to teaching mathematics at home, as well as insights from other research highlighting deficits in this subject during the pandemic, Cahoon *et al* recommend that "support for children's learning mathematics must be prioritised. This may be through providing resources for parents to use with their children or funding for targeted small-group teaching".[154] Finally, to address the concerns of parents and guardians with regard to children's social development skills, the authors recommend that children be given "time and space to engage with their friends, play and develop social skills as we emerge from the pandemic".[155]

An article by Fredman advocates adopting a "human rights-based approach" when considering the child's right to education in the context of the COVID-19 pandemic, and references the CRC, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of Persons with Disabilities.[156] Fredman makes three points: first, "the obligation to fulfill the right to education comes with a duty to do so without discrimination on a range of grounds, including race, gender, disability, language, national or social origin, birth, or 'other status' … such as economic and social situation".[157] On this point, Fredman observes that "deep pre-existing inequalities have been magnified and intensified" during the COVID-19 pandemic, with many children not having "access to Internet, computers, housing, and parental support" in circumstances where home learning has replaced in-person attendance.[158] Second, Fredman outlines that States have a duty "to devote the 'maximum of their available resources, individually or through international assistance and co-operation' to the fulfillment of the right to education",[159] and third, "States have a 'specific and continuing obligation to move as expeditiously as possible towards the full realization' of the right" to education.[160] Fredman observes that online teaching "only very partially achieves … objectives" required as part of the right to education, such as "the development of the child's personality and abilities to their

152 *Ibid* at p 450.

153 *Ibid* at p 451.

154 *Ibid* at p. 452.

155 *Ibid* at p 452.

156 S Fredman, "A human rights approach: The right to education in the time of COVID-19" (2021) 92 *Child Development* 900 at p 900.

157 *Ibid* at p 901.

158 *Ibid*.

159 *Ibid*.

160 *Ibid* at p 902.

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fullest potential, and their preparation to participate effectively in society".[161] According to Fredman, digital tools must "be managed in a human-rights compliant way", including with regard to "children's right to privacy".[162]

4.3.7 Signs of Safety

An article by Caffrey and Browne considers "[h]ow and why social workers' use of SofS (Signs of Safety) tools and processes is thought to offer opportunities to support family members' motivation to engage in the child protection process and thus maximize the family's potential to build safety around their child".[163] The authors carried out a realist review of the literature as well as four focus groups with 22 SofS experts "from nine countries across four continents".[164] The authors show that "SofS strategies mirror those that SDT (self-determination theory) research has found facilitate 'autonomous motivation'" and they suggest the need for empirical research to further explore this.[165] They add that "SDT implies that SofS can be explained as an 'interpersonal style' … with outcomes highly influenced by how families feel in interactions with workers and, at an overarching level, whether families feel that interactions are autonomy supportive or controlling".[166] They further report from their research that "engaging in an autonomy supportive way in no way negates the importance of setting and enforcing 'bottom lines'. Rather, via SDT, we show how SofS can be conceptualized as aiming to set and enforced limits in ways that support basic needs for autonomy, competence and relatedness, avoiding a controlling approach".[167]

Casey and McKendrick discuss the child's right to play under Article 31 of the CRC, analysing "play as a remedy to crisis" and "the tools that promote a rights-based case for play".[168] In doing this, the authors consider the Children's Rights Impact Assessment/ Evaluation of laws and policies introduced during the COVID-19 pandemic in 2020 published by the Children and Young People's Commissioner in Scotland. At the outset, it is shown that the child's right to play "was not being sufficiently realised in practice" prior to the Covid-19 pandemic, and that in "times of crisis … Perhaps more than ever, children still need to move, use their imaginations, laugh, interact, and experience what Lester and Russell refer to as the 'everyday magic' of play".[169] It is argued that "the greatest global threat to play is in the challenges presented by the scale of forced displacement" and that the "challenges that present in sustaining play in transit, and in temporary accommodation, are significant".[170]

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161 *Ibid* at p 902.

162 *Ibid* at p 902.

163 L Caffrey and F Browne, "Understanding the social worker-family relationship through self-determination theory: A realist synthesis of signs of Safety" (2022) *Child & Family Social Work*, https://doi.org/10.1111/cfs.12903.

164 *Ibid* at p 4.

165 *Ibid* at p 11.

166 *Ibid*.

167 *Ibid*.

168 T Casey and J H McKendrick (2022) "Playing through crisis: lessons from COVID-19 on play as a fundamental right of the child", *The International Journal of Human Rights* at p 3.

169 *Ibid* at pp 5-6.

170 *Ibid* at p 6.

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4.4 Discussion and Recommendations

From an Irish perspective, two main points emerge from the case law of the ECtHR and European Committee of Social Rights discussed at section 4.2 above. The first is the reinforcement of the positive obligation on State authorities to investigate all complaints of domestic abuse, and to take reasonable measures to mitigate risks of further domestic abuse where State authorities are aware of that risk, or ought to be aware of it. Second, it has been clarified that the obligation on State authorities to vindicate the rights of child migrants and refugees (including to humanitarian assistance, protection from harm, accommodation, education, and the appointment of a legal representative and/or guardian) does not diminish in circumstances where significant numbers of children arrive in the country and place the system under strain. This finding is highly topical given the recent influx of large numbers of refugees from Ukraine.

Section 4.2.3 discussed a recent judgment of the UK Supreme Court regarding the application of the proportionality test by courts when determining applications for care orders. As noted in the discussion of that case, the Irish courts have not, to date, adopted a similar approach to proportionality analysis in care order cases. Nonetheless, the similarities between the relevant legal frameworks in the two jurisdictions mean that it is likely that the case law of the UK Supreme Court will be cited in Irish courts in the future. If it were to be followed, this would impose a demanding standard on District Court judges in child care cases—one which is arguably incompatible with current arrangements in which most judges are generalists rather than specialists; case loads are extremely heavy; and few cases generate a written judgment.

The main issues arising from the discussion of Irish case law in section 4.2.4 are the need to amend the law on statutory rape to account for the decision of the High Court in *CW v Minister for Justice*;[171] when doing so, the opportunity should also be taken to re-name the relevant offence from “Defilement of child under the age of 17 years” to “Sexual act with child under 17 years of age”. The adoption case law discussed in section 4.2.4.2 highlights the importance of an ongoing emphasis on reunification when children are placed in care, with a proactive approach taken by Tusla to provide parents with the full range of supports necessary to ensure their ongoing involvement in their children’s lives. A failure to do so may result in the refusal by the High Court to grant adoption orders formalising the relationship between children in care and their foster carers, as happened in *Child and Family Agency and Ms A v Adoption Authority of Ireland and Ms C*.[172] The findings of the study by O’Connor, Funcheon and Brady (discussed at section 4.2.3.5 above) suggest that a concerted effort is needed to align reunification practices in Ireland with the standards set down by the case law of the ECtHR (and increasingly endorsed by the Irish courts).

Other issues highlighted by academic research published over the past 12 months (and discussed at section 4.3 above) include the reasons why children enter care (with poverty a particular risk factor), and outcomes for children in care (including adverse social and health outcomes, and a significantly increased likelihood of criminalisation). The challenges

171 [2022] IEHC 336.

172 [2022] IEHC 389.

in facilitating the disclosure of child sexual abuse has been further documented, and the recent research by Gewehr *et al* and Mooney deserves close attention in the ongoing development of law and policy in this space. Research from a range of jurisdictions on the topic of child participation in child protection systems illustrates the challenge in meeting the vision of Article 12 of the CRC. Some aspects of Irish practice measure up quite well against this international evidence, as illustrated by the HIQA reports discussed in section 2.4.1 of this Report. That is not to say that we can afford to lessen our efforts to enhance child participation in Ireland merely because other countries are experiencing challenges; instead, we should take the opportunity to learn from the international evidence as we seek to address the weak points in our approach to child participation (most obviously in the courts). Finally, a significant volume of research is now available to inform our understanding of how children engaged with the education system during the COVID-19 pandemic. The consistent findings regarding the uneven impact of lockdowns on children (with the most disadvantaged suffering the most adverse impacts) merit close attention in the response of the education system aimed at mitigating these impacts over the coming years.

Key Recommendations

- All complaints of domestic abuse must be promptly investigated, with reasonable steps taken to mitigate identified risks of domestic abuse (as per the decision of the ECtHR in *De Giorgi v Italy* and related case law).
- The standard of the State's response to the needs of migrant and refugee children cannot be allowed to slip in circumstances where significant numbers of children are in need of humanitarian assistance, protection, accommodation, education and legal assistance.
- Section 3 of the Criminal Law (Sexual Offences) Act 2006 should be replaced to take account of the decision of the High Court in *CW v Minister for Justice*; the offence contained in section 3 should also be re-named from "Defilement of child under the age of 17 years" to "Sexual act with child under 17 years of age".
- Reunification practice should be the subject of a sustained focus by Tusla in response to the recent judgments of the Irish courts (as influenced by the case law of the ECtHR).
- Child protection law, policy and practice should take close account of recent Irish and international research on issues including the link between poverty and children in care; outcomes for children in care; disclosure of child sexual abuse; child participation in the child protection system; and home learning during the COVID-19 pandemic.

APPENDIX A:

DISCUSSION PAPER ON REVIEWING LEGISLATIVE COMPLIANCE WITH THE CRC

1. Introduction

In its 2016 Concluding Observations on Ireland, the Committee on the Rights of the Child ("the CRC Committee") stated the following:

> The Committee notes as positive the recent efforts of the State party to improve the harmonization of its national law with the Convention. It is concerned, however, that … there is no legislation stipulating statutory obligations for public entities to respect the provisions of the Convention in relevant administrative proceedings and decision-making processes.
>
> The Committee recommends that the State party conduct a thorough assessment on the extent to which legislation affecting the rights of the child complies with the Convention and implement specific legislation and/or legislative amendments to ensure that the Convention is respected, including in administrative proceedings and decision-making processes.[1]

This aspect of the CRC Committee's Concluding Observations on Ireland were not isolated or unique to Ireland. In its General Comment No 5 on General measures of implementation of the Convention on the Rights of the Child in 2003, the Committee observed as follows:

> The Committee believes a comprehensive review of all domestic legislation and related administrative guidance to ensure full compliance with the Convention is an obligation. Its experience in examining not only initial but now second and third periodic reports under the Convention suggests that the review process at the national level has, in most cases, been started, but needs to be more rigorous. The review needs to consider the Convention not only article by article, but also holistically, recognizing the interdependence and indivisibility of human rights.

1 Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic reports of Ireland, CRC/C/IRL/CO/3-4*, 1 March 2016 at [10] to [11].

> The review needs to be continuous rather than one-off, reviewing proposed as well as existing legislation. And while it is important that this review process should be built into the machinery of all relevant government departments, it is also advantageous to have independent review by, for example, parliamentary committees and hearings, national human rights institutions, NGOs, academics, affected children and young people and others.[2]

In its Concluding Observations on State reports, the Committee has previously called on numerous States Parties to conduct a review along these lines; examples include (but are not limited to) New Zealand,[3] Ukraine[4] and Singapore.[5]

The purpose of this discussion paper, prepared at the request of the Department of Children, Equality, Disability, Integration and Youth, is to explore how Ireland might best respond to the Committee's recommendation that Ireland conduct a thorough assessment on the extent to which legislation affecting the rights of the child complies with the Convention. It will begin by identifying published examples of similar exercises, before proceeding to examine guidance provided by the CRC Committee and UNICEF about the obligations of States Parties to review legislative compliance with the CRC. This material will inform a discussion of the scope and design of a possible process that might be followed in a review of Ireland's legislative compliance with the CRC.

2. Examples of Similar Exercises

In the course of preparing this discussion paper, a search was conducted for published outputs (in the English language) based on comprehensive or detailed reviews of national legislation for compliance with the CRC. No single example of a comprehensive published review was identified, and detailed published reviews were relatively small in number. The closest example to the proposed exercise was the Legislative Gap analysis authored by Simon Hoffman and Sally Sellwood on behalf of the Children's Commissioner for Jersey, which was published in 2020.[6] Due to time and budgetary constraints, this report was not a comprehensive review. Instead, it focused on legislation in four areas: family environment and alternative care; disability, health and welfare; education and special protection measures. These areas were "identified as areas offering the greatest potential to reveal gaps in SoJ [States of Jersey] legislation with greatest impact for children in Jersey".[7] The report identified gaps in existing legislation, but did not proceed to make specific recommendations for potential reforms that would fill those gaps.

2 Committee on the Rights of the Child, *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, CRC/GC/2003/5, 27 November 2003 at [18].

3 Committee on the Rights of the Child *Concluding Observations: New Zealand*, CRC/C/15/Add.216, 27 October 2003 at [9].

4 Committee on the Rights of the Child, *Concluding observations: Ukraine*, CRC/C/UKR/CO/3-4, 21 April 2011 at [9].

5 Committee on the Rights of the Child, *Concluding Observations: Singapore*, CRC/C/15/Add.220, 27 October 2003 at [9].

6 S Hoffman and S Sellwood, *Legislative Gap Analysis relating to States of Jersey* (26 August 2020), available at https://www.childcomjersey.org.je/media/1389/legislative-gap-analysis-oct-2020.pdf.

7 *Ibid* at p 11.

A number of broader reviews have been conducted as part of UNICEF's Legislative Reform Initiative. Published reports of these reviews include examples from Jamaica,[8] Armenia,[9] Barbados[10] and Ghana.[11] However, while these reviews covered a broader range of laws than the recent report on Jersey, the published outputs based on the reviews are considerably less detailed and lack specific analysis of individual pieces of legislation.

In 2007, UNICEF published a study by the Innocenti Research Centre on law reform and implementation of the CRC in 60 countries.[12] The study examined background issues such as the status of the CRC in national law; reservations and declarations to the CRC; and constitutional recognition of children's rights, before examining national laws relevant to the general principles of the CRC and 12 separate thematic areas. Given the extremely broad scope of a comparative study of 60 countries, the level of detail provided on individual laws was necessarily limited. The focus was primarily on national laws that further the implementation of the CRC, with little focus on national laws which conflict with the CRC or contain gaps.

A subsequent UNICEF study authored by Laura Lundy, Ursula Kilkelly, Bronagh Byrne and Jason Kang examined implementation of the CRC in 12 countries, with detailed analysis of six (Australia, Belgium, Germany, Ireland, Norway and Spain).[13] Whereas the Innocenti report from 2007 had specifically focused on law reform as a measure of implementation of the CRC, Lundy *et al* examined the full range of legal and non-legal measures of implementation. Consequently, while the number of countries examined is smaller, the report did not have scope for a detailed examination of the specifics of particular laws and their compliance with the CRC beyond a small number of indicative examples.

The above publications provide examples of a variety of methodological and structural approaches from which lessons can be learned for the proposed legislative review; but for the reasons set out above, none of them provide a template to follow. However, detailed guidance is available elsewhere on how such a review might be structured and designed. This will be further discussed in sections 3 and 4 below.

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8 UNICEF Jamaica, *Advancing Children's Rights in Jamaica: Report on Legislative Reform Initiative* (2004), available at https://www.unicef.org/jamaica/reports/advancing-childrens-rights-jamaica.

9 H Khemchyan, T Robinson and K Quashigah, *Legislative Reform Related to the Convention on the Rights of the Child in Diverse Legal Systems* (UNICEF: 2008) at pp 1-27, available at https://sites.unicef.org/policyanalysis/rights/files/Legislative_Reform_related_to_CRC_in_diverse_legal_systems.pdf.

10 *Ibid* at pp 28-58.

11 *Ibid* at pp 59-92.

12 Innocenti Research Centre, *Law Reform and Implementation of the Convention on the Rights of the Child* (UNICEF, 2007), available at https://www.unicef-irc.org/publications/pdf/law_reform_crc_imp.pdf.

13 L Lundy, U Kilkelly, B Byrne and J Kang, The UN Convention on the Rights of the Child: a study of legal implementation in 12 countries (UNICEF: 2012), available at https://downloads.unicef.org.uk/wp-content/uploads/2012/11/UNICEFUK_2012CRCimplementationreport-FINAL-PDF-version.pdf.

3. Design of Review Process

The UNICEF Handbook on Legislative Reform, published in 2008, includes a dedicated section on review of legislation for compatibility with the CRC.[14] This guidance draws on comments made by the CRC Committee at its twenty-second session in 1999:

> The Committee recommends to States Parties that they set up a mechanism to ensure that all proposed and existing legislative and administrative measures are systematically reviewed to ensure the compatibility with the Convention on the Rights of the Child. Such reviews should be carried out considering all the provisions of the Convention, and be guided by its general principles; they should also give adequate attention to the need to ensure appropriate consultation with and involvement of civil society during the review process.[15]

The Handbook notes that "the specific details of the review process will vary depending on the nature of the political and legal system in each country", but nonetheless states that there are "several basic elements that will form part of a successful review process":

> 1. Analysis of the existing legislation in relation to both the provisions of the CRC … and the situation of children in the country concerned, including issues such as gender parity, economic status and geographic limitations;
>
> 2. Consultation with the widest possible range of people, institutions and groups interested in legislation that affects the rights of children; and
>
> 3. Development and presentation of conclusions and recommendations for further action.[16]

It is emphasised that "[t]he analysis and consultation elements of the review process are equally important and require the same level of commitment and preparation to ensure a successful review".[17] The Handbook points to the technical language used in legislation, which makes it important that the analysis element is conducted by professionals with knowledge of and familiarity with the drafting or implementation of legislation. This may include lawyers, but also child care experts, health workers, educators, children's rights advocates and others who have specialised knowledge of the issues.[18] At the same time, the analysis should go beyond the mere letter of the law and consider how it is applied by the courts and the civil authorities responsible for implementing it, as well as how it is viewed by the people it directly affects.[19] A narrow approach that relies solely on hiring a small group of legal experts to review legislation is described by UNICEF as having "several inadequacies", including that it is likely to miss important issues of implementation and

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14 UNICEF, *Handbook on Legislative Reform: Realising Children's Rights Volume 1* (2008), available at https://sites.unicef.org/policyanalysis/rights/files/LRIHandbook-Final.pdf (hereinafter "UNICEF Handbook").

15 Committee on the Rights of the Child, *Report on the twenty second session* (September/October 1999), CRC/C/90, 7 December 1999 at [291(f)], cited in UNICEF Handbook at p 44.

16 UNICEF Handbook at p 46.

17 *Ibid*.

18 *Ibid* at p 47.

19 *Ibid*.

create a greater risk of bias than a more heterogeneous process with wider participation.[20]

With respect to consultation, the UNICEF Handbook notes that "the review process should involve the full range of parties who have an interest in the situation of children and their rights":

> As the principal organ of the State, responsible for both developing and implementing legislation, the government naturally has a key role to play at all stages of the review. To be effective, the review will need to engage all organs of government, both political and administrative. The commitment of government to the process, and their full acceptance of the results, will be critical to the success of this endeavour. At the same time, the review process needs to go well beyond the formal governmental structure. It should engage all sectors of the country, covering as many representatives of different stakeholders as possible. It is especially important to involve groups which may be marginalized or disenfranchised from normal centres of authority and decision-making within the country.[21]

Potential participants in consultation include people who work with the legislation on a day-to-day basis, NGOs, academics, members of the media, parents, and importantly, "children themselves should be actively engaged in the review process, since they are the ones most immediately and directly affected".[22] Child participation must be meaningful, and include age-appropriate information that will allow children to participate in an informed way, as well as creative methods of engagement and expression.[23] The UNICEF Handbook states bluntly that "[a] public consultation process that does not provide for appropriate participation by children who are capable of participating (whatever their chronological age) will not fulfil the obligations of the State Party under the CRC."[24]

The UNICEF Handbook further recommends that the technical team prepare a summary report of their analysis which is made available in advance of the consultation process in order to allow participants in the process to engage in an informed manner and "promote a broad" based public discussion of the implications of the analysis, and of children's rights in general."[25] It points to the legislative review initiative completed in Jamaica in 2004 as an example of how each of the above goals can be effectively achieved.[26]

Additional points highlighted in the UNICEF Handbook include the following:

- The scope of the exercise must be clearly defined at the outset by identifying the legislation and any related policies, programmes and institutional structures that will be subject to review.[27]

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20 *Ibid* at p 48.

21 *Ibid* at p 45.

22 *Ibid* at pp 50-51.

23 *Ibid* at pp 54-57.

24 *Ibid* at p 57.

25 *Ibid* at pp 51-52.

26 UNICEF Jamaica, *Advancing Children's Rights in Jamaica: Report on Legislative Reform Initiative* (2004), available at https://www.unicef.org/jamaica/reports/advancing-childrens-rights-jamaica.

27 *Ibid* at p 63.

- The review should highlight gaps in legislation as well as issues arising from existing legislation.[28]
- Legislation should be prioritised for review based on whether it directly addresses children or whether, although not expressly referring to children, it indirectly impacts on their lives.[29]
- The review should take into account General Comments and Concluding Observations of the CRC Committee on the State Party conducting it,[30] as well as the full range of international instruments which complement and amplify certain aspects of the CRC (if the State is party to them).[31]
- The process should have a clearly defined timetable with a clear deadline for completion based on a realistic schedule.[32]
- Recommendations arising from the review should be "as specific as possible, so as to guide subsequent governmental actions, including the drafting of any new or revised legislation as well as any policies, administrative arrangements or budgetary provisions that may be needed to give effect to the new or existing legislation", and indicate who will be responsible for ensuring that the recommendations are realised.[33]
- From the beginning of the review process, there should be a firm commitment from the government to act in response to the conclusions of the review.[34]

Finally, the Handbook notes that "[t]he effectiveness of a legislation review depends on the strength and commitment of its coordination and management", a process which can be led either by Government or by NGOs, or through co-operation between both sectors;[35] but "[w]hoever assumes responsibility for overseeing the legislation review process must understand that this is a major commitment of both time and resources".[36]

4. Structure of Review

The scope of the proposed review of legislative compliance with the CRC is necessarily extremely broad, involving all articles of the CRC and a large number of Acts of the Oireachtas (some of which contain a substantial number of relevant sections). It will also be necessary to include a certain amount of secondary legislation. (For example, Article 25 CRC obliges States Parties to carry our periodic review of care placements; the relevant standards in Irish law are almost entirely contained in secondary legislation, and so a review that omitted all secondary legislation would not provide an accurate assessment of the state of compliance with Article 25.)

Given the scope of the exercise, it will be necessary to formulate a framework to organise and focus the inquiry. The UNICEF Handbook identifies two possible approaches:

28 *Ibid* at p 67.
29 *Ibid* at p 66.
30 *Ibid* at p 79.
31 *Ibid*.
32 *Ibid* at pp 62-63.
33 *Ibid* at pp 84-85.
34 *Ibid* at pp 63-64.
35 *Ibid* at pp 58-61.
36 *Ibid* at p 61.

> On the one hand, the Convention can be used as a "checklist," taking each article individually and looking to see if there is existing legislation that relates to the rights specifically mentioned in that article and, if the legislation does exist, determining whether it satisfies the obligations under that article, both in its formal expression and the way in which it is enforced and implemented.
>
> On the other hand, the CRC ... can be used as a standard against which all existing legislation, programmes, policies and institutions ... [is] measured. This approach involves starting with the legislation and practice and assessing their appropriateness against the ... [Convention] as a whole.[37]

Of these two approaches, the latter appears to be more effective: it avoids the creation of silos, within which certain pieces of legislation are reviewed only for their compliance with individual articles in isolation. In General Comment No 5, the CRC Committee emphasised that any review of legislative compliance with the CRC "needs to consider the Convention not only article by article, but also holistically, recognizing the interdependence and indivisibility of human rights".[38] A statute might appear compliant when assessed against a single article, but a more rounded analysis involving the combined effect of a number of articles may lead to a different conclusion.

The various provisions of the CRC overlap and interlock in so many different ways that many different schemes could be devised for structuring a thematic approach to the review. However, bearing in mind that the motivation for the proposed review in Ireland has stemmed from the CRC periodic reporting process and will feed into future State reports, it makes sense to adopt the scheme utilised by the CRC Committee as part of this process rather than devising a new one. The CRC reporting guidelines[39] require States Parties to provide information according to a number of clusters of rights, as follows:

A. General measures of implementation (arts. 4, 42 and 44 (6))

B. Definition of the child (art. 1)

C. General principles (arts. 2, 3, 6 and 12)

D. Civil rights and freedoms (arts. 7, 8, and 13-17)

E. Violence against children (arts. 19, 24 (3), 28 (2), 34, 37 (a) and 39)

F. Family environment and alternative care (arts. 5, 9-11, 18 (1-2), 20, 21, 25 and 27 (4))

G. Disability, basic health and welfare (arts. 6, 18 (3), 23, 24, 26, 27 (1-3) and 33)

H. Education, leisure and cultural activities (arts. 28-31)

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37 *Ibid* at p 80.

38 Committee on the Rights of the Child, *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, CRC/GC/2003/5, 27 November 2003 at [18].

39 Committee on the Rights of the Child, *Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44, paragraph 1 (b), of the Convention on the Rights of the Child*, CRC/C/58/Rev.3, 3 March 2015.

I. Special protection measures (arts. 22, 30, 32, 33, 35, 36, 37 (b)-(d) and 38-40)

This framework was been successfully employed in the Legislative Gap analysis recently published by the Children's Commissioner for Jersey.[40] It is well suited to meeting the CRC Committee's expectation of a "holistic" approach by allowing for aspects of legislation to be benchmarked against a range of related provisions of the CRC rather than article-by-article, as well as for legislation to be examined under more than one thematic heading where relevant. For example, various provisions of the Child Care Act 1991 would fall to be examined both under "Violence against children" and "Family environment and alternative care", as well as potentially under "Special protection measures".[41]

Unlike periodic reports to the CRC Committee, the legislative review need not address all of the above thematic headings in a single exercise, and could potentially be divided into a number of sections. For example, the Legislative Gap Analysis for Jersey did not attempt to cover all nine of the headings set out above, but focused instead on just four (headed F, G, H and I above). Dividing the review into clusters could make the process more manageable and allow for the use of different expertise in the project teams charged with conducting different aspects of the review. The following proposed breakdown would have a degree of thematic coherence, and would allow for the areas with the largest volume of legislation that is directly focused on children to be prioritised:

- Phase 1: Headings E (Violence against children) and F (Family environment and alternative care).
- Phase 2: Headings G (Disability, basic health and welfare), H (Education, leisure and cultural activities) and I (Special protection measures).
- Phase 3: Headings A (General measures of implementation), B (Definition of the child), C (General principles) and D (Civil rights and freedoms).

5. Compliance Rating

For the purposes of identifying priorities for reform, it may be beneficial if the review included a scoring system setting out the degree of compliance or non-compliance. It is suggested that simplicity is more beneficial than nuance for present purposes, since any such scoring system is indicative only. At the same time, a scoring system must be able to capture something more than a simple judgment of the letter of the law being compliant or non-compliant with the CRC. The guidance from the UNICEF Handbook makes it clear that a review must be able to capture situations where legislation appears compliant with the CRC on its face, but is non-compliant in practice due to issues arising from the implementation of legislation rather than its drafting. As noted by Perrault, "explicit textual consistency between national laws and provisions of international human rights instruments … is not sufficient. Laws do not function in a vacuum, and the greater challenge is often their implementation and enforcement."[42] For example, the CRC

40 S Hoffman and S Sellwood, *Legislative Gap Analysis relating to States of Jersey* (26 August 2020), available at https://www.childcomjersey.org.je/media/1389/legislative-gap-analysis-oct-2020.pdf.

41 As noted in the UNICEF Handbook at p 76, "[i]nevitably, some legislation will come up again and again in relation to different provisions of the Conventions".

42 N Perrault, *Comprehensive and Holistic Legislative Reform on Behalf of Children's Rights* (UNICEF, 2008) at p 15,

Committee's 2016 Concluding Observations on Ireland expressed concern about delays in commencing legislation that had already been enacted.[43] Similarly, issues relating to policy or resources may result in a piece of legislation which is potentially compliant with the CRC operating in a non-compliant manner.

One possible (and relatively straightforward) method of capturing these issues would be to apply a basic RAG rating system:

> **RED:** legislation is substantially non-compliant with the CRC and needs to be amended.
>
> **AMBER:** legislation is potentially compliant with the CRC, but compliance is hindered by implementation issues (eg commencement, policy, resourcing, enforcement).
>
> **GREEN:** legislation is substantially compliant with the CRC.

The UNICEF Handbook also recommends that a legislative review accounts for the fact that non-compliance could arise from the absence of legislation rather than from the wording or implementation of existing legislation. Again, this corresponds with concerns expressed by the CRC Committee in its 2016 Concluding Observations on Ireland that insufficient attention is paid to the rights of children born as a result of surrogacy arrangements,[44] and about the lack of a comprehensive legal framework allowing adopted children to access information regarding their origins.[45] In both of these cases, non-compliance with CRC obligations flows from the complete absence of relevant legislation (and in both cases, detailed draft legislation is working its way through the Oireachtas). The legislative review would be incomplete if it did not capture situations such as these that require the enactment of whole new Acts of the Oireachtas. This could be accommodated under the "Red" heading in a RAG rating system, in that the solution to the non-compliance is the same as in cases where existing legislation is substantially non-compliant—ie legislative reform is required. If this approach were adopted, the relevant entry in the review could take the form of a red entry against the most closely-related Act of the Oireachtas (for example, the Children and Family Relationships Act 2015 could be rated as red due to its failure to address surrogacy); or alternatively, a placeholder entry could be inserted to represent the relevant gap and the necessity to enact an entirely new piece of legislation.

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available at https://sites.unicef.org/policyanalysis/rights/files/Comprehensive_and_Holistic_Legislative_Reform_on_Behalf_of_Children_Rights.pdf.

43 Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic reports of Ireland*, CRC/C/IRL/CO/3-4, 1 March 2016 at [10] to [11].

44 *Ibid* at [33].

45 *Ibid* at [45].

6. Conclusion

Conducting a detailed review of legislative compliance with the CRC is a clear obligation of Ireland as a State Party to the Convention, as has been made clear both in General Comment No 5 and in the most recent Concluding Observations of the CRC Committee on Ireland. However, although the CRC Committee has clearly stipulated that all States Parties to the CRC share this obligation, and UNICEF has provided detailed guidance on how such a review should be conducted, the published literature contains relatively little detail demonstrating concrete examples of the design, structure or findings of past reviews in other States. The reviews that have been published are generally not comprehensive in their coverage, and lack key components identified in the UNICEF Handbook (such as detailed consultation processes, child participation, and recommendations for reform).

The absence of a clear template for the proposed exercise presents both a challenge and an opportunity. The challenge is in devising and implementing a process that meets the vision set out in the relevant output of the CRC Committee and UNICEF. As outlined above, this would require a properly resourced process drawing on adequate expertise and consultation, and a firm commitment to the process by all branches of Government. The opportunity is for Ireland to produce the first published comprehensive and CRC-compliant review of national legislation. Succeeding in this goal would not only put Ireland in a position to significantly enhance our national compliance with our CRC obligations; it would provide a template for other States to perform similar exercises, and establish Ireland as a leader in the field that could be held up as an example to other States Parties to the CRC.

To this end, the following recommendations are made:

- The proposed review of legislative compliance with the CRC should commence at the earliest available opportunity.
- Parties invited to tender for the process should be expressly required to prepare their bids in line with the guidance set out in the UNICEF Handbook. The assessment of tenders should take account of the extent to which the bids adhere to this guidance.
- Consideration should be given to dividing the process into a number of thematic clusters and engaging different review teams with different mixes of expertise for each cluster, with clusters prioritised into phases along the lines set out in section 4 above.
- The process should involve both technical analysis and consultation (with meaningful child participation being an essential part of the consultation process), and should generate specific recommendations for reform.
- In order to make the exercise manageable in scale, the main focus should be on primary legislation. However, in circumstances where secondary legislation or policy play a key role in the implementation of legislative standards in practice, these should also be factored into the analysis. The review team(s) could make this assessment on a case-by-case basis.