Second Report of the Special Rapporteur on Child Protection

A Report Submitted to the Oireachtas

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GLOSSARY OF ABBREVIATIONS

CAAB	–	Children Acts Advisory Board
COPINE	–	Combating Paedophile Information Networks in Europe
DPP	–	Director of Public Prosecutions
ECHR	–	European Convention on Human Rights
ECtHR	–	European Court of Human Rights
EU	–	European Union
HSE	–	Health Service Executive
ICMEC	–	International Centre for Missing and Exploited Children
UNCRC	–	United Nations Convention on the Rights of the Child

EXECUTIVE SUMMARY

SECTION 1: COURT PROCEEDINGS

In recent times there has been a general shift in thinking towards the victim of an offence in the context of a criminal trial. The most vulnerable of all victims are children. There is a need to streamline our court system and to cater for the needs of child victims so as to ensure the minimal amount of distress that may caused to them in the investigation and prosecution of an offence.

The greatest problem faced by child victims is the delay that is often associated with bringing cases to trial. Such delay can arise for a number of reasons, e.g. the disclosure of material between various agencies or last minute defence applications on issues such as insanity. A means of tackling this problem would be to introduce a system of case management in respect of cases involving child victims. Such systems operate in other areas of our legal system to great effect and therefore ought to be considered in the present context.

Those who interact with children throughout the investigation and prosecution of offences ought to be trained in techniques designed to aid a child victim through the process. A child needs to be made as comfortable as possible throughout the process. The attendance of a child victim as a witness at trial is of crucial importance. Legislation has been in place since 1992 to allow children provide evidence by way of video/television link. However, this legislation has yet to be commenced nationwide.[1] Furthermore the venue utilised for the purposes of giving such evidence should not be in the environs of the courthouse. Video link evidence by its nature can be provided from anywhere in the world, and therefore ought to be used accordingly.

Last year this report discussed in detail the establishment of a comprehensive *guardian ad litem* scheme whereby suitably qualified persons could represent the interests of children in litigation. This equally applies to child victims and their need to be adequately represented in proceedings.

[1] In practice however, I do not know of any judge, in the Circuit or Central Criminal Court, who has proceeded to hear a case involving a child without the availability of video link evidence.

SECTION 2: FRESH COMPLAINT EVIDENCE AND CHILDREN

Where the victim of an alleged sexual offence makes a voluntary complaint within a reasonable period of the offence, not only is the fact of the complaint admissible to show consistency and credibility of the complainant, but the details of the complaint are also admissible. This is the doctrine of fresh complaint evidence. It is an exception to the rule against narrative. The rationale behind the rule is that the sooner a complaint is made following an alleged sexual offence the more plausible the allegation.

The application of this doctrine in the context of child victims is questionable at best. Indeed the doctrine has been abolished in other jurisdictions in respect of adults and children. There may be an infinite number of reasons why a child would not make a complaint of a sexual offence at the first available opportunity. Account ought to be taken of this fact when considering the application of the doctrine of fresh complaint evidence where the complainant is a child.

SECTION 3: CHILD PORNOGRAPHY

The Child Trafficking and Pornography Act 1998 establishes a number of criminal offences relating to child pornography. A review of this Act is now called for. It defines 'child' as a person under the age of 17 years. This is at odds with other jurisdictions, and even Irish constitutional jurisprudence and other Irish statutes which deem a child to be a person under the age of 18 years. The 1998 Act provides a detailed definition of child pornography, thus depriving the judiciary of a great deal of discretion in this area. As a result there have been a number of cases in which material was deemed not to constitute child pornography within the meaning of the Act despite it being of a questionable nature. The possibility of introducing a category of indecent material into the workings of the 1998 Act should be explored as this would provide a basis for prosecuting those who engage in material of a questionable nature. The COPINE scale should be utilised in distinguishing between material that falls under the heading of indecency, or alternatively child pornography.

The 1998 Act is quite detailed, and it is feared that this detail may in fact lead to prosecutions failing as a result of legal argument and technical loopholes. Areas of the 1998 Act need to be broadened to ensure that the spirit and purpose behind the Act is

achieved. This is particularly evident in respect of s.4 of the Act which criminalises those who have custody, charge or care of a child and allow that child to be used for pornography. At the core of this offence is the breach of trust between the accused and the child. Evidently this is a grave offence, therefore in an effort to distinguish it from other offences under the Act consideration ought to be given to imposing a minimum mandatory sentence for those found guilty under s.4.

Any review of the 1998 Act ought to reflect changes in technology, most notably the use of the internet. Whilst a person can be prosecuted under the Act for possessing a standard photograph depicting child pornography, a person who simply views an image on the internet and does not download it cannot be prosecuted. In seeking to bolster our legislation against child pornography assistance can be derived from the implementation and ratification of several international instruments designed to promote and foster cross-border cooperation between states in the fight of what is now a global industry.

Consideration must also be given to the child victims of pornography. It is important that the child used for pornographic purposes be provided with the opportunity to address the court as to the effects of the offence on him/her for example, through the medium of a victim impact statement.

SECTION 4: CHILD ABUSE AND NEGLECT

Ireland has an obligation under the United Nations Convention on the Rights of the Child 1989 to take positive steps to prevent child abuse and neglect, and to provide services to victims of such abuse and neglect. The best interests and welfare of a child is the guiding principle in terms of Irish child care legislation. Significant progress has been made since the establishment of the Office of the Minister for Children and Youth Affairs. A continuing cause for concern, however, is systematic failure, often caused by a lack of communication between various state agencies. The *Children First* guidelines have been in place since 1999, but have yet to be satisfactorily implemented. This is an area of concern, highlighted both domestically and internationally by a number of tragic cases. Positive and proactive, as opposed to reactive, steps are required in this field. In July 2008 the Office of the Minister for Children and Youth Affairs published a review of the *Children First* guidelines. This

review called for uniformity and consistency in the implementation of the *Children First* guidelines at a local level.

At present state agencies tend to only act in relation to children at risk of abuse. However, this represents a minority in terms of the number of children in need of assistance and support by these agencies. In Ireland we tend to focus on those children at risk of abuse to the detriment of other children in need of help. This can lead to children falling through the cracks of our child protection system with the possible consequence of abuse and neglect. Other jurisdictions operate a centralised intake system whereby all referrals concerning children in need are sent to a specialised unit which assesses the matter and determines an appropriate response. The operation of such a system in conjunction with a differential response model, whereby a range of responses are available depending on the nature of the referral, is thought to be the best means of dealing with this issue.

The starting point for preventing child abuse and neglect is education, an area in which the Office of the Minister for Children has played a key role in developing over the last number of years. The general public needs to be educated so as to be able to recognise, prevent and report child abuse. Resources are required to fund adequate after care facilities for the victims of child abuse and neglect so that their physical and psychological recovery, and social reintegration can be fostered. The same is also required in terms of perpetrators of child abuse and neglect. Rehabilitation of offenders is a key requirement in seeking to prevent future instances of child abuse and neglect.

SECTION 5: DEVELOPMENTS 2007-2008

This section of the report provides a commentary on developments in the area of child care and protection since the publication of the 2007 report. Public policy initiatives are often well publicised in the media. However, difficulties arise in terms of assessing developments or reporting on reforms in case law due to the *in camera* nature of the proceedings and the lack of approved written judgments. Nonetheless, there are a number of areas of note in which there have been developments.

The Joint Committee on the Constitutional Amendment on Children published an interim report in September 2008 in relation to vetting and the use of "soft information". This was a topic which was considered in detail in the 2007 report. The Committee unanimously recommended the introduction of legislation to provide for the use of "soft information". Whilst this development is welcomed, caution is recommended. It is essential that any legislation enacted in this area withstand constitutional and ECHR scrutiny. To that end the various constitutional rights and ECHR doctrines need to be given careful consideration. The "soft information" models in operation in South Africa, Northern Ireland and England and Wales ought to be analysed with the view to adopting aspects therein. The recommendations cited in the 2007 report are reiterated in terms of the form and substance this legislation should take.

This report has highlighted the detrimental effect which delay in court proceedings can have on children. In 2008 there were two cases of note emanating from the Superior Courts dealing with this topic. In the well publicised "Mr. G." case it took one year for the children who were the subjects of child abduction proceedings to be returned to Ireland. Although these proceedings were instituted in England a referral was made to the Irish High Court, and Supreme Court on appeal.

In the second case of *C. v. D.P.P.*, Dunne J. in the High Court held that the state has a special duty to expedite proceedings concerning children due to the vulnerable nature of children and the exacerbating effects which systemic delay in the court system may impose upon them. The court granted an injunction restraining the Director of Public Prosecutions from taking any further steps in the prosecution of the child in this case owing to a 14 month delay in proceedings which was deemed to be a breach of the state's duty.

Finally, the Court of Criminal Appeal interpreted s.56 of the Children Act 2001 in *The People (D.P.P.) v. Onumwere*. Section 56 provides that, as far as practicable, a child detained in a Garda station shall not associate with an adult who is also detained, and shall not be kept in a cell unless there is no other secure accommodation available. The court held that this section was satisfied in circumstances where a station had no

secure accommodation other than cells and a child was detained in one of these cells provided there was no adult prisoner in the cell with the child.

RECOMMENDATIONS

SECTION 1: COURT PROCEEDINGS

Cases in which children are victims, whether they be criminal or civil, ought to be governed by a statutory system of case management. Assistance can be gleaned from case management models found in other areas of Irish law, e.g. the commercial court, but particular consideration ought to be given to the English and Australian models. The process should be judge-led, with increased focus on time-limits for processing the case. Sanctions ought to be included to deal with any party that does not adhere to the system.

Those involved with child victims in the criminal justice system ought to be provided with special training to enable them interact with the child in a positive and constructive manner.

It is recommended that section 13 of the Criminal Evidence Act 1992 be commenced forthwith throughout the country so as to enable the provision of video link evidence to all child victims. This facility ought to be provided in a comfortable and relaxed setting away from the courthouse and scene of the trial.

The 'Justice for Victims' initiative should include special protections for vulnerable victims, most particularly child victims of violent and/or serious crimes. Protection should be exceptionally high where the accused is a parent or guardian or where the parent or guardian cannot adequately support or protect the child victim during the case. Provision should be made to provide independent representation of the child victim in such cases. Such representation should cover both welfare and legal rights. Those providing such representation ought to have the requisite experience and expertise and to this end it is recommended that a panel of suitable candidates be established. In addition, the representation of a child ought to reflect the individual child's needs, requirements and wishes having regard to his/her age and maturity. A reform of the guardian ad litem scheme is advocated, along similar lines as the English model. Such a reform should see specific requirements laid down as to the qualifications of guardians and their responsibilities as regards the child victims. The

reform should also include provision for the appointment of a solicitor to ensure the protection of the legal interests of the child.

SECTION 2: FRESH COMPLAINT EVIDENCE AND CHILDREN

It is recommended that the common law rule on fresh complaint evidence be abolished. A new evidentiary rule should be put in place to allow out of court complaints to be admitted both in fact and in content. A provision should be included to allow the judge to retain discretion not to admit the complaint where to do so would constitute a real or serious risk of an unfair trial to the accused.

SECTION 3: CHILD PORNOGRAPHY

The definition of 'child' for the purposes of the Child Trafficking and Pornography Act 1998 should be amended to that of a person under the age of 18 years.

The Child Trafficking and Pornography Act 1998 should be amended so as to include a category of material which is indecent. This would apply to the offences already contained in the Act, i.e. allowing a child to be used for indecent material; producing, distributing etc. indecent material; and possession of indecent material. An offence involving indecent material would be of a lesser standard than one involving child pornography. The following is recommended as a statutory definition for 'indecent material':

> *Material is indecent if a reasonable person would consider that –*
>
> *(a) whatever its circumstances or any person's purpose in relation to it, it is because of its nature indecent, or*
>
> *(b) because of its nature it may be indecent and because of its circumstances or the purpose of any person in relation to it (or both) it is indecent.*

For cases involving indecent material and child pornography, the COPINE scale should be used by the courts in determining the category of material before it. This may be implemented by way of Practice Direction. In terms of distinguishing between indecent material and child pornography, it is suggested that indecent material can be ascribed to categories 1-3 of the COPINE scale, with categories 4-10 denoting child pornography.

Section 4 of the Child Trafficking and Pornography Act 1998 should be amended so that it be couched in broader terms which focus on there being a relationship of trust and confidence between the child and offender, rather than setting out in detail the circumstances in which a person has the custody, charge and care of a child. In addition, due to the gravity of this offence, it is recommended that a mandatory minimum sentence of at least 3 years be imposed.

The mental element of the offence of producing, distributing etc. child pornography under s.5 of the Child Trafficking and Pornography Act 1998 should be amended to include the concept of 'recklessness' so as to enable the prosecution of the purposively ignorant offender.

Section 6 of the Child Trafficking and Pornography Act 1998 should be amended to include the offence of viewing child pornography, or indecent material.

Owing to the international dimension of child pornography, it is recommended that any review of the Child Trafficking and Pornography Act 1998 take into account the international instruments that have been published since its enactment.

It is recommended that the legislature refrain from distinguishing between categories of child pornography based on the age of the victim. Rather the age of the victim is a matter to be taken into consideration by the court in assessing the gravity of the offence and the requisite sentence.

It is recommended that the meaning of sexual offence within the Criminal Evidence Act 1992 should be amended to include offences under the Child Trafficking and Pornography Act 1998, thereby affording child victims of pornography an opportunity to provide a victim impact statement pursuant to the Criminal Justice Act 1993, if they so wish.

SECTION 4: CHILD ABUSE AND NEGLECT

A number of key areas for improvement as regards child abuse are evident from an examination of the Irish as well as the international context. It is recommended that strengthening of guidelines and legislation be considered in Ireland. The Committee

on the Rights of the Child recommended that Ireland continue reviewing the 'Children First: National Guidelines for the Protection and Welfare of Children', and consider the establishment of the guidelines on a statutory basis to strengthen child protection in the state. The committee has also recommended the development of a comprehensive child abuse prevention strategy. Such a strategy should include the development of appropriate responses to abuse, neglect and domestic violence. There is also a need for ongoing independent monitoring of the objectives of both the guidelines and the proposed strategy. This report echoes these recommendations.

Better co-ordination of child protection services is also needed. The findings of poor professional standards and organisation regarding the cases of the McElhills in Northern Ireland and Rilya Wilson in the United States of America need to be considered in the Irish context. Such systemic failures can have far-reaching consequences for vulnerable children. There is a need to clearly outline inter-departmental and inter-agency communication and responsibilities for the implementation of the 'Children First Guidelines'. Improved structures are needed to promote inter-agency cooperation at all levels. The recommendation by the 'Toner Report', for example, of a liaison between social services and the police should also be considered in Ireland. Such a liaison could ensure that information is adequately shared amongst the relevant authorities.

So as to prevent those children 'in need' of assistance and protection, albeit not 'at risk' of abuse, from falling through systematic cracks, a system needs to be established whereby such children can be monitored, assessed and assisted in a manner proportionate to their needs. Such monitoring ought to be ongoing and if a situation deteriorated the matter could then be referred to the relevant state agencies so that appropriate procedures could be put in train to prevent any potential child abuse.

The state has a positive obligation toward the protection of children in Ireland. The first step of prevention is education. At present there exists an education programme of this nature in Ireland entitled the "Stay Safe" programme. It is imperative that this programme be properly resourced, maintained and made available nationwide.

Regular reviews should be carried out to ensure that the programme keeps abreast with developments and initiatives in other jurisdictions.

A 24-hour, seven day a week phone service should be established so as to enable concerned persons contact the social work services.

Treatment programmes ought to be provided to perpetrators of child abuse and neglect in an attempt to rehabilitate offenders so as to prevent future instances of abuse and neglect.

INTRODUCTION

This report represents the second instalment to be published by the Special Rapporteur on Child Protection. The first report was submitted to the Oireachtas in December 2007.[2] This report aims to build upon the foundations laid down in the first report and also to analyse key areas in child care and protection coming to the fore in Ireland.

Since the submission of the first report there have been positive developments within the social and legal context in terms of the care and protection provided to children. Statistics demonstrate an increase in resources and funding within the HSE to those departments charged with a duty toward children. In addition, the Joint Committee on the Constitutional Amendment on Children published its interim report in September 2008 unanimously recommending the introduction of legislation to provide for a vetting system utilising "soft information". This was an area given extensive analysis and consideration in the 2007 report and this recent announcement by the Oireachtas is to be welcomed.

This report seeks to analyse, discuss and consider other areas of the law on child care and protection that have yet to be accorded the due weight which they necessitate. It is essential to remember that the state, and its various bodies and agencies, has a constitutional obligation to defend and to vindicate the personal rights of children in Ireland.[3] This obligation includes a constitutional duty to care for children in circumstances where their families fail to do so. The Constitution is the dominant source of this duty. Children enjoy rights under the Constitution, including the right to privacy, bodily integrity and education. The vulnerability of children must be borne in mind when assessing the level of care and protection required to safeguard their rights. Violations of the constitutional rights of children in the form of child abuse and neglect or pornography, to name but a few examples, have detrimental and ongoing effects. Childhood is essentially a long term process of education ultimately leading to adulthood. In saying this, however, one does not merely refer to scholastic education but also physical, social, emotional, psychological and moral education. There is

[2] See http://www.omc.gov.ie/viewdoc.asp?DocID=687.
[3] See, for example, *G. v. An Bord Uchtála* [1980] I.R. 32.

therefore a heavy duty on the state to safeguard all aspects of the education and development of children. Not only does this duty arise under the Constitution but also under the European Convention on Human Rights. There is a fear that if the state fails in its duty towards any one child then that child will be deprived of his/her rights, his/her education, and ultimately his/her childhood. Following the Supreme Court decision in *T.D. v. Minister for Education*[4] there has been a marked reluctance on the part of the High Court to grant mandatory orders against the state. While this is so, the state cannot obviate its obligations to children in this regard, and indeed the Supreme Court did leave the door open for the granting of mandatory orders in exceptional cases. That said, however, there is evidence that the state has taken a proactive role in providing services to children in need. By adopting such an approach the state wishes to avoid any future High Court actions calling into question the adequacy of its provision of care to children. Such an approach is to be welcomed, and indeed appears to have borne fruit to date.[5]

This report begins with an analysis of court proceedings with particular emphasis placed on delay in cases involving children. The doctrine of fresh complaint evidence and its application to children is also considered. The legislation covering child pornography is critically analysed having regard to the needs of modern society and practices in other jurisdictions. The broad area of child abuse and neglect is discussed and suggestions are made in terms of the manner in which this needs to be addressed at all levels. As with the last report, these sections are accompanied with concise and reasoned recommendations which it is hoped will be given due consideration. Finally the report concludes with a commentary on some of the developments within the past year relevant to the substance of the 2007 report and indeed the present report.

It is salutary to point out that any reforms that may come about in this area need to be effective. Whilst legislation is indicative of progress the manner in which it is implemented, or indeed can be implemented, is of crucial importance. A broader and more holistic approach needs to be taken to reforming child law. Legislation is obviously the first step but consideration also needs to be given to the rules of court and the procedural and enforcement mechanisms to be utilised. This requires a more

[4] [2000] 3 I.R. 62.
[5] *H.S.E. v. R.* [2007] IEHC 459 (Unreported, High Court, MacMenamin J., 18 July, 2007).

nuanced approach than, it is respectfully submitted, has heretofore been undertaken in this area. For reform to be truly effective it must be easily enforced, and this may require a review of the rules of court also.

SECTION 1: COURT PROCEEDINGS

1.1 Introduction

In the past number of years, there has been a definite movement on the part of the state towards greater acknowledgement of the victim within the criminal justice process. In 1974 the Criminal Injuries Compensation Tribunal was set up. Section 5 of the Criminal Justice Act 1993 established the Victim Impact Report requirement where the court had to take into account the views of the victim of a crime. In 1999 the Department of Justice drew up a Victims' Charter. This was followed in 2005 by a Commission for the Support for the Victims of Crime. Most recently, 2008 saw the creation of the "Justice for Victims Initiative" introduced by Minister for Justice, Equality and Law Reform, Mr. Dermot Ahern, TD. This initiative will see the introduction of a new Bill in 2009 amending certain laws including the use of the victim impact statement. It will also see the creation of an Executive Victims of Crime Office within the Department of Justice, Equality and Law Reform, the reconstitution of the Commission for the Support for the Victims of Crime and also the formation of a Victims of Crime Consultative Forum.

This trend is equally as visible in the international arena. In 1985, the UN General Assembly adopted the UN Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power.[6] The Declaration lays down specific rights for victims of crime including access to justice and fair treatment, restitution and compensation and assistance. A more recent example of note is the *Guidelines for the Treatment of the Victims of Crime* published by the Human Rights Unit of the Secretariat of the British Commonwealth.[7] These guidelines seek to encourage the Commonwealth countries to implement the UN Declaration in an effective manner. Interestingly, the guidelines identify certain types of victims as more vulnerable than others and needing more exceptional protection. Children fall within this category. Special measures to protect vulnerable witnesses were recommended such as the use of video-link evidence and possibly the use of a pre-recorded statement from the victim.

[6] GA/RES/40/34.

[7] Available at http://thecommonwealth.org/Shared_ASP_Files/UploadedFiles/%7B99410136-47A1-478F-B549-DB753CF8B20B%7D_Victims%20of%20Crime.pdf.

It is suggested that given the recent announcement of the *Justice for Victims Initiative*,[8] now is an appropriate time to give special consideration to including greater protection for child victims particularly when it comes to protecting their interests within a trial for violent and/or sexual offences. This issue is particularly pressing where a parent or guardian[9] is the accused or where the parent or guardian cannot adequately support or protect the child victim during the case. Research shows that the prosecution of violent and sexual offences can last for two years or more. During such a trial, the interests of the child should be protected and represented. While strictly speaking the law only views the complainant as a witness, albeit a special one, the exceptional vulnerability of a child victim in such a trial should be acknowledged and special procedures should be put in place to ensure that at all times the child is informed of, and understands, the legal progress of the case. Moreover, given the vulnerability noted above, the law should have a responsibility to ensure that the non-legal interests of the child victim are also represented to guarantee that the minimum level of distress is caused to the child.

1.2 Disclosure of Documentation

Delay in cases involving child victims and perpetrators is a significant problem. There are a number of reasons for such delay ranging from a lack of court rooms, a lack of judges and last minute applications made by a party to an action with the result of further delay of a hearing. Article 6 of the European Convention on Human Rights (ECHR) provides for a right to a fair trial, including the right to a hearing within a reasonable time. The argument could be made that because of the special situation of children (whereby they are children for a finite period of time), a case could be taken under the Convention that lengthy delays constitute a violation of their Article 6 right to a speedy hearing.

The length of time it takes for disclosure of documentation is the most common reason for delay. A possible means of eliminating such unnecessary administrative and systemic delay is to establish a departmental body charged with the duty of compiling all necessary documentation from the various agencies and bodies that may

[8] Announcement made by the Minister for Justice, Equality and Law Reform, Mr. Dermot Ahern, TD on 19 June, 2008.
[9] This could also be extended to a situation where the accused is a person with authority over the child to ensure complete protection of the child.

be involved in a case, e.g. the Health Services Executive (HSE), An Garda Síochána etc. This body could operate in much the same manner as the Central Authority does in child abduction cases and European Arrest Warrant cases. The task of this body would be to cooperate with all relevant bodies, facilitate the investigation and possible prosecution of a case and to promote expedition throughout the process.

1.3 Case Management

The lack of a coherent, country-wide case management system within the criminal law courts creates a number of problems, most importantly, delay in the movement of cases through the courts.[10] There is no incentive (or penalty) for the defence to have evidential issues solved pre-trial. As a result, issues of insanity, disclosure, fitness to plead, etc., are routinely raised on the day when the trial is due to commence. This generally results in an adjournment. The inordinate delay in criminal trials can have a very significant impact on children involved in those trials.

While a number of *ad hoc* initiatives to improve case management in the criminal courts have been started, case management needs to be put on a statutory basis to ensure maximum impact on the criminal justice system. Case management systems have recently been introduced in both England and Wales and Australia which could provide a blueprint for how to reform the criminal case management system in Ireland.

1.3.1 *England and Wales – Criminal Procedure Rules 2005*

In 2003 Lord Justice Auld conducted a comprehensive review of the Criminal Courts of England and Wales.[11] His report led to the introduction of the Criminal Procedure Rules 2005 which substantially reformed the case management structure of the criminal law courts.

[10] In 2006, the National Crime Council published "An Examination of Time Intervals in the Investigation and Prosecution of Murder and Rape Cases in Ireland from 2002 to 2004". In this Report the Council noted that in the average murder trial, the total duration of the case was 90 weeks while in the average rape trial the duration was 118 weeks. The Report is available at http://www.irlgov.ie/crimecouncil/downloads/Time_Intervals_Research.pdf.

[11] http://www.criminal-courts-review.org.uk/auldconts.html.

These Rules seek to ensure that the case is dealt with efficiently and expeditiously while taking into account the gravity of the offence alleged, the complexity of the issue, the severity of the consequences for both defendant and victim and the needs of other cases.[12] To ensure attainment of these objectives a number of responsibilities were imposed on parties to the trial. The case must be prepared and conducted by the parties in accordance with the overriding objectives. The Rules and any directions given by the courts must be complied with. If any of the parties fail to follow the procedural requirements of the Rules or any direction of the court, this must be notified to the court immediately.

Part 3 of the Rules lays the primary duty of "active" case management firmly at the door of the court. This requires the court to identify the material issues in the case at an early stage and give any appropriate directions as quickly as possible. It must also address the needs of the witnesses in the early stages. The tasks within the case must be set out with certainty and, most importantly, with a timetable for the movement of the case through the system. Once the case enters the judicial system, the court must monitor the progress of the case and also the compliance of the parties with court directions. It has a role in ensuring that evidence is presented in what is termed the "shortest and clearest way". A linked function is to discourage delay by dealing with as many aspects of the case as possible when in court and thereby, avoiding unnecessary hearings. The court should also encourage the parties and participants in the case to cooperate in the progress of the case. A party can apply to the court for a direction if it is needed to further the overriding objective. Another measure introduced to ensure this system works is the appointment of an individual by both the prosecution and defence who will have responsibility for the progression of the case on their part. The court must also nominate a case progression officer who will carry out the duties of the court under the Rules.

The 2005 Rules were amended in 2008 to include sanctions for non-compliance. Such sanctions were inserted following the case of *R. (Kelly) v. Warley Magistrates'*

[12] Rule 1.1.

Court[13] where it was noted by the court that the absence of such sanctions rendered the Rules ineffective.

The penalties for non-compliance are housed in the newly inserted Rule 3.5(6). If a party fails to comply with a rule or a direction, the court has the power to fix, postpone, bring forward, extend, cancel or adjourn a hearing, exercise its powers to make a costs order and impose such other sanction as may be appropriate. The court has also been given the power (also under Rule 3.5) to make a costs order where it decides that one of the parties to criminal proceedings has incurred costs due to the unnecessary or improper act by the other party, due to the improper, unreasonable or negligent act or omission of a legal representative or where there has been serious misconduct by a person not party to the proceedings.[14]

There are additional requirements contained in the 2005 Rules which also impose sanctions on parties. Under Parts 24, 34 and 35, if a party does not comply with a rule or direction of the court then the court may refuse evidence sought to be admitted by that party or in some circumstances, it can draw adverse inferences from the late introduction of evidence.

The stated aim of the Criminal Procedure Rules is to ensure justice. Most significantly for our purposes, this is said to include dealing with the case efficiently and expeditiously and the related aim of recognising the interests of witnesses, victims and jurors and keeping them informed of progress.

1.3.2 *Australia - The Magellan Case Management System*

Since 2003, the Australian Family Courts have been rolling out a new case management system based on a successful pilot of a system in child cases involving allegations of sexual and/or physical abuse in parental separation proceedings. The aim of the Magellan model is to ensure an effective and efficient system to deal with these types of complaints while deciding on issues of custody. The introduction of the system acknowledged that in these types of cases, various bodies will have a certain stake in the case e.g. the police, the child protection department, perhaps

[13] [2007] EWHC 1836.
[14] Sections 19A and 19B of the Prosecution of Offences Act 1985 respectively.

psychologists, school teachers, etc. The interaction of all these bodies in such cases is very difficult and can lead to a very complicated and lengthy case. The Magellan system seeks to involve all of the external stakeholders in a structured manner to ensure that all the key information is presented to the court with the central aim of ensuring the welfare of the child is protected.

Similar to the English system discussed above, the Magellan system is judge-led. That said, there are a number of core elements to this system to ensure its smooth running:

- There is a heavy focus on inter-organisational co-operation;
- The judge has the overall responsibility for deciding if a case will be dealt with under these rules (however, the registrar also has a role in aiding the judge in this decision);
- Every child within the system is given a designated lawyer and the court can order expert investigations from child protection agencies and/or a court family consultant;
- There is no cap placed on legal aid funding for cases that qualify for the Magellan system;
- Early in the case, reports from child protection agencies are filed with the court (the Magellan report);
- Early in the case, the judge will make interim orders on access;
- There are also strict time limits imposed by the judge on the proceedings from start to finish – a recognition that a speedy hearing of the issues is in the best interests of the child;
- There is close communication on case management between external information providers and a small team of the judge, the registrar and family consultants;
- One team of court officers and a judge aims to deal with each case from start to finish to ensure consistency;
- The overall goal of the process is to ensure the child's welfare is the key priority.

Unlike the system in England and Wales, the Magellan system has been in place long enough to conduct a thorough review of its effectiveness. In October 2007, the

Australian Institute of Family Studies released a very comprehensive report on the success of the Magellan case management model.[15] It was noted that one of the reasons for the creation of a special system to deal with these types of complaints was that they involved an overlap between various bodies, each of whom have differing responsibilities to the child. The Magellan case management system seeks to ensure structured co-operation between these bodies to expedite the movement of the case through the court but still preserves the integrity of the case.

Overall, the report was very positive about the new system. It noted that the majority of aims sought to be achieved by this system were actually being achieved:

- Magellan cases were cleared 4.6 months quicker than Magellan-like[16] cases (Magellan cases taking on average 7.3 months);
- There was more consistency in the approach of the court as the judicial personnel dealing with each case did not vary as much as in Magellan-like cases;
- There was greater involvement of the statutory child protection department (ensured by the requirement of the production of the Magellan report early in the case);
- There were fewer court dates for each case, ensuring minimal stress to both the child and the family.

One key difference between the English system and this system is that there are no penalties for failure to keep within a court-set deadline. The system bases itself on co-operation between the various bodies involved and it is this co-operation which is utilised to ensure deadlines are kept. The timely expedition of the case is also aided by the consistency of the judicial personnel involved. The officers (judge and registrar) will get to know the family involved and the external stakeholders over the duration of the case and this ensures that nothing will slip through the cracks. So far, it appears

[15] Australian Institute of Family Studies, *Cooperation and Coordination: An Evaluation of the Family Court of Australia's Magellan Case-Management Model* (October 2007). Available at http://www.aifs.gov.au/institute/pubs/magellan/index.html.
[16] Cases in which an allegation of sexual/physical abuse has been made against a parent in the context of family law proceedings in a district where the Magellan case management model is not operational.

to be working well. Also, it must be noted, that in cases such as these, penalties may not be appropriate.

A number of issues which needed improvement were identified in the report. First, it was noted that a clarification of the eligibility criteria for cases was necessary. Both lawyers and external stakeholders were often unclear as to what level and type of case would qualify for these special rules.

There also appeared to be a certain perception amongst some lawyers and external stakeholders that the Magellan system was merely one for fast-tracking cases. This appears to arise from a lack of education on the Magellan process. An issue that links into this perception was that no standardised training for the judicial officers involved has been provided.

There was a significant level of confusion as to what the Magellan system could or would achieve, mainly among the litigating spouses. There appeared to be a belief that the system would deal with more than the custody matters, e.g. vindication of the alleged abusing spouse, criminal conviction of an abusing spouse, etc. The author of the report however, noted that such confusion was not confined to the Magellan system or the Family Courts.

This type of case management model is to be welcomed as it seeks to ensure a speedy and effective judicial process while ensuring that the child's interests are paramount. It also appears to be something which could be altered to suit more than the narrow wedge of cases it deals with in Australia. It is arguable that such a system could be put into use for a wide variety of child welfare cases. In terms of criminal cases involving children, it may be more difficult to use as, while the welfare of the child will still be a factor of major importance, our constitutional system would also seek to preserve a high degree of protection of the accused's due process rights. The use of a case management system based on inter-organisational cooperation in a wholly adversarial trial might not be any more effective than the system that is in place at the moment. It is suggested that if such a system were contemplated for the criminal courts it would need a serious overhaul and the possible introduction of penalties as in the English case management model.

1.3.3 *The Irish Context*

As noted, the long delay in criminal cases coming to court can have a detrimental effect on the complainant, especially if he/she is a minor. The child is asked to "hold onto" the trauma until the case is completed. A year or two years can see significant changes in the life of a child – they may have progressed from primary school to secondary school, they may be entering a period of state examinations, etc. If a system was introduced which ensured that trials would proceed as efficiently and as promptly as possible, this would ensure minimum disruption in the life of the child and minimum prejudice to his/her outside life.

However, any reform of the criminal justice system must bear in mind the protections afforded to the accused by the Constitution, the ECHR and international conventions. Most significantly, under Article 38.1 of Bunreacht na hÉireann, the accused must be guaranteed a trial in due course of law. This has been noted to include the usual cluster of due process rights including a right to a fair trial and what Keane C.J. described in *P.M. v. Malone* as "the right of the accused to be protected from stress and anxiety caused by an unnecessary and inordinate delay"[17] in the holding of his or her trial.

In addition any reform must not infringe on the accused's right to legal professional privilege – i.e. the court, in requiring the defence to impart information on the progress of the case cannot overstep the boundaries of these privileged communications.

However, in favour of a system of case management from the defence perspective is the right of the accused to a speedy trial as recognised in *State (O'Connell) v. Fawsitt*[18] as an aspect of the rights of the defendant under Article 38.1. Providing that safeguards were in place to ensure that Article 38.1 rights were protected[19] the creation of a statutory case management system would, in fact, vindicate the rights of the accused whilst also guaranteeing that the interests of the victim and witnesses are not sidelined.

[17] [2002] 2 I.R. 560, at 581. See also *Mills v. R* (1986) 29 D.L.R. 161.
[18] [1986] I.L.R.M. 639.
[19] These safeguards should also protect the rights of the accused under Article 6 of the ECHR.

Case management and the fast tracking of cases is not an unknown concept in Irish law. Increasingly various areas of our legal system are being modified to provide for the speedier resolution of cases. For example High Court family law cases are now expected to be determined within one year of commencement.[20] Similarly, cases can be fast tracked in the commercial court.[21] It is submitted that nowhere more so is expedition required than cases involving children. This has been recognised by the courts in a variety of cases,[22] but most notably in child abduction cases where international instruments require such cases to be determined within six weeks.[23] The Supreme Court has referred to the long term effects on children of delay in the determination of a case as being "immense".[24] In the child abduction case of *Minister for Justice (E.M.) v. J.M.*,[25] Denham J. in the Supreme Court commented on the litany of errors that occurred during the progression of the case through the court system. She called for reform to avoid a similar situation occurring again and suggested "case management, both administrative and judicial, in the High Court and in the Supreme Court".[26] The learned judge's comments were duly acted upon and now a strict case management exercise is undertaken by the High Court every Wednesday morning in respect of child abduction cases. A Supreme Court practice direction is also in place to ensure the expeditious hearing of all appeals in matters of child abduction.[27] It is recommended that a statutory case management system be introduced to deal with cases involving children. The legal basis grounding such a system should be similar to that of the commercial court, i.e. a statutory instrument amending the rules of court.

Case management within the commercial court has largely been a success and lessons ought to be learned from this. One problem with the system, however, has been that many of the cases which are dealt with so efficiently in the commercial court then

[20] High Court Practice Direction (HC40) – Family Law Proceedings, paragraph 1.
[21] Order 63A, Rules of the Superior Courts.
[22] *C. (A minor) v. D.P.P.* [2008] IEHC 39 (Unreported, High Court, Dunne J., 21 February, 2008). See Section 5.4.
[23] Hague Convention on the Civil Aspects of International Child Abduction, Article 11; Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matter of parental responsibility, Article 11(3).
[24] *Eastern Health Board v. M.K. and M.K.* [1999] 2 I.R. 99, at 115.
[25] [2003] 3 I.R. 178.
[26] *Ibid.,* at 195.
[27] Supreme Court SC04 – Hague Convention, Child Abduction and Enforcement of Custody Orders Act 1991.

encounter lengthy delays on appeal. This is a result of the heavy workload which the Supreme Court bears.

The consequence of this is that, while dates are immediately available in the Commercial List in the High Court, the waiting list for a hearing in the Supreme Court is up to 6 months for priority cases and 26 months for those without priority.[28] Dowling has noted that "[a]s a result, the benefit of having proceedings expedited in the Commercial Court can be lost".[29] If a case management system is to be successfully introduced, the problem of long delays in the Supreme Court would have to be addressed.

To ensure the success of such a system it is vital not only that sanctions are included to deal with any party that does not adhere to the directions of the court,[30] but also that the legal system is organised so that the courts at all levels, including the Supreme Court, are able to process cases promptly.

1.3.4 RECOMMENDATION

Cases in which children are victims, whether they be criminal or civil, ought to be governed by a statutory system of case management. Assistance can be gleaned from case management models found in other areas of Irish law, e.g. the commercial court, but particular consideration ought to be given to the English and Australian models. The process should be judge-led, with increased focus on time-limits for processing the case. Sanctions ought to be included to deal with any party that does not adhere to the system.

1.4 The Child Victim's Interaction with the Criminal Process

There needs to be greater co-operation between the different professionals involved in the criminal process. A child will interact with several different professionals throughout the investigative and prosecutorial process, e.g. members of An Garda Síochána, social workers, psychologists, solicitors, barristers, members of the courts service and judges. Each such person will be required to interact with the child in a

[28] Courts Service, *Annual Report 2007*, at 117.
[29] S. Dowling, *The Commercial Court* (Thomson Round Hall, 2007), at 8-9.
[30] For example, failure by the defence to adhere to the timeframe specified by the judge is a factor which could be taken into account at any subsequent bail hearing. Moreover, it could be a reason to refuse bail in circumstances where the State are objecting to bail and the bail judge is minded to grant bail on the grounds of delay in obtaining a trial.

meaningful, compassionate and understanding manner. Therefore emphasis needs to be placed on the manner in which these people will interact with children.

It is suggested that a highly trained interdisciplinary team, consisting of gardaí**,** social workers and psychologists be formed. Such a team could go immediately to the site of a crime involving children as victims or perpetrators. These professionals could then carry out interviews and other necessary work. Training is necessary for gardaí and social workers who work with children in the legal process. There is a particular need to train these professionals on how to conduct interviews with children. They should be trained on how to avoid being leading in their questioning, as well as interviewing children as quickly as is feasible so that the child can remember as much as possible. It is important that the story is the child's own account. To this end it is noted that in 1993 An Garda Síochána established the Domestic Violence and Sexual Assault Investigation Unit. This unit is charged with, amongst other things, the task of investigating offences under the Child Trafficking and Pornography Act 1998 and has a designated Paedophile sub-division. It was in fact this unit that conducted Operation Amethyst in 2002 resulting in over 100 searches of dwellings around the country and leading to a number of arrests. Importantly the unit provides specialised training for its members designed to provide them with the requisite skills in investigating these offences and interviewing those involved, including child victims. This is to be welcomed. However, it is essential that this unit is well funded and the training and services provided keep apace with international best practice in this field.

The judiciary also play an important role in accommodating child victims in the court process. Often the court is conducted in a more informal manner, and court attire may be dispensed with so as to avoid any intimidation of the child. However, it is recommended that specialised judges be assigned to deal with cases concerning child victims. Such a model exists in France.

In France the judges in civil proceedings involving children specialise in those areas. Specific initial and in-service training is given to family and juvenile court judges. The training, provided by the National College of Magistrates, aims to make judges

aware of and sensitive to issues such as the needs of children regarding listening, protection, care and the detecting of sexual violence.[31]

In July 2008, the Minister for Justice, Equality and Law Reform signed the Commencement Order in respect of the Civil Law (Miscellaneous Provisions) Act 2008.[32] The Act provides for the appointment of three new judges to the District Court to deal with cases involving children.[33] This comes on foot of a recommendation in the *National Youth Justice Strategy 2008-2010*. This development is welcomed. However, in order for it to operate effectively it must be utilised in a proactive manner. The appointment of the judges and the training they are to receive throughout their tenure will be critical.

The initial interview with a child victim is essential to any future prosecution. The interviewing garda plays a key role in this regard. The techniques adopted in such an interview are important. The child needs to be made feel comfortable and able to open up to the garda. Also, the garda needs to be able to relate to the child and understand any phrases and vocabulary the child might adopt by virtue of his/her age. Following this great care must be taken in leading the child through the prosecution process.

In this regard the attendance of a child as a witness at trial is an area of crucial importance. The use of video link evidence is helpful in this context. This allows the child provide his/her evidence in real time at a venue other than the court room, thus protecting the child from any detrimental effects of being in close proximity with the accused. There are several legislative provisions that allow for evidence to be given in this format. In the criminal sphere s.13 of the Criminal Evidence Act 1992[34] is applicable.[35] This section applies to the trial of offences committed under the Child

[31] Report of France to the Committee on the Rights of the Child CRC/C/OPSC/FRA/1 6 November, 2006.
[32] S.I. No. 274 of 2008 Civil Law (Miscellaneous Provisions) Act 2008 (Commencement) Order 2008. Signed on the 18th July, 2008.
[33] See press release of the Minister for Justice, Equality and Law Reform delivered on the 18th July, 2008, at: http://www.justice.ie/en/JELR/Pages/Commencement%20of%20Civil%20Law%20(Miscellaneous%20Provisions)%20Act%202008.
[34] Number 12 of 1992.
[35] In terms of civil law cases s.21 of the Children Act 1997 (Number 40 of 1997) applies.

Trafficking and Pornography Act 1998.[36] This section allows for the giving of evidence by a victim/witness under the age of eighteen years by way of television link whether the child is in Ireland or not, unless "the court sees good reason to the contrary". Unfortunately, however, this section has been commenced in a piecemeal manner and therefore only operates in designated regions of the country.[37] It is thought that the reason for the sporadic availability of this facility is one predominantly based on finance thus leading to the inability to provide these facilities on a nationwide basis. Such facilities ought to be made available to all child victims and not just those who by chance happen to live in a particular area of the country. Whilst it is noted that a trial can be transferred to another region for the purposes of availing of such facilities this only serves to add to the systemic delay which often accompanies cases of this nature.[38] It is recommended that s.13 of the Criminal Evidence Act 1992 be commenced forthwith throughout the country with each region being provided with the necessary facilities and equipment.[39]

In terms of the logistics involved in operating video link evidence an issue arises as to the venue at which the child should present his/her evidence. As it is provided via video link it is not necessary for the child to attend at the courthouse where the trial is proceeding. The benefit to be derived from video link evidence is often lost in circumstances where a child has to attend the courthouse to give the evidence, as the environs of the area can prove to be an intimidating and upsetting experience for the child, with the consequence of impairing his/her ability to give evidence. This has

[36] See Criminal Evidence Act 1992, s.12, as amended by the Child Trafficking and Pornography Act 1998, s.10.

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

[38] Ring, "Trial and Error: Current Problems in the Trial of Sexual Offences: A Prosecutor's Perspective" (2003) 13(2) ICLJ 3.

[39] It is noted that in those regions where s.13 of the Criminal Evidence Act 1992 has not been commenced use may be made of s.16 of the Criminal Justice Act 2006 (Number 26 of 2006) in terms of enabling evidence to be given by video link. However this is unsatisfactory for the following reasons. First, if the facilities are not available in a region then a submission under s.16 for video link evidence would be fruitless. Second, the Criminal Evidence Act 1992 provides a specified section for the giving of video link evidence under the Child Trafficking and Pornography Act 1998, and therefore ought to be utilised to its full potential.

been noted in England, and on occasion the experience has been so stressful for the child that the prosecution had to be dropped.[40] It is therefore recommended that child victims be provided with a comfortable and relaxed setting, and one which is detached in so far as possible from the courtroom environment, for the purposes of providing his/her evidence by way of video link.

1.4.1 RECOMMENDATION

Those involved with child victims in the criminal justice system ought to be provided with special training to enable them interact with the child in a positive and constructive manner.

It is recommended that section 13 of the Criminal Evidence Act 1992 be commenced forthwith throughout the country so as to enable the provision of video link evidence to all child victims. This facility ought to be provided in a comfortable and relaxed setting away from the courthouse and scene of the trial.

1.5 Representation of Child Victims in Violent and/or Sexual Cases

1.5.1 *Introduction*

Having regard to the vulnerability of child victims there is a need to ensure that their interests are adequately represented throughout the court process so as to ensure the minimum level of distress caused to the child. While it is acknowledged that this is a high burden of protection to meet, it should be noted that there have been steps towards independent representation of the interests of the child already in family law matters and reform and extension of those provisions could meet this standard. There have also been movements towards protecting the legal interests of victims, both adult and children, within rape trials. Section 34 of the Sex Offenders Act 2001 saw the legislature insert a provision into the Criminal Law (Rape) Act 1981[41] whereby when a complainant faces examination by the defence on his/her sexual history, that person is entitled to separate legal representation. This was a significant movement from the traditional position that a witness, even the victim, was still only a witness and

[40] Spencer, "The Evidence of Children – The English Experience" [1997] 2(9) Bar Review 382.
[41] Section 4A of the Criminal Law (Rape) Act 1981.

therefore not entitled to separate legal representation. The change can also be seen as part of the wider movement towards acknowledging greater protection for victims within the criminal justice process.

1.5.2 *The Swedish Model*

In January 2000, the Act concerning Special Representatives for Children entered into force in Sweden. To be appointed as a special representative (conservator) is an assignment whereby the special representative performs tasks on behalf of someone. The Swedish government outline that the position is founded on the belief that everyone in Sweden should have equal rights, regardless of capacity.[42] The Act concerning Special Representatives for Children aims to strengthen the rights of the child when a parent, or someone close to the parent, is suspected of an offence against the child. The objective of the law is to prevent further abuse against the child.

Under the law, a special representative can be appointed for a child under certain circumstances. This representative then acts on the child's behalf, in place of the child's legal custodian. The individual seeks to protect the rights of the child during investigations and court proceedings. The prosecutor applies to the court for a special representative for children. Representatives must have particular training (provided by the Crime Victim Compensation and Support Authority) and qualifications.[43] The person appointed as a special representative should be, "a just, experienced and otherwise suitable man or woman".[44] A person who is a minor may not be a special representative. A relative may be appointed as special representative for a person who needs this. The special representative will not cost the child anything, as he or she will be paid by the state.

1.5.3 *The Guardian Ad Litem Service – a possible blueprint?*[45]

Whilst the Swedish model is attractive it must be noted that in terms of the protection of children within the Irish family law system, there have been some important innovations over the past number of years, most notably the introduction of the

[42] http://www.dom.se/templates/DV_InfoPage____2351.aspx.
[43] Report of Sweden to the Committee on the Rights of the Child CRC/C/125/Add.1. 11 January, 2005.
[44] http://www.dom.se/templates/DV_InfoPage____2351.aspx.
[45] See also *Report of the Special Rapporteur on Child Protection 2007*, section 5.4.

guardian ad litem service. This was created under the Child Care Act 1991[46] and seeks to represent the child's interests in certain types of proceedings, namely those involving care and supervision orders,[47] and those involving children under the care of the HSE.[48] A similar provision exists in private law matters concerning the welfare of children. However this section has not yet been commenced.[49]

While such a development is undoubtedly to be welcomed, there have been a number of criticisms made of the scheme, most notably its lack of guidelines. There are no provisions laying down who should be appointed as a *guardian ad litem*, what qualifications he/she should have or what responsibilities he/she should perform. The Children Acts Advisory Board (CAAB) has however recently sought submissions on the qualifications, criteria for appointment, training and role of any *guardian ad litem* appointed under the Child Care Act 1991. CAAB is due to publish a report on this issue shortly.

In terms of lawyers representing children in court, whether they be solicitors or barristers, it is recommended that they have adequate experience and expertise in terms of both interacting with children and child law. It is suggested that a panel of appropriate lawyers be established for this purpose. In determining who shall qualify to partake on such a panel regard must be had for each individuals experience and expertise in the area.

In terms of actually representing children there can be no blanket approach to this. Rather, a more nuanced approach is required dependant upon the needs, requirements and wishes of the child. There is a world of difference between the capacity and competence of a seven year old in comparison to a sixteen year old and this needs to be appreciated in terms of representing children. A seven year old who might give evidence at a hearing may wish to do so via video link, whereas a sixteen year old

[46] Section 26 of the Child Care Act 1991 allows the court to appoint a *guardian ad litem* in situations where the child is not a party to the proceedings.
[47] Part IV of the Child Care Act 1991.
[48] Part VI of the Child Care Act 1991.
[49] Section 11 of the 1997 Act inserts Part IV into the Guardianship of Infants Act 1964. Under s.28 of the 1964 Act, the court can appoint a *guardian ad litem* in proceedings under s.6A (where an unmarried father applies to be appointed as a guardian of his infant), under s.11 (where a guardian applies to the court for a direction on any question affecting the welfare of the child) and under s.11B (where a blood relative or a person who has acted *in loco parentis* applies to the court for access to the child).

may wish to do so in court. The wishes of the child need to be respected in this regard. After all, it is a right enjoyed by a child founded upon the principles of constitutional justice.[50] Accordingly, dependent upon the age and maturity of a child, representation of a child ought to reflect the individual child's needs, requirements and wishes.

It is suggested that a reformed *guardian ad litem* scheme could provide a possible blueprint to ensure that the child victim's welfare and legal interests are represented in the trial of violent and/or serious offences. To this end however, it would be helpful to analyse the *guardian ad litem* scheme in place in England and Wales.

1.5.4 *A Comparative Analysis with the English and Welsh Model*

The Children Act 1989 saw the introduction of the *guardian ad litem* scheme in England and Wales. Under s.41 of this Act, the court "shall" appoint a *guardian ad litem* to "safeguard the interests of the child"[51] unless the court is satisfied that such an appointment is not necessary. This section also allows the Secretary of State to regulate these appointments by creating panels from which *guardian ad litems* can be appointed. The Secretary can also regulate the qualifications and/or training of *guardian ad litems*.

Regulations were drawn up in 1991 to augment the 1989 Act, including provisions on the *guardian ad litem* and to lay down the specific duties and responsibilities of the role. One important provision requires the *guardian ad litem* to appoint a solicitor to represent the child.[52] These provisions were updated in the Family Proceedings Court (Children Act 1989) (Amendment) Rules 2001 where the title "children's guardian" has been substituted for *guardian ad litem*. It also allows for the court to appoint more than one guardian to represent a child.

The differences between this scheme and that in place under Irish law are quite significant. Under the English provisions, it must be shown that the appointment is not necessary to safeguard the interests of the child before the court can decline to appoint a children's guardian. A negative approach was taken by the Irish legislature in the Child Care Act 1991 where it must be shown that the appointment is necessary

[50] *F.N. and E.B. v. C.O., H.O. and E.K.* [2004] 4 I.R. 311.
[51] Section 41(2) of the Children Act 1989.
[52] Section 11 of the Family Proceedings Courts (Children Act 1989) Rules 1991.

before it can be made. Such an approach can hardly be said to fully protect the interests of the child. Additionally, under the English 1991 and 2001 Rules, the children's guardian must appoint a solicitor for the child if one has not already been appointed. There is no equivalent in the Irish legislation and it has been suggested that it is implicit in the legislation that if a *guardian ad litem* has been appointed, this precludes the appointment of a solicitor.[53] Finally, the most noteworthy difference is the lack of direction within the Irish system. As noted above, the CAAB have sought submissions on the qualifications, criteria for appointment, training and role of any *guardian ad litem*, a development which is to be welcomed. It should be pointed out, that given this movement towards providing a more coherent and structured *guardian ad litem* service the opportunity could and should be taken to expand its remit to include such cases as discussed above. If the scheme were to be structured in a similar manner to that of England and Wales and expanded to include these cases, both the welfare and legal interests of the child victim could be protected as the appointment of a *guardian ad litem* would inevitably see the appointment of a solicitor for the child victim.

1.5.5 RECOMMENDATION

The 'Justice for Victims' initiative should include special protections for vulnerable victims, most particularly child victims of violent and/or serious crimes. Protection should be exceptionally high where the accused is a parent or guardian or where the parent or guardian cannot adequately support or protect the child victim during the case. Provision should be made to provide independent representation of the child victim in such cases. Such representation should cover both welfare and legal rights. Those providing such representation ought to have the requisite experience and expertise and to this end it is recommended that a panel of suitable candidates be established. In addition, the representation of a child ought to reflect the individual child's needs, requirements and wishes having regard to his/her age and maturity. A reform of the guardian ad litem scheme is advocated, along similar lines as the English model. Such a reform should see specific requirements laid down as to the qualifications of guardians and their responsibilities as regards the child victims. The

[53] Shannon, G., *Child Law*, (Thomson Round Hall, Dublin, 2005).

reform should also include provision for the appointment of a solicitor to ensure the protection of the legal interests of the child.

SECTION 2: FRESH COMPLAINT EVIDENCE AND CHILDREN

2.1 Introduction

In the past number of years, some evidentiary rules and procedures have been relaxed by statute to take account of the differing nature and capacity of children in giving evidence and also the ways in which children deal with crimes committed against them. The law now allows children to give evidence via video-link, questions of both the prosecution and defence can be put to them by an intermediary, and the court can accept the unsworn testimony of a child in both criminal and civil cases. One rule which remains unaltered but which seems somewhat illogical, particularly when applied to children, is that of fresh complaint.

The fresh complaint rule allows the prosecution to lead evidence of out of court statements made by the victim alleging a sexual assault. The rule continues that if the complaint is made voluntarily and as soon as is reasonably possible after the commission of the offence, then it is admissible to show the consistency and credibility of the complainant (rather than to prove the truth of the statement itself). The fresh complaint rule is an exception to the rule against narrative which prohibits the introduction in court of prior consistent statements made by a witness (including the complainant and accused) to show the credibility of that witness. In charging the jury in a case wherein the doctrine of fresh complaint may apply the trial judge directs that fresh complaint evidence does not amount to corroboration but instead only goes towards consistency.

The rule against narrative aims to prevent a witness fabricating a story and then repeating it a number of times to enhance his/her credibility in court. The fresh complaint exception was originally allowed because it was thought that the strict requirements of the timing of the complaint and the necessity of voluntariness would ensure that only those telling the truth would fall within this exception. This expectation flows from the somewhat bizarre belief that if a person truly has been sexually assaulted they will complain immediately. Stanchi notes that the elements of the rule have led to a paradox in that the rule is both useful for complainants and

damaging.[54] It is useful in that if the victim's complaint does happen to fall within the strict requirements and it can be presented in court, this will go some way to proving the complainant's credibility to the jury. It is damaging in that if the complaint made does not fall within the parameters of the rule, the jury might assume that the complainant never made a complaint and this could seriously damage the complainant's case. It also reinforces the archaic stereotype that the court should be suspicious of sexual complainants.

2.2 Operation of the Rule

As noted above, for the complaint to be admissible, it must be made as soon as is reasonably possible after the commission of the alleged offence and it must be made voluntarily. These requirements have been discussed a number of times by both the English and Irish judiciary and the same requirements apply to both complaints made by adults and children.

Prior to the decision in *R. v. Lillyman*,[55] it was only the fact that a complaint was made that could be admitted into evidence. The court would not permit admission of the details of the complaint itself. Since the decision in *Lillyman* if the complaint is admissible at all, that will include both the fact that it was made and the details of the complaint itself.

This element of the rule was first discussed in the Irish case of *People (D.P.P.) v. Brophy*[56] where the accused was convicted of indecently assaulting a 14 year old girl and sentenced to 5 years imprisonment. Evidence of a complaint made by the complainant was presented by the prosecution who did not disagree that it was not made at the first available opportunity.[57] The prosecution suggested that because the complainant delayed in the making of the complaint, this merely meant that the complaint was not admissible to prove the facts stated therein but was admissible to show that a complaint had been made. The evidence of the complainant was not corroborated and parts of her testimony were inconsistent. The Court of Criminal

[54] Stanchi, "The Paradox of the Fresh Complaint Rule" (1996) 37 Boston College Law Review 441.
[55] [1896] 2 Q.B. 167.
[56] [1992] I.L.R.M. 709.
[57] The complainant had met her mother a short time after the commission of the alleged offence but did not say anything. Later on in the evening, she told some friends and subsequently her father of the alleged indecent assault.

Appeal noted that the approach of the prosecution in presenting the fact of a complaint (as opposed to the contents of the complaint) was incorrect:

> "It seems to the court...that either evidence of a complaint having been made is admissible or it is not. If it is admissible, then subject to the discretion of the trial judge to prevent unnecessary prejudicial repetition, the terms of the complaint are also admissible. It is for the trial judge to rule on the matter in the first instance...".

While the Irish courts have been very strict on the requirement that the complaint is made as soon as is reasonably possible,[58] it seems that, in some cases, if the complainant can show a valid justification for a short delay, this will not automatically render the complaint inadmissible. In *People (D.P.P.) v. R.*,[59] the accused appealed against his conviction for rape and sexual assault on the grounds that *inter alia* it had not been made as soon as possible after the commission of the alleged offence. The court in this case took a pragmatic approach to the requirement of "fresh" complaint. The adult complainant and her husband had been staying with her sister-in-law and her partner. The complainant alleged that the partner had sexually assaulted her on a Sunday evening and it was not until Monday evening, after they had returned to their own home, that she told her husband of the incident. The court allowed this complaint on the basis that the partner of the sister-in-law was acknowledged to have a violent temper and the complainant argued that she was afraid that there would be a violent confrontation between him and her husband.

In *People (D.P.P.) v. Kiernan*,[60] the complainant alleged she had been raped by the accused in his house on a Friday night. After the alleged rape, she had met the accused's girlfriend and had told her of the rape. However the accused's girlfriend did not believe the complainant. Following this encounter, she returned to her own home where she met her parents and other family members. She did not complain to them. The prosecution argued that the reason for her delay was that she wanted to wait to tell her boyfriend as his brother was a social worker and she thought he would be able to advise her. She met her boyfriend on the Saturday following the alleged rape. However, she did not tell him of the incident until the Sunday. The court held that if

[58] *People (D.P.P.) v. Synnott* unreported, Court of Criminal Appeal, 29 May, 1992. The Court refused to allow the admission of a complaint where the delay was one year.
[59] [1998] 2 I.R. 106.
[60] Unreported, Court of Criminal Appeal, 11 March, 1994.

the complaint had been made on the Saturday, it would have been admissible. That said, the delay until Sunday was not justifiable.

The Court of Criminal Appeal in the recent case of *The People (D.P.P.) v. T.O'R.*[61] has maintained this approach. In that case the complainant was raped between midnight and 1 a.m., but did not complain about the matter until 3 p.m. the next day. The court noted that she did not tell the accused's sister, for whom she was babysitting, upon her return, nor did she tell her own mother or sisters. The reason proffered for this was two fold. The complainant felt ashamed as to what happened and did not want to upset her mother, and in addition the accused had threatened her. It was not until 3 p.m. the next day when the complainant was with a friend did she discuss the incident. The court held that while the complaint was not made at the first available opportunity it was made as speedily as could reasonably be expected. Nonetheless, the issue did not fall under the doctrine of fresh complaint due to the content of the complaint.

The other substantive element of the rule is that the complaint must be made voluntarily. This requirement has also been interpreted quite narrowly so that, as Healy notes any "lack of spontaneity due to prompting, where the allegation was first conveyed in response to another person's demands or in response to leading questions" will render the complaint inadmissible.[62] Again, it seems that this component of the rule derives from the conviction that those telling the truth will not need prompting or encouragement to make a complaint. This would seem to preclude suggestive questioning. However, in *R. v. Osbourne*[63] where the complaint was made after the complainant's friend asked her why she had not waited for her in the accused's home, the court held that such a question did not render the complaint inadmissible. A similar approach has been taken by the Irish Courts where in *People (D.P.P.) v. R.*,[64] a conversation was commenced by the complainant with the words "Denis is no gentleman". Her husband asked what she meant by that and she then made the complaint. The court held that the complaint was admissible.

[61] [2008] IECCA 38 (Unreported, Court of Criminal Appeal, 14th March, 2008).
[62] Healy, J., *Irish Laws of Evidence* (Thomson Round Hall, Dublin, 2004).
[63] [1905] 1 K.B. 551.
[64] [1998] 2 I.R. 106.

The jury must be made aware that the complaint cannot be used as proof of the facts contained therein. In *People (D.P.P.) v. M.A.*,[65] the accused was convicted of rape and appealed his conviction on the basis that the judge had not properly instructed the jury that evidence of the complaint could only be admissible to show consistency of the complainant's story and not to prove the facts asserted therein. The Court of Criminal Appeal allowed the appeal stating that in every case where a complaint was admitted under the fresh complaint rule, the judge should give a direction to the jury that the complaint can only be considered with regard to the consistency of the evidence of the complainant and not the truth of the complaint itself.

2.3 Approaches in Other Jurisdictions

2.3.1 Canada

The legislature abolished the fresh complaint rule in Canada following the Report of the Federal/Provincial Task Force on Uniform Rules of Evidence where it was stated that there was no connection between how quickly a complaint is made and whether or not it is fabricated.[66] This recommendation was then incorporated into the Criminal Law Amendment Act.[67]

2.3.2 Australia

The South Australia and Australian Capital Territory[68] legislatures also abolished the rule in 1999. The legislation made all complaints inadmissible regardless of when they were made. As a result of severe criticism, both legislatures have reintroduced the rule in an amended form.

Queensland has taken a different approach – instead of abolishing the rule, it has narrowed the scope allowing admissibility of the fact that the complaint was made but

[65] [2002] 2 I.R. 601.
[66] Report of the Federal/Provincial Task Force on Uniform Rules of Evidence (1982) 301, published at (1981) 18 CR (3d) 289.
[67] SC 1980-81-82, c 125, s.246.5.
[68] Evidence Act 1971 (ACT), s.76C.

not of the contents of the complaint.[69] Under this new regime, evidence of a complaint is admitted regardless of when it was made and the judge does not give a warning to the jury as to the reliability of the evidence. The section still reserves discretion on the part of the judge to exclude the complaint if it would be unfair to the accused.

Finally, in the uniform evidence act jurisdictions, the approach is similar to that in England and Wales (see below). The fact of the complaint and the details of the complaint are admitted.

2.3.3 England and Wales

In 2003, the English legislature codified the approach in that jurisdiction to fresh complaint in the Criminal Justice Act. Under this piece of legislation, the court now admits the fact of the complaint and the contents of the complaint. However they have retained the requirement that the complaint be made as soon as could be reasonably expected.[70]

2.4 The Need for Reform

The presence of this rule in our evidentiary laws is not unusual – it has existed in one form or another in most common law jurisdictions for a long time. As noted above, its foundations lie in the fact that it is an exception to the rule against narrative and it must be construed strictly so as to ensure complaints are not fabricated. This focus on fabrication has always been a particular worry of the law especially in relation to sexual offences. However, it must now be acknowledged that this rule is increasingly bizarre and archaic, especially when it is considered in relation to children and reporting of sexual offences.

Children, who are the victims of sexual offences, may find it even more difficult than an adult to complain about the event. The shame and humiliation felt by an adult is commonly put forward, and accepted, as a justification for not making a complaint at the first available opportunity. It is suggested that these feelings are magnified in respect of child victims by virtue of their natural immaturity. Moreover, a child may not even realise the seriousness and gravity of the event and because of their lack of

[69] Evidence (Protection of Children) Amendment Act 2003, s.40.
[70] Criminal Justice Act 2003, s.120(4).

understanding may not make a complaint for a significant period of time. The judgment of Walsh J. in *The People (D.P.P.) v. J.T.*[71] displays a judicial appreciation for these factors. In that case the accused was convicted of incest, buggery and indecent assault of his daughter between the ages of 11 and 19. The complainant daughter suffered from downs syndrome. The sexual abuse extended over an eight year period but the complainant did not make a complaint until three months following the last incident having been prompted to do so by virtue of a television programme she saw. The court, having regard to her immaturity and intellectual disabilities, held that the complaint was not too remote to be taken into account as being consistent with the complainant's credibility as a witness. This case illustrates the need to take a different approach in respect of child victims of sexual offences. However, the degree of flexibility exercised in this case has not since been replicated.

One must question the almost mandatory requirement to obviate all forms of delay in making a complaint before the doctrine of fresh complaint can apply. Delay is a common phenomenon across our jurisprudence. For example in judicial review case law the courts readily accept reasons for delay thereby allowing the matter to proceed. There is a dearth of case law recognising and accepting reasons for delay, yet the doctrine of fresh complaint does not appear to accommodate this area of jurisprudence. The result being a lack of judicial consistency in dealing with this matter.

In the past number of years, the increasing number of cases involving adults who had been sexually abused as children has seen the courts develop a substantial body of jurisprudence on delays in the prosecution of sexual offences as it is recognised that these complaints are legitimate and this issue must be tackled by the law. In the most recent authoritative decision on this issue, *H. v. D.P.P.,*[72] the Supreme Court noted that in deciding whether to allow the case to go ahead:

> "the core inquiry is not so much the reason for the delay in making a complaint by a complainant but rather whether the accused will receive a fair trial or whether there is a real or serious risk of an unfair trial. In practice this has invariably been the essential and ultimate question for the court. In other

[71] (1988) 3 Frewen 141.
[72] [2006] IESC 55 (Unreported, Supreme Court, 31 July, 2006).

words, it is the consequences of the delay rather than delay itself which has concerned the court."

Essentially, the court appears to be acknowledging that there are innumerable reasons why a child will not immediately complain about sexual abuse[73] and that this should not prevent the accused from being prosecuted. The focus should be on protecting the right of the accused to a fair trial. It is suggested that this would be a sensible approach to the rule on fresh complaint and would ensure consistency as well. It seems somewhat unusual that the courts can allow a case to be prosecuted despite a significant delay, providing the accused's right to a fair trial is protected, but they cannot overlook a delay in making a complaint even if the delay is only a matter of days.

2.5 RECOMMENDATION

It is recommended that the common law rule on fresh complaint evidence be abolished. A new evidentiary rule should be put in place to allow out of court complaints to be admitted both in fact and in content. A provision should be included to allow the judge to retain discretion not to admit the complaint where to do so would constitute a real or serious risk of an unfair trial to the accused.

[73] In *G. v. D.P.P.* [1994] I.R. 374; *B. v. D.P.P.* [1997] 3 I.R. 140; *P.C. v. D.P.P.* [1999] 2 I.R. 25; *S. v. D.P.P.* [2000] IESC 30 (Unreported, Supreme Court, 19 December, 2000) the court accepted psychological evidence that dominion by the abuser over the child can prevent him/her from speaking up. In *B.* the court accepted evidence given by the complainant that she felt she was to blame for the abuse.

SECTION 3: CHILD PORNOGRAPHY

3.1 Introduction

The Child Trafficking and Pornography Act 1998,[74] hereinafter referred to as the '1998 Act', was brought into force against a backdrop of increasing public concern surrounding the sexual exploitation of children both domestically and on the international front. In drafting the Bill,[75] account was had of the EU Joint Action against Trafficking in Human Beings and the Sexual Exploitation of Children,[76] an action plan in which Ireland played a leading role during its Presidency of the EU. While Ireland has played an important role on the international stage in terms of developing policy in this area, implementation of international initiatives in this field must now be given priority.

[74] Number 22 of 1998.
[75] Child Trafficking and Pornography Bill 1997 (Number 73 of 1997).
[76] 97/154/JHA of 24 February, 1997.

The 1998 Act is quite detailed and specific, and has been amended.[77] It is proposed to solely deal with issues relating to child pornography under the 1998 Act in this section.[78] The Act defines child pornography[79] and creates the offences of using children for pornography,[80] the production and distribution of child pornography,[81] and the possession of child pornography.[82] A number of issues arise in relation to the operation of this Act that require critical analysis.

3.2 The Meaning of 'Child' in the 1998 Act

Section 2(1) defines 'child' as a person under the age of 17 years.[83] The rationale behind adopting this age limit was based on the lawful age of consent to partake in sexual relations. The age of consent has become a topic of great debate in the aftermath of the case of *C.C. v. Ireland*,[84] wherein the Supreme Court upheld a challenge to the constitutionality of the strict liability offence of unlawful carnal knowledge with a girl under 15 years of age on the basis of its failure to allow a defence of honest/reasonable belief that the girl in question was not under 15 years of age. Irrespective of the final determination as to the lawful age of consent to engage in sexual relations, it is recommended that the definition of a child for the purposes of the 1998 Act be amended to that of a person under the age of 18 years.

The reasoning for this is twofold. First, it would be in accordance with the constitutional definition of child as enunciated by the Supreme Court in the case of *Sinnott v. Minister for Education.*[85] Second, it accords with the growing international trend. The United Nations Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography,[86] and EU Council Framework Decision 2004/68/JHA of 22 December, 2003, on combating the sexual exploitation of children and child pornography both seek to implement a

[77] Child Trafficking and Pornography (Amendment) Act 2004 (Number 17 of 2004); Criminal Law (Sexual Offences)(Amendment) Act 2007 (Number 6 of 2007).
[78] See *Report of the Special Rapporteur on Child Protection 2007* (section 4) for analysis on child trafficking.
[79] Section 2.
[80] Section 4.
[81] Section 5.
[82] Section 6.
[83] See Appendix 2.
[84] [2006] 2 I.L.R.M. 161.
[85] [2001] 2 I.R. 545.
[86] Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May, 2000, and entered into force on 18 January, 2002.

uniform approach across all State Parties and Member States respectively having regard to the international dimension commonly associated with child pornography. That said, our legislation ought to reflect, or at least complement, that of other jurisdictions and the provisions contained in the above mentioned international instruments. By way of illustration the Council Framework Decision defines 'child' as a "person below the age of 18 years".[87] The Council of Europe Cybercrime Convention, which amongst other issues relates to child pornography on the internet, defines 'minor' as a person under the age of 18 years, albeit it does permit states to designate a lower age limit of not less than 16 years.[88] Recently our closest neighbour England amended its laws in this manner, as did Australia which operates a legal system very similar to our own.[89]

Therefore it is clear that the growing international trend points towards defining a child for the purposes of child pornography as a person under the age of 18 years. Even if the lawful age of consent in respect of engaging in sexual relations remains at 17, or is determined at another age other than 18 years, this should still not affect any decision to define child as a person under the age of 18 years for the purposes of the 1998 Act. Indeed, in the four Australian States and Territories that have defined child as a person below the age of 18 years the general age of consent in those jurisdictions remains at 16 years.

3.2.1 RECOMMENDATION

The definition of 'child' for the purposes of the Child Trafficking and Pornography Act 1998 should be amended to that of a person under the age of 18 years.

3.3 Section 2 – Child Pornography

[87] Article 1(a).

[88] Convention on Cybercrime, Budapest, 23.XI.2001, Article 9(3).

[89] Section 45(2) of the English Sexual Offences Act 2003 (c.42) amended s.2(3) of the Protection of Children Act 1978 (c.37) by increasing the age of a 'child' from 16 to 18 years of age. In 2004, s.473.1 of the Australian Commonwealth Criminal Code was amended thereby increasing the age of a 'child' from 16 to 18 years for the purposes of child pornography; see Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No.2) 2004. This amendment became effective on the 1st of March, 2005. In addition, various Australian States and Territories amended their laws in 2004 in a similar manner – Australian Capital Territory, Northern Territory, Tasmania, and Victoria. The States and Territories of New South Wales, Queensland, South Australia and Western Australia have maintained the age at 16 years.

Section 2 of the 1998 Act defines child pornography in a detailed manner.[90] This marks a departure from traditional definitions found in legislation as it curtails the discretion of the courts in determining what might constitute child pornography. In effect, it seeks to encompass any visual or audio representation of a person depicted as being a child engaged in explicit sexual activity, witnessing any such activity, or where the dominant characteristic is the depiction of the genital or anal region of a child for a sexual purpose. The definition also includes such representations produced by or from computer graphics or by other electronic means.

3.3.1 *Computer Graphics and Electronically Generated Images*

Section 2(2) of the 1998 Act expands the definition of child pornography to include circumstances where in fact an actual child was not used to create the pornography. Such images are referred to as pseudo-photographs in the English legislation.[91] Section 2(2) of the 1998 Act states:

> "The reference in paragraph (a) of the definition of child pornography to a person shall be construed as including a reference to a figure resembling a person that has been generated or modified by computer-graphics or otherwise, and in such a case the fact, if it is a fact, that some of the principal characteristics shown are those of an adult shall be disregarded if the predominant impression conveyed is that the figure shown is a child."

The phraseology of this section is problematic in two regards, and may in fact lead to a constitutional challenge. First the phrase "resembling a person", and second the phrase "predominant impression conveyed".

Interestingly, similar phraseology was deemed unconstitutional by the United States Supreme Court in the case of *Ashcroft v. Free Speech Coalition*.[92] The case concerned the Child Pornography Prevention Act of 1996 (CPPA) which added new subsections to 18 U.S.C. § 2256(8). The subsections sought to deal with virtual child pornography, i.e. pornography created by computer generated images or through the use of adults depicted as being children. A constitutional challenge was brought by persons involved in the adult entertainment industry claiming that the use of the phrases "appears to be" and "conveys the impression" of a child was overbroad and vague, and had a chilling effect on the production of their works which were protected

[90] See Appendix 2.
[91] Protection of Children Act 1978 (c.37), s.1, as amended by the Criminal Justice and Public Order Act 1994 (c.33), s.84.
[92] 535 U.S. 234 (2002).

by the First Amendment. A majority of the Supreme Court agreed and struck down the two subsections in question. The court held that the productions could not be described as obscene, nor was there any exploitation of real children which would otherwise entitle the state to intervene. The court reasoned that the statute sought to create a criminal offence where in fact there was no crime and no victim of a crime. It was of the opinion that virtual pornography is not "intrinsically related" to the sexual abuse of children. Relying on previous precedents the majority held that a mere tendency of expression to encourage an illegal act is not a sufficient reason for prohibiting such expression as there must be a direct link between the expression and the imminent illegal act.

The phraseology struck down in this case is similar to that in the 1998 Act set out above, and therefore gives cause for concern as to the constitutionality of s.2(2) of the 1998 Act. However, it is submitted that there are a number of distinguishing features that might apply to any such challenge brought in Ireland. First and foremost freedom of expression in the United States has been given considerable protection over the years and it is only in the most exceptional of cases that it will be regulated. This reflects the absolutist conception of free speech found in the First Amendment's declaration that "Congress shall make no law … abridging the freedom of speech". Both the Irish Constitution and the European Convention of Human Rights favour a more limited conception of freedom of expression. Both provide for it to be limited where that is required, for example, for public interest reasons such as "the protection of health or morals".[93]

Irish jurisprudence on freedom of expression is not therefore as strong as that in the United States. Of particular importance, however, in the current context is the express constitutional limitation on freedom of expression in Ireland set out in Article 40.6.1°(i) rendering the publication of "indecent matter" punishable in accordance with the law. It is thought that any form of child pornography, or material suggestive of child pornography would be deemed "indecent matter" for the purpose of our Constitution. Second, constitutional jurisprudence in the United States centres on the

[93] The European Court of Human Rights has allowed Contracting States a wide margin of appreciation when regulating matters of obscenity or morality. See, for example, *Muller v. Switzerland* (1991) 12 E.H.R.R 212; *Wingrove v. U.K.* (1997) 24 E.H.R.R. 1; *Otto Preminger Institut v. Austria* (1995) 19 E.H.R.R. 34.

rights of the individual whereas Irish constitutional jurisprudence tends to place greater weight on the common good. Therefore, the question that might be posed in any challenge to s.2(2) of the 1998 Act is whether the right of an individual to publish such material should trump the protection of the common good in seeking to prohibit such material. Third, it is difficult to agree with the reasoning of the United States Supreme Court in *Ashcroft* in relation to virtual child pornography not being "intrinsically related" to the exploitation of children. Research has shown that persons who seek out such virtual child pornography join the "market place" -so to speak- for child pornography, thereby increasing demand. This demand has to be met with supply resulting in an increase in the exploitation of children.

Whilst the decision in *Ashcroft* does expose the potential for s.2(2) of the 1998 Act to be subjected to constitutional challenge, it is thought that the common good would prevail and s.2(2) would be upheld.

3.3.2 *An Offence of Indecency?*

Investigations into possession of child pornography indicate a wide variety in the kinds of images collected by adults who have a sexual interest in children.[94] A negative aspect in adopting such a detailed definition of child pornography in the 1998 Act relates to the lack of discretion afforded to the courts in assessing what material falls under the Act. Material that might be deemed suspect but does not reach the threshold of child pornography will not result in a prosecution under the Act and it is understood that a number of cases have failed on this basis. In this regard, under s.2 of the 1998 Act the necessity for the sexual activity in which the child is engaged in to be "explicit" is thought to represent too high a threshold. It is therefore recommended that the concept of "indecency" be introduced to run alongside that of child pornography in the 1998 Act. Essentially, it would apply to the use of children in creating such material, the production and distribution of such material, and the possession of such material in accordance with ss. 4, 5, and 6 of the 1998 Act respectively, thereby creating a lower grade of offence.

[94] Krone, "Does thinking make it so? Defining online child pornography possession offences", *Trends and Issues in Crime and Criminal Justice*, April 2005.

Section 3(3)(e) of the 1998 Act, as amended,[95] defines sexual exploitation of a child to include acts of an "indecent nature". It is recommended that this concept of indecency be expanded so as to apply to child pornography also. The question then arises as to what constitutes indecency. Examples of the type of material that would fall under this heading, that may not fall within the 1998 Act as it currently stands, are as follows:

- Photographs of fully clothed children adopting indecent poses or positions.
- Seemingly harmless photographs of children but used by a person for prurient sexual gratification, e.g. parents might photograph their children in swimming clothes at the beach with no ulterior motive whatsoever, whereas a stranger may take photographs of such children on a beach for his/her own sexual gratification.
- Representations of casual intimacy.
- Indecent conversations in internet chat rooms, e.g. conversations of a sexual nature.

It is recommended that the 1998 Act be amended to include a category of material whereby the court would have discretion to criminalise the possession, distribution and possession of the above examples as they can precipitate the graver offence of child pornography, or may lead to instances of grooming[96] and the sexual exploitation of children.

Any statutory definition of indecent material needs to be phrased in a sufficiently broad manner so as to enable the courts exercise their discretion on a case by case basis. Such discretion is required so that the parents on the beach in the example above are not prosecuted, but the stranger is. Although English legislation in this area criminalises the production and distribution,[97] and possession[98] of indecent photographs of children, no statutory definition as to what constitutes indecency is provided. English case law dictates that indecency is to be assessed on an objective basis and is properly a matter for a jury to decide upon.[99] What is clear, however, is that it relates to material of a lesser nature to that currently defined as child

[95] Section 3(3) was substituted by s.6 of the Criminal Law (Sexual Offences)(Amendment) Act 2007 (Number 6 of 2007).
[96] See also *Report of the Special Rapporteur on Child Protection 2007*, section 4.3.
[97] Protection of Children Act 1978 (c.37), s.1
[98] Criminal Justice Act 1988 (c.33), s.160.
[99] *R. v. Smethurst* [2002] 1 Cr. App. R. 6.

pornography in the 1998 Act. Section 473.4 of the Australian Commonwealth Criminal Code Act 1995[100] details a test for determining whether material is offensive, and it is submitted that such a test could equally apply as to whether material is indecent. It states:

> "The matters to be taken into account in deciding for the purposes of this Part whether reasonable persons would regard particular material, or a particular use of a carriage service, as being, in all the circumstances, offensive, include:
> (a) the standards of morality, decency and propriety generally accepted by reasonable adults; and
> (b) the literary, artistic or educational merit (if any) of the material; and
> (c) the general character of the material (including whether it is of a medical, legal or scientific character)."

It is recommended that any statutory definition of indecent material take into account both the circumstances in which the material was produced, or by which a person came into possession of such material, and the intent of the producer or possessor.[101] Having regard to the English definition of "sexual" in s.78 of the Sexual Offences Act 2003,[102] the following definition as to what constitutes "indecent material" is recommended:

> Material is indecent if a reasonable person would consider that –
> (a) whatever its circumstances or any person's purpose in relation to it, it is because of its nature indecent, or
> (b) because of its nature it may be indecent and because of its circumstances or the purpose of any person in relation to it (or both) it is indecent.

3.3.2.1 RECOMMENDATION

The Child Trafficking and Pornography Act 1998 should be amended so as to include a category of material which is indecent. This would apply to the offences already contained in the Act, i.e. allowing a child to be used for indecent material; producing, distributing etc. indecent material; and possession of indecent material. An offence involving indecent material would be of a lesser standard than one involving child

[100] As amended by the Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No.2) 2004.
[101] Gillespie, "Child Pornography: Balancing Substantive and Evidential Law to Safeguard Children Effectively From Abuse" (2005) 9(1) E. & P. 29.
[102] c.42.

pornography. The following is recommended as a statutory definition for 'indecent material':

Material is indecent if a reasonable person would consider that –

(a) whatever its circumstances or any person's purpose in relation to it, it is because of its nature indecent, or

(b) because of its nature it may be indecent and because of its circumstances or the purpose of any person in relation to it (or both) it is indecent.

3.3.3 Distinguishing between Indecent and Pornographic material

The various forms of images commonly referred to as child pornography have in fact been categorised. In 1997, the Department of Psychology in University College Cork established the COPINE[103] project. The COPINE project categorised the nature of material on the following scale of increasing gravity:

1. Indicative (non-erotic/non-sexualised pictures)
2. Nudist (naked or semi-naked in legitimate settings)
3. Erotica (surreptitious photographs showing underwear/nakedness)
4. Posing (deliberate posing suggesting sexual content)
5. Erotic posing (deliberate sexual or provocative poses)
6. Explicit erotic posing (emphasis on genital area)
7. Explicit sexual activity not involving an adult
8. Assault (sexual assault involving an adult)
9. Gross assault (penetrative assault involving adult)
10. Sadistic/bestiality (sexual images involving pain or animal)

For the purposes of sentencing in cases involving indecent and pornographic material pertaining to children, the English Sentencing Advisory Board adopted the COPINE scale and established the following 5 levels concerning the nature of the material.[104]

Level	Description	COPINE scale

[103] Combating paedophile information networks in Europe. See www.copine.ie.

[104] Sentencing Advisory Panel, *The Panel's Advice to the Court of Appeal on Offences Involving Child Pornography*, August 2002, p.6. This report arose from a request by the Court of Appeal in the case of *Wild (No.1)* [2002] 1 Cr. App. R. (S) 37.

1	Images depicting nudity or erotic posing, with no sexual activity.	2. Nudist 3. Erotica 4. Posing 5. Erotic posing 6. Explicit erotic posing
2	Sexual activity between children, or solo masturbation by a child.	7. Explicit sexual activity not involving an adult
3	Non-penetrative sexual activity between adult(s) and child(ren).	8. Assault
4	Penetrative sexual activity between child(ren) and adult(s).	9. Gross assault
5	Sadism or bestiality	10. Sadistic/bestiality

The Sentencing Advisory Panel did not include COPINE category 1 on the basis that such images could not be categorised as indecent or pornographic.

The Court of Appeal in England in the case of *R. v. Oliver*[105] accepted these guidelines, but in respect of Level 1 omitted categories 2 and 3 of the COPINE scale on the basis that they did not, of themselves, meet the threshold for indecency or pornography. However, the Court of Appeal in the later case of *R. v. Carr*[106] appears to implicitly accept that COPINE categories 1 to 3 can constitute indecent material, albeit not worthy of punishment in that case. The guidelines adopted in England in the case of *R. v. Oliver* have been met with some level of approval in this jurisdiction, noting however that Irish sentencing jurisprudence does not provide for the use of guidelines to the extent used in England. In *The People (D.P.P.) v. G.McC.*,[107] Geoghegan J. in the Court of Criminal Appeal derived "some assistance" from the categorisation approved of in *R. v. Oliver.* Fennelly J. in the Court of Criminal Appeal case of *The People (D.P.P.) v. Loving*[108] also referred to this categorisation and in fact went further and related the offences before the court in that case to the categories set out in *R. v. Oliver.*[109]

[105] [2002] EWCA Crim 2766.
[106] [2003] EWCA Crim 2416.
[107] [2003] 3 I.R. 609.
[108] [2006] 3 I.R. 355.
[109] *Ibid.,* at 364.

It is clear, therefore, that the COPINE scale has been met with judicial approval. In terms of distinguishing between what constitutes child pornography for the purposes of the 1998 Act and the above proposed introduction of indecent material, it is recommended that categories 1 to 3 of the COPINE scale act as indicators for what constitutes indecent material, whilst categories 4 to 10 fall under the definition of child pornography as per the 1998 Act.

3.3.3.1 RECOMMENDATION

For cases involving indecent material and child pornography, the COPINE scale should be used by the courts in determining the category of material before it. This may be implemented by way of Practice Direction. In terms of distinguishing between indecent material and child pornography, it is suggested that indecent material can be ascribed to categories 1-3 of the COPINE scale, with categories 4-10 denoting child pornography.

3.4 Section 4 – Allowing a Child to be Used for Child Pornography

Section 4(1) of the 1998 Act criminalises those who have the custody, charge or care of a child and allow that child to be used for child pornography.[110] Section 4(2) details the circumstances in which a person is deemed to have the custody, charge or care of a child. It is submitted that in relation to this section the devil is in the detail in that due to the specific and technical circumstances set out in s.4(2), it may give rise to legal argument in certain cases and expose potential loopholes in the legislation. For example, a natural father who is not a guardian of his child, and is subject to a barring order from the home of the child would not fall under s.4 of the 1998 Act, thereby escaping possible conviction. Similarly, a swimming coach who uses a child for pornography outside of training time thereby technically not having charge or care of the child might also escape conviction under s.4. Both parties in the above examples may escape conviction due to the detailed and technical nature of s.4 despite contravening the clear purpose behind s.4, that being the punishment of those who breach a relationship of trust with a child in order to use the child for pornographic purposes.

[110] See Appendix 2.

It is difficult to see why in fact s.4 was enacted, as the offence which it seeks to regulate is clearly covered by s.3(2)(b), using a child for the purpose of sexual exploitation. Both offences carry the same maximum term of imprisonment, 14 years. The rationale for the s.4 offence, and its specific reference to those who have the custody, charge or care of a child, clearly seeks to punish those who abuse relationships of trust. It is a graver offence to use a child with whom the offender has a relationship of trust for pornographic purposes than a child who is a stranger to the offender. Research has demonstrated that children exploited by persons they know and trust suffer greater psychological and emotional harm as a result of the offence. As this is a graver offence it is submitted that the level of punishment should be greater than that if the child is used for pornographic purposes by a stranger. It is therefore recommended that s.4 be amended so that it be couched in broader terms which focus on there being a relationship of trust and confidence between the child and offender, rather than setting out in detail the circumstances in which a person has the custody, charge and care of a child.

As noted both sections 3 and 4 carry a maximum term of imprisonment of 14 years. This is adequate, but in order to differentiate between the two offences it is recommended that a mandatory minimum sentence be imposed for a breach of s.4.

In the past, the view has been expressed that mandatory minimum sentences could be unconstitutional on the ground that it "precludes the Court from doing what it is constitutionally required to do, namely to consider whether the personal circumstances of the offender warrant a reduction in sentence below the prescribed period".[111]

At the same time, however, mandatory sentences have been a feature of Irish criminal law. The Misuse of Drugs Act 1977 as amended[112] provides that a person found guilty of being in possession of drugs with a value of €12,697.38 (IR£10,000) or more[113] be

[111] Ní Raifeartaigh, "The Criminal Justice System and Drug Related Offending: Some Thoughts on Procedural Reforms", (1998) Bar Review 4(1).
[112] Criminal Justice Act 1999 (Number 10 of 1999).
[113] Misuse of Drugs Act 1977, s.15A.

sentenced to a term of imprisonment not less than 10 years,[114] unless the court determines that by reason "of exceptional and specific circumstances relating to the offence, or the person convicted of the offence, it would be unjust in all the circumstances to do so".[115] Similarly the Criminal Justice Act 2006 introduced mandatory minimum sentences in respect of various firearms offences.

Furthermore, a recent challenge to the requirement of a mandatory life sentence for murder was dismissed by the High Court. In *Whelan & Lynch v. Minister for Justice, Equality and Law Reform*,[116] Irvine J. held as follows:

> "There is nothing constitutionally unacceptable, on the present case law, in the Oireachtas deciding to prescribe general rules which reflect its views, as democratically elected representatives of the public, as to the degree of seriousness to be attributed to different types of offences".

The decision in *Whelan* is based in part on the particular nature of murder, the fact that the sentence prescribed was the maximum possible under the law, and the fact that an accused could have been convicted of lesser offences arising out of the same conduct. These factors are, to some extent, peculiar to the offence of murder. *Whelan* is therefore a strong, but not decisive precedent on this point.

However, it is clear that mandatory minimum sentencing is not, of itself, unconstitutional. It is argued in this Report that its use is justified in this area. In terms of protecting children there is a clear public policy imperative pointing towards the protection of children and punishment of offenders. This imperative is founded upon both the constitutional and ECHR rights of a child, which it is submitted override those of an offender in this instance.

It is recommended that a mandatory minimum sentence for the purpose of s.4 of the 1998 Act should be no less than 3 years so as to ensure that the European Arrest Warrant procedure can be invoked if needs be.[117]

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[114] Misuse of Drugs Act 1977, s.27(3C).
[115] Misuse of Drugs Act 1977, s.27(3D).
[116] [2007] IEHC 374.
[117] European Arrest Warrant Act 2003 (Number 45 of 2003). See Article 2(2) of Council Framework Decision of 13 June, 2002, on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA).

3.4.1 RECOMMENDATION

Section 4 of the Child Trafficking and Pornography Act 1998 should be amended so that it be couched in broader terms which focus on there being a relationship of trust and confidence between the child and offender, rather than setting out in detail the circumstances in which a person has the custody, charge and care of a child. In addition, due to the gravity of this offence, it is recommended that a mandatory minimum sentence of at least 3 years imprisonment be imposed.

3.5 Section 5 – Producing, Distributing, etc., Child Pornography

For a person to be found guilty of an offence under s.5 of the 1998 Act the prosecution must prove that the accused "knowingly" took part in the activities set out therein.[118] This gives rise to a potential lacuna in the law in that it will not capture those persons who distribute and import child pornography without knowing the content of the product they are dealing with. If a person merely dealt with plain packages, not knowing what was inside, he/she would not fall under s.5. It is submitted that this cannot be tolerated as it provides a loophole for the ignorant offender. All a person needs to do to escape prosecution under s.5 is not ask what they are dealing with. Despite not asking what they are dealing with they are still partaking in the process and thus supplying child pornography.

To rectify this situation it is recommended that s.5 of the 1998 Act be amended so as to include recklessness as a mental element to the offence. This would therefore provide the prosecution and the court with greater scope to deal with the purposively ignorant offender.

3.5.1 RECOMMENDATION

The mental element of the offence of producing, distributing etc. child pornography under s.5 of the Child Trafficking and Pornography Act 1998 should be amended to include the concept of 'recklessness' so as to enable the prosecution of the purposively ignorant offender.

3.6 Section 6 – Possession of Child Pornography

[118] See Appendix 2.

3.6.1 *Introduction*

Under s.6 of the 1998 Act it is an offence to knowingly possess child pornography.[119] This is a 'hybrid offence'. It can be tried summarily in the District Court where the maximum sentence is a fine not exceeding IR£1,500, and/or imprisonment for a term not exceeding twelve months. Alternatively, conviction on indictment can result in a fine not exceeding IR£5,000, and/or imprisonment for a term not exceeding 5 years.

3.6.2 *An Offence of Viewing Child Pornography?*

Section 6 of the 1998 Act fails to account for the viewing of child pornography, particularly such material on the internet. Therefore, at present, those who view child pornography on the internet will only come under the scope of s.6 if they download the material to their computer, or other device, or print the material as they will then be in possession of same. There is a distinction between viewing and being in possession of child pornography. In the Canadian case of *R. v. Daniels*,[120] it was held that an individual need not view the material in order to be in possession of it. Instead it is the element of control over the material and the ability to decide what might be done with the material that is the essential element of possession.

In order to successfully tackle child pornography our legislation must keep apace with technological developments, with particular regard being had to the internet. It is in this context that it is recommended that an offence of viewing child pornography be introduced into the 1998 Act. When a person views a page on the internet the browser software automatically copies the page and stores it onto the hard drive of the computer in a process referred to as 'caching'. The purpose behind caching is to enable faster opening of web pages if a viewer returns to a past page. People do not necessarily know that their computer is in fact copying and storing the web pages they view. However, those with the requisite technical knowledge can in fact use the caching process to repeatedly view child pornographic web pages without ever having downloaded the page, thus arguably not being in possession of the material within the meaning of s.6.

[119] See Appendix 2.
[120] (2004) 191 C.C.C. (3d) 393.

This problem is illustrated in the Pennsylvania Superior Court ruling in *United States v. Diodoro.*[121] In this case, the accused intentionally visited websites and viewed several hundred images of child pornography. The accused, however, did not download any of the images and claimed that he did not know that his computer automatically stored the images by way of caching. The prosecution solely relied on the cached images and did not produce any evidence that the accused in fact knew of these. The appeal court reversed the accused's conviction due to a lack of evidence demonstrating that he knew of the images being on his computer. The court did, however, point out that in order to avoid a similar result in the future the state legislature could amend the statute so as to include an offence of viewing images of child pornography on the internet without downloading them.

It is recommended that the offence of viewing child pornography, without the requirement of possessing same, be introduced into the 1998 Act. Viewing child pornography is contrary to the common good because by viewing such images people are creating a demand, with the result of increased supply, which relies upon the production of pornography and exploitation of children, both of which are already criminal offences. If the above recommendation of the introduction of the concept of 'indecent material' is accepted, then an offence of viewing should equally apply to such material.

3.6.2.1 RECOMMENDATION

Section 6 of the Child Trafficking and Pornography Act 1998 should be amended to include the offence of viewing child pornography, and/or indecent material.

3.7 Combating Child Pornography – Further Reforms

3.7.1 *International Dimension*

[121] Unreported, 2 November, 2006, (2006 PA Super 308).

With the prevalence of the internet child pornography has truly become an international problem, thereby requiring an international response. Ireland has been at the forefront of policy development on the international stage in relation to child pornography. The state now needs to implement the key international instruments.

In October 2002, the International Centre for Missing and Exploited Children (ICMEC) held its first Global Forum on Child Pornography in Dublin. It undertook a global campaign aimed at attacking child pornography and assisting its victims. The ICMEC launched a 10 point action plan commonly referred to as the "Dublin Plan":

1. Build public awareness of the problem of child pornography.
2. Demand that child pornography be placed higher on the political agenda.
3. Create an international child pornography monitoring and oversight system.
4. Undertake extensive research to define and measure the extent of the problem.
5. Examine and evaluate current law enforcement practices.
6. Develop and promote systems for identifying the victims of child pornography.
7. Develop and promote model legislation and ensure consistency of laws between nations.
8. Enhance the capacity of law enforcement to investigate and prosecute child pornography.
9. Promote information sharing and co-ordination between and among law enforcement agencies, internet hotlines, the media and others.
10. Promote stronger involvement by private sector entities, including Internet Service Providers and Non-Governmental Organisations.

This action plan has since been updated and now consists of 15 points.[122]

The United Nations issued the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. It was adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May, 2000, and entered into force on 18 January, 2002. There are approximately 161 signatory States to this Protocol, with only 33

[122] See in general www.icmec.org.

States who have yet to ratify it. Ireland should now build on its international reputation in this area by ratifying this important international instrument.

The EU has published Council Framework Decision 2004/68/JHA of 22 December, 2003, on combating the sexual exploitation of children and child pornography.[123] In addition the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse was signed by Ireland on the 25th October, 2007, but ratification remains outstanding. Both of the foregoing instruments seek to impose minimum standards on the prevention of child pornography on the international stage and to facilitate cross-border cooperation.

It is recommended that the Government take cognisance of these international instruments and consider the implementation of same so as to signify that Ireland actively promotes the fight against child pornography on the international stage as well as domestically. Interestingly in drafting the 1998 Act the legislature took account of the EU Joint Action against Trafficking in Human Beings and the Sexual Exploitation of Children 97/154/JHA of 24 February, 1997. This Joint Action has now been repealed by the Council Framework Decision referred to above.[124] It would therefore appear timely to reassess the 1998 Act, as amended, in the light of the Council Framework Decision.

3.7.1.1 RECOMMENDATION

Owing to the international dimension of child pornography, it is recommended that any review of the Child Trafficking and Pornography Act 1998 take into account the international instruments that have been published since its enactment.

3.7.2 *Child Pornography v. Juvenile Pornography*

It has been argued that the age of a child who is the subject of pornography is a factor to be taken into account in determining the gravity of the offence and the sentence to be imposed. This could lead to the categorisation of 'child pornography' and 'juvenile pornography', with child pornography attracting greater penalties. While it is accepted

[123] OJ L 13/44 20.01.2004.
[124] Article 11.

that the age of the child may be a relevant factor in the consideration of any given case, it is suggested that the legislature should steer clear of seeking to categorise the gravity of these offences with reference to the age of a child.

The repulsion that might be associated with the use of a very young child in pornography is obvious. Nevertheless one cannot categorically say that it will be any greater than that caused by the use of a teenage child. The degree of emotional and psychological harm caused to a child arising from pornography cannot be calculated objectively with reference to the inanimate concept of age. Each child will react differently. Therefore age cannot of itself be categorised as a factor relating to the nature of the offence committed.[125] It is, however, a factor that may be taken into account by the court in exercising its discretion at the sentencing stage. The Court of Appeal in *R. v. Oliver*[126] recognised the age of a child as being an aggravating factor contributing towards the seriousness of a particular offence. It is submitted that this is the correct approach to take in this regard.

3.7.2.1 RECOMMENDATION

It is recommended that the legislature refrain from distinguishing between categories of child pornography based on the age of the victim. Rather the age of the victim is a matter to be taken into consideration by the court in assessing the gravity of the offence and the requisite sentence.

3.7.3 Child Victim Impact Statements

Section 5 of the Criminal Justice Act 1993, as amended, provides the opportunity to a victim of an offence to give an account of the effect of the offence on him/her. This section only applies to those offences prescribed in the Act, including sexual offences as defined in the Criminal Evidence Act 1992, as amended. At present, however, it does not afford this facility to children who are the subject matter of pornography. As already noted the effects of pornography on a child can be detrimental and long

[125] See Sentencing Advisory Panel, *The Panel's Advice to the Court of Appeal on Offences Involving Child Pornography*, August 2002, p.13.
[126] [2002] EWCA Crim 2766, at para.20.

lasting, particularly if the child is identifiable and the material has been made widely available, e.g. on the internet. It is recommended that a child be afforded the facility to address the court, through the medium of a victim impact statement, as to the effects of the commission of the offence on him/her. The vulnerability of children is a particular aspect of the offence and therefore ought to be taken into account.

3.7.3.1 RECOMMENDATION

It is recommended that the meaning of sexual offence within the Criminal Evidence Act 1992 should be amended to include offences under the Child Trafficking and Pornography Act 1998, thereby affording child victims of pornography an opportunity to provide a victim impact statement pursuant to the Criminal Justice Act 1993, if they so wish.

SECTION 4: CHILD ABUSE AND NEGLECT

4.1 Introduction

Children enjoy rights under both the Constitution and European Convention on Human Rights (ECHR). Among these rights include the right to bodily integrity, privacy, family life and education. Each of these rights are potentially violated when it comes to child abuse and neglect. The effects of a violation of these rights on a child far surpass that of an adult. Children represent one of, if not, the most vulnerable groups in society. Abuse and neglect can seriously stunt the development of a child, not just physically but emotionally and psychologically. Thus there is a need to be extra vigilant in terms of abuse and neglect perpetrated against children.

This section endeavours to examine the treatment of the issue of child abuse both in the Irish context and internationally. It will outline international initiatives designed to combat child abuse as well as specific Irish issues regarding child abuse. A comparative analysis of the practice in other jurisdictions will be undertaken. International case studies will be analysed to determine what may or may not work in the Irish context. On foot of this, informed recommendations shall be made.

4.2 Prevention of Child Abuse and Neglect

4.2.1 *International Legal Provisions*

Article 19 of the UN Convention on the Rights of the Child 1989 (UNCRC) is the key international legal provision on child abuse and neglect.[127] It provides that states shall take all appropriate measures to protect children from all forms of abuse. The second paragraph of Article 19 of the UNCRC outlines a wide range of potential responses to child abuse and neglect. The state action which it calls for includes the establishment of social programmes for the prevention of abuse and neglect, a system for reporting child abuse and a system for responding to such reporting with treatment where necessary.

It is clear from Article 19 that state obligations do not simply involve negative obligations (i.e. that the state and its organs refrain from abusing children). Article 19

[127] See Appendix 1.

also stipulates that states have a positive obligation to ensure children are not abused or neglected in the private sphere, including the family environment. This requires a proactive approach obliging states to put effective child protection systems in place. There are also many other provisions in the UNCRC which outline the duty of the state to protect children from abuse and neglect.[128]

The Charter of Fundamental Rights of the European Union (2000)[129] contains a special provision (Article 24) on the right of children to such protection and care as is necessary for their well being. The ECHR does not contain a specific provision on children's rights.[130] The ECHR does, however, contain a number of provisions which are relevant to the rights of children, such as the right to freedom from torture, inhuman or degrading treatment and punishment, the right to a fair hearing, the right to respect for private and family life and the right not to be deprived of one's liberty.[131]

The European Court of Human Rights (ECtHR) has strengthened the position of children's rights through its case law. The case of *A. v. United Kingdom*[132] concerned a 9 year old boy who had been receiving severe beatings by his stepfather with a cane. The ECtHR held that the state has an obligation under Article 3 of the ECHR to protect children against serious breaches of personal integrity by providing effective

[128] For example, Art 3 (best interests of the child); Art 6 (right to life and survival and development); Art 16 (private life); Art 20 (right to special care in the case of having no family); Art 21 (safe system of adoption); Art 23 (special care of disabled child); Art 24 (right to health); Art 25 (right to review of treatment); Art 27 (right to a minimum standard of living); Art 31 (right to rest and play); Art 32 (protection from economic exploitation); Art 33 (protection from drug abuse); Art 34 (protection from sexual abuse); Art 35 (protection from abduction); Art 36 (protection from other forms of exploitation); Art 37 (protection from torture or other cruel, inhuman or degrading treatment or punishment); Art 38 (protection from engagement in armed conflicts); and Art 39 (duty to promote recovery of child victims). Furthermore, principle 9 of the United Nations Declaration of the Rights of the Child 1959 states that: "The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic in any form".

[129] The Charter of Fundamental Rights of the European Union (2000) OJ C 364/1.

[130] Although Article 2 of the Optional Protocol to the Convention ("1. Enforcement of certain Rights and Freedoms not included in Section I of the Convention") does contain a right to education.

[131] Art 3: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment"; Art 6: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"; Art 8: "Everyone has the right to respect for his private and family life"; Art 5: "No one shall be deprived of his liberty save … (d) in the case of lawful detention of a minor by lawful order for the purpose of educational supervision".

[132] *A. v. United Kingdom (Human Rights: Punishment of Child)* (Application No 25599/94) [1998] 2 FLR 959.

deterrence, and that such deterrence may be provided through the criminal law. In so holding the court specifically made reference to Articles 19 and 37 of the UNCRC.

4.2.2 *Irish Legal Provisions*

The provision of child care/protection services in Ireland are underlined by the obligation that the best interests of the child be the guiding principle in all issues regarding child welfare. Section 3 of the Child Care Act 1991 places a statutory duty on the Health Service Executive (HSE) to protect children who are not receiving sufficient care and protection within their family unit. It also requires that the welfare of the child be the first and paramount consideration. The Guardianship of Infants Act 1964, which governs court proceedings involving the custody of a child, also invokes the best interests principle as the paramount consideration.

Guidelines relating to child abuse and neglect were introduced in Ireland in 1999, entitled *Children First: National Guidelines for the Protection and Welfare of Children.* The aim of the guidelines is to improve the identification and management of child abuse. While the introduction of the guidelines is very positive, their implementation has been described as "sporadic and *ad hoc*".[133] Monitoring of the implementation of the guidelines highlights the fact that progress has been slow in some vital areas. The Office of the Minister for Children and Youth Affairs launched a national review of compliance with the *Children First* guidelines in July 2008.[134] The report concluded that a fundamental review or revision of the *Children First* guidelines is not required. Rather, the problems lie in the implementation of the guidelines at local level in the sense that they are not being implemented in a uniform manner. Therefore consistency in implementation appears to be the main cause for concern at present. Also noted was the need to ensure cooperation between Government departments so as to provide clarity and consistency in the implementation of child protection policy.

[133] Children's Rights Alliance, *From Rhetoric to Rights: Second Shadow Report to the United Nations Committee on the Rights of the Child* (March 2006), at para.228.

[134] Office of the Minister for Children and Youth Affairs, *National Review of Compliance with Children First: National Guidelines for the Protection and Welfare of Children* (July, 2008). The report is available at http://www.omc.gov.ie/viewdoc.asp?fn=/documents/Publications/CF_Compliance.pdf.

4.2.3 *Lessons from Systemic Failures Elsewhere*

The McElhill case in Northern Ireland is a stark example of a system failing to respond to clear warning signs as regards child protection, caused by failure to adhere to procedure and to communicate between agencies. Arthur McElhill, Lorraine McGovern and their five children (aged nine months to 13 years) died in a fire at their home in Omagh on the 13th November, 2007. Arthur McElhill, a convicted sex offender, is believed to have started the fire. Henry Toner QC chaired an independent review into the deaths of Arthur McElhill, Lorraine McGovern and their five children.[135] He noted serious shortcomings in the manner in which information regarding Arthur McElhill's criminal offences was communicated across agencies and highlighted "dangerous inconsistencies in the management of social services staff" and "poor professional standards".

The often poor communication between various bodies is also highlighted. The report made 63 recommendations. It recommended that child protection work be structured, as well as evidenced through written records. Supervision should be appropriately audited. It was also indicated that agencies should ensure that staff have been trained in risk assessment procedures and that this is shared with other relevant agencies. The report emphasised that where a child makes a complaint regarding domestic violence that this is followed through "as a matter of priority" and that the child should be interviewed. There are draft Child Protection Standards in Northern Ireland and the report recommended that these be finalised, taking into account the issues around sex offenders arising from this case.

Decisions regarding case closure were also highlighted as a problem area. Such decisions should be based on adequate assessment of the progress in the case, with full collaboration of other agencies involved. As regards communication between social workers and the police force, the report recommended that a key social worker be appointed for liaising for this purpose. The report also recommends a review of the Out of Hours Service and the need for clear training and job descriptions. Staff should

[135] Department of Health, Social Services and Public Safety, *Independent Review Report of Agency Involvement with Mr. Arthur McElhill, Ms. Lorraine McGovern and their children* (June 2008). Available at http://www.northernireland.gov.uk/news/news-dhssps-010708-report-of-independent.

also have 24 hour access to all records to be able to respond to any situations that may arise.

In the United States of America the Rilya Wilson case involved a similar failing of professional standards. It also resulted in the expedient passing of legislation (the Rilya Wilson Act) as an arguably knee-jerk reaction to a particular case which may not be as useful as longer-term planning. Four-year-old Rilya was placed in the custody of the Department of Children and Families in Florida in 2000. Her mother was a homeless drug addict. Rilya and her sister were placed with a woman who authorities believed to be her grandmother (Geralyn Graham) by the Department of Children and Families. Ms. Graham was checked by the Department for suitability and passed. That said, the extent of the check was unclear and it emerged later that Ms. Graham had 40 different aliases. Easily accessible court documents listed her criminal convictions. Furthermore, six months before Rilya was placed in her care she had been diagnosed as 'psychotic'.

A state adoption counsellor visited the house of Ms. Graham in April 2002 to explore the possibility of adoption for the two girls. Ms. Graham told the counsellor that she had not seen Rilya since January 2001. She claimed that a woman and a man had come and told her that they were employees of the Department of Children and Families. They had taken Rilya, claiming that this was for a neurological evaluation of the child. Rilya was never returned. Ms Graham said that she had attempted to call Rilya's caseworker, but that her calls had been ignored. It transpired that Rilya's caseworker had not seen her for at least 16 months and that she had been writing false reports of monthly checks on the child. Ms. Graham was charged in 2004 with the murder, kidnapping and abuse of the child. Rilya has never been found.

4.2.4 RECOMMENDATIONS

A number of key areas for improvement as regards child abuse are evident from an examination of the Irish as well as the international context. It is recommended that strengthening of guidelines and legislation be considered in Ireland. The Committee

on the Rights of the Child recommended that Ireland continue reviewing the 'Children First: National Guidelines for the Protection and Welfare of Children', and consider the establishment of the guidelines on a statutory basis to strengthen child protection in the state.[136] *The committee has also recommended the development of a comprehensive child abuse prevention strategy. Such a strategy should include the development of appropriate responses to abuse, neglect and domestic violence. There is also a need for ongoing independent monitoring of the objectives of both the guidelines and the proposed strategy. This report echoes these recommendations.*

Better co-ordination of child protection services is also needed. The findings of poor professional standards and organisation regarding the cases of the McElhills in Northern Ireland and Rilya Wilson in the United States of America need to be considered in the Irish context. Such systemic failures can have far-reaching consequences for vulnerable children. There is a need to clearly outline inter-departmental and inter-agency communication and responsibilities for the implementation of the 'Children First Guidelines'. Improved structures are needed to promote inter-agency cooperation at all levels. The recommendation by the 'Toner Report', for example, of a liaison between social services and the police should also be considered in Ireland. Such a liaison could ensure that information is adequately shared amongst the relevant authorities.

4.3 Children 'In Need' of help, yet not 'At Risk' from abuse

There is also an issue of families being assessed but not receiving the assistance they need, because they do not reach the threshold of abuse that would warrant formal intervention by the authorities. Research indicates that most children who come into contact with the care system are "in need" of assistance but may not be "at risk" of child abuse.[137] In cases of suspected child abuse in Ireland, there is a low rate, on average below 45%, of confirmed child abuse.[138] These constitute cases whereby the level of abuse or neglect may not be serious or visible enough for formal intervention by authorities. However this does not detract from the fact that many of these children

[136] Concluding Observations and Recommendations of the Committee on the Rights of the Child on Ireland's Second Report to the Committee, 2006.
[137] Ferguson, H., and O'Reilly, M., *Keeping Children Safe: Child Abuse, Child Protection and the Promotion of Welfare* (A & A Farmer, Dublin, 2001).
[138] Department of Health & Children, *Child Abuse Statistics 2002–2004*.

are in need of assistance. Research findings suggest that many such cases fall through the cracks and although services may be needed, they are not provided. It has been suggested that children who are "in need" rather than "at risk" may be provided with protection through the support of community groups who could coordinate when necessary with formal child protection organisations.[139]

4.3.1 *Centralised Intake Systems*

There is a suggested solution to prevent cases which do not reach the threshold of 'abuse' from falling through the cracks. Centralised intake systems are operated in Australia, New Zealand and some parts of the United States of America. Centralised intake systems consist of a team of social workers based in a national call centre. These staff have access to child protection information held by all state agencies nationwide. The staff process all child protection referrals received. They decide whether there is a need for further information in a particular case and then they refer the case to the relevant regional child protection team for action if it is considered necessary.[140]

Buckley emphasises that the effectiveness of this system depends on its capacity to provide follow-up support. She warns that if a centralised system becomes overloaded, intervention thresholds may be raised to a high (and possibly unsafe) degree. There are indications that this happened in New South Wales.[141] However, evidence from New Zealand shows that the system can lead to a much more focused use of capacities and resources.[142] The Department of Child, Youth and Family of New Zealand annual report of 2003/4 noted a high percentage of referrals being considered by the staff of the system to require further action. The report claims that this demonstrates that the initial screening methods within the system operate very efficiently.[143]

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[139] Office of the Minister for Children and Youth Affairs, *Service User's Perceptions of the Irish Child Protection System*, July 2008. Report available at http://www.omc.gov.ie/viewdoc.asp?Docid=876&CatID=13&mn=&StartDate=1+January+2008. See also Buckley, "Reviewing Children First: Some considerations" (2005) 8(3) IJFL 2.
[140] Tominson, "Child Protection 'down under': Key trends in policy and practice" in M. Hill *et al* (eds.) cited in Buckley, "Reviewing Children First: Some considerations" (2005) 8(3) IJFL 2.
[141] *Ibid*.
[142] New Zealand Department of Child, Youth and Family 8 [C.Y.F. Annual Report 2003/4] cited in Buckley, "Reviewing Children First: Some considerations" (2005) 8(3) IJFL 2.
[143] *Ibid.*

4.3.2 *Differential Response Model*

It is also suggested that in many cases, social workers may be designating a situation as potentially 'child abuse' in order for the family in question to be provided with family support services. In Ireland, as many as 54% of possible abuse cases are deemed not to reach the level of abuse on investigation, and these cases do not, then, get the assistance that they may well need.[144] The Differential Response Model provides a way of dealing with this issue. It offers various responses to a reported concern about a child. The first possible response is the traditional investigative response. This focuses on an incident and attempts to determine culpability. The second potential response is a "customised" response. This response is family-centred and focuses on the strengths of the family, while still maintaining child safety as a key focus.[145]

The severity of the concern dictates the response, which may be made by a community-based voluntary agency instead of a state agency. The response generally consists of a preliminary assessment by the state child protection agency. If a case does not fall within the definition of child abuse, services will be provided with an emphasis on the voluntary participation of the family in dealing with and finding a resolution to their difficulties. The overall approach of the Differential Response Model is one of support and welfare provision.

There are examples of the use of the Differential Response Model in some regions of the United States of America, Canada and New Zealand. The U.S. system involved taking cases where serious levels of abuse were not involved, and applying a different approach than the traditional one. This different approach involves investigative fact finding and a focus on collaborative partnerships with families. It encourages agencies to provide services without an emphasis on the formal determination of abuse or neglect.[146]

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[144] Department of Health & Children, *Analysis of Interim Data Set 2001*, cited in Buckley, "Reviewing Children First: Some considerations" (2005) 8(3) IJFL 2.
[145] Buckley, "Reviewing Children First: Some considerations" (2005) 8(3) IJFL 2.
[146] Caplin, K., and Costello, C., *Alternative Response Model; What it is and How it Works*, Paper Presented at the Conference, *"Place Matters in Maryland: Achieving Outcomes Through Data-Driven Best Practices",* April 16-17, 2008.

Evaluations of the use of the system in the U.S. were carried out over five years. The evaluation compared families in the Differential Response system with control groups that were not in the system. The control groups received traditional investigative responses. The evaluations showed that standards of child safety were not lowered by the Differential Response Model. In fact, it was found that safety situations for children improved sooner. The evaluation established that although start-up costs for the Differential Response Model were significant, the total costs for case management for the Differential Response Model families was less than those in the control group.[147]

4.3.3 RECOMMENDATION

So as to prevent those children 'in need' of assistance and protection, albeit not 'at risk' of abuse, from falling through systematic cracks, a system needs to be established whereby such children can be monitored, assessed and assisted in a manner proportionate to their needs. Such monitoring ought to be ongoing and if a situation deteriorates the matter can then be referred to the relevant state agencies so that appropriate procedures can be put in train to prevent any potential child abuse.

4.4 Education Programmes

The government of New Zealand claim that public education on the issue of child abuse and neglect is a major focus of government policy.[148] The "Breaking the Cycle" campaign aims to teach New Zealanders that child abuse is unacceptable. It also teaches how to recognise, prevent and report abuse. As well as raising awareness through community and professional education, the campaign consists of television, radio and print media advertisements. The programme is evaluated on an ongoing basis.[149]

Sweden also ensures extensive funding for education programmes in relation to domestic violence. For example, in 1999, a conference for young people and adults was organised by the Minister for Gender Equality Affairs. The conference sought to highlight the vulnerability of children and to emphasise the responsibility of adults in

[147] Loman and Siegel, "Alternative Response in Minnesota: Findings of the Programme Evaluation", (2005) *Protecting Children* 20:78-92.
[148] Report of New Zealand to the Committee on the Rights of the Child CRC/C/93/Add.4.
[149] *Ibid.*

this regard. Work carried out in five government-funded projects relating to the prevention of violence against women was presented. To ensure the continuation of the awareness raising, funding was also provided for a number of regional conferences.[150]

In December 2005, the Irish Government announced that it would launch a nationwide awareness campaign on child sexual abuse. This campaign has been titled the "Stay Safe" programme. This is a welcome development, and is in keeping with initiatives launched in other jurisdictions. It is important that this campaign be properly resourced, maintained and made available nationwide.

4.4.1 RECOMMENDATION

The state has a positive obligation toward the protection of children in Ireland. The first step of prevention is education. At present there exists an education programme of this nature in Ireland entitled the "Stay Safe" programme. It is imperative that this programme be properly resourced, maintained and made available nationwide. Regular reviews should be carried out to ensure that the programme keeps abreast with developments and initiatives in other jurisdictions.

4.5 Responding to Child Abuse

There are many changes to the nature and quality of services to be made. Services need to have a more supportive, preventative and therapeutic emphasis, as opposed to the "crisis intervention" approach.

As recommended by the Committee on the Rights of the Child, victims of abuse and neglect need to have access to counselling and treatment involving physical recovery and social reintegration.[151] It is clear that there is a serious need for an "out of hours" social work service. Such a service should be in operation for 24-hours per day, and widely publicised.

4.5.1 RECOMMENDATION

[150] Report of Sweden to the Committee on the Rights of the Child CRC/C/125/Add.1. 11 January, 2005.
[151] Concluding Observations and Recommendations of the Committee on the Rights of the Child on Ireland's Second Report to the Committee, 2006.

A 24-hour, seven day a week phone service should be established so as to enable concerned persons contact the social work services.

4.6 Responding to the Perpetrator

A key aspect of seeking to prevent child abuse into the future is the rehabilitation of offenders. Often an offender is related to the child and as a result of the incidents is ostracised from the family. This can have a detrimental effect on the offender with the result that he/she will continue offending into the future in respect of other children. The cycle of abuse needs to be broken. Therefore it is imperative that offenders are provided with, and receive, rehabilitation. At present the Department of Justice, Equality and Law Reform is reviewing the law on sex offenders and is considering the introduction of mandatory treatment programmes.[152] It is submitted that in tandem with such a review consideration ought to be given to the provision of treatment programmes for perpetrators of child abuse and neglect.

A mandatory treatment programme could potentially raise constitutional concerns. The law is clear that medical treatment cannot generally be carried out on a patient without his/her consent. This is based on the constitutional rights to bodily integrity, self-determination and autonomy. There may be exceptions to the rule requiring consent as when, for example, a patient is considered to lack the requisite capacity to consent.[153]

This principle has also been recognised and enforced by the European Court of Human Rights. The court has held that "the imposition of medical treatment**,** without the consent of a mentally competent adult patient, would quite clearly interfere with a person's physical integrity in a manner capable of engaging the rights protected under Art 8(1) of the Convention".[154]

Mandatory psychological treatment for offenders might therefore be argued to constitute a *prima facie* interference with the right to autonomy and self-determination of the individual offender who does not wish to undergo such treatment.

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[152] "Minister says law on sex offenders is being reviewed", *Irish Times,* 18 September, 2008.
[153] *Fitzpatrick v. K.* [2008] IEHC 104.
[154] *Pretty v. U.K.* (2002) 35 E.H.R.R. 1, at para. 63; see also *Glass v. U.K.* (2004) 39 E.H.R.R. 341.

Mandatory treatment systems have been examined by courts in a number of Canadian cases. In *R. v. Kieling*[155] and *R. v. Rogers,*[156] courts struck down as unconstitutional efforts to compel offenders to undergo particular treatment as part of the conditions of their probation. Anderson J.A. observed in *Rogers* that:

> "[A] probation order which compels an accused person to take psychiatric treatment or medication is an unreasonable restraint upon the liberty and security of the accused person. It is contrary to the fundamental principles of justice and, save in exceptional circumstances, cannot be saved ….".

However, in the subsequent decisions of *R. v. Payne*[157] and *R. v. Goodwin,*[158] similar requirements were upheld in a different penal context. The courts in these later cases were dealing with the Canadian long-term offender regime, which is applied to individuals in respect of whom there has been an assessment that there is a reasonable possibility of the risk of their offending being controlled in the community. The courts distinguished orders issued under this scheme from probation orders on the basis that it is a "regime that puts protection of the public as the dominant consideration".[159] This meant that, in the *Goodwin* case it was the court's view that "mandatory treatment and medication conditions in an order are a proportionate response to protecting the public from a person who, by definition, is a substantial risk to reoffend".[160]

It is instructive to note that the Canadian decisions upholding mandatory treatment relied strongly on the fact that the individuals concerned had been assessed as persons suitable for entry into the long-term offender scheme and in respect of whom the relevant conditions were appropriate.

A similar view emerges from the ECHR jurisprudence in this area. In *Storck v. Germany*,[161] the court found a violation of Article 5 had occurred where an individual had been detained on mental health grounds without the necessary legal assessment procedure being followed. More pertinently, the court also found Article 5 to have

[155] (1991) 64 C.C.C. (3d) 124.
[156] (1991) 61 C.C.C. (3d) 481.
[157] [2001] O.T.C. 15.
[158] (2002) BCCA 513.
[159] *Ibid.,* at para.31, per Donald J.A.
[160] *Ibid.,* at para.83.
[161] [2005] ECHR 61603.

been violated in *Enhorn v. Sweden*[162] where a HIV positive individual was detained on public health grounds. The court accepted the possibility that individual rights could be interfered with to protect the public but felt that this could only occur as a "last resort in order to prevent the spreading of the disease, because less severe measures have been considered and found to be insufficient to safeguard the public interest".[163]

If this reasoning is applied to the proposal to require the non-consensual treatment of offenders, it suggests that the concept may potentially be capable of being justified on constitutional and convention grounds. The public interest in ensuring that those convicted of sexual offences do not re-offend is an important countervailing interest.

However, the concern with a mandatory regime is that it may apply to those who either are regarded as presenting no risk of re-offending, those who could be treated by less intrusive means, or those upon whom the treatment is likely to have no positive affect. The Canadian courts and the Strasbourg court both attach considerable importance to the principle of individual assessment as a way of ensuring that the interference with the individual's rights is proportionate.

This suggests that any review of this proposal should consider the question of whether a mandatory treatment regime should only be applied to those offenders in respect of whom it is considered to be a necessary, suitable and proportionate measure.

4.6.1 RECOMMENDATION

Treatment programmes ought to be provided to perpetrators of child abuse and neglect in an attempt to rehabilitate offenders so as to prevent future instances of abuse and neglect.

[162] [2005] ECHR 56529.
[163] *Ibid.,* at para.44.

SECTION 5: DEVELOPMENTS 2007-2008

5.1 Introduction

This section provides a commentary on developments in the area of child care and protection since the publication of the 2007 report. Such is the public interest in the safety and welfare of children that key policies and initiatives tend to be publicised in the media. However, difficulties arise in terms of analysing developments within the courts. There are a number of reasons for this. First, the *in camera* rule often prevents the publishing of cases. Second, the vast majority of written judgments in this area, of which there are very few, remain unapproved. Finally, a great deal of the power involved in child protection has been devolved to the District Court from which one would not expect any form of written judgment or record of events. The few judgments that there are which are relevant to the content of this report shall be analysed herein.

5.2 Vetting and Soft Information

Last year this report considered in detail the area of vetting and soft information.[164] It recognised that the process of vetting persons involved in work with children forms an integral part of any child protection system. At present vetting in respect of those who work with children is based on "hard information", i.e. information pertaining to criminal activity and successful prosecutions. So-called "soft" information includes information which has come to the attention of the state authorities – be it the relevant local authority, the HSE, Gardaí, or VEC – that falls short of conviction of a relevant offence, such as an allegation of abuse.

In September 2008, the Joint Committee on the Constitutional Amendment on Children published an interim report on the "proposal to give legal authority for the collection and exchange of information concerning the risk or the occurrence of endangerment, sexual exploitation or sexual abuse of children".[165] By a unanimous decision the committee found:

> "that a Constitutional Amendment is not required to permit the Oireachtas to enact legislation in relation to the creation of a statutory scheme to regulate

[164] See *Report of the Special Rapporteur on Child Protection 2007*, section 2.
[165] Report available at http://www.oireachtas.ie/viewdoc.asp?DocID=9927.

> and control the manner in which records of criminal convictions and information including 'soft' information concerning the risk or the occurrence of endangerment, sexual exploitation or sexual abuse of children can be stored and deployed by An Garda Síochána and other Statutory Agencies for the purpose of Child Protection."

Whilst the committee reached the conclusion that a constitutional basis was not required for the introduction of a vetting system in which "soft information" would be utilised, consideration must be given to the manner in which such legislation will operate with particular regard being had to the constitutional rights of all parties involved. The 2007 report highlighted the following constitutional rights as being relevant to such a debate; the right to equal treatment before the law, the right to a good name, the right to privacy, the right to earn a livelihood, and principles of fair procedures and constitutional justice.

Any system introduced into Irish law that allows for the use of "soft information" must be constructed in such a manner that it will withstand any constitutional or ECHR challenge. In addition, it must adhere to the doctrine of proportionality which may well necessitate specification as to the nature of allegations and categories of persons that would fall within such a system. In that sense lessons can be learned from the experiences of the United States of America which enacted Megan's Law, and England and Wales which enacted Sarah's law. These jurisdictions have encountered some of the issues involved in seeking to establish a system of vetting based on "soft information", e.g. issues of retrospective effect and double jeopardy.

In formulating a vetting system utilising "soft information" regard should be had to the models that currently operate within South Africa,[166] Northern Ireland and England and Wales.[167] Also the judgment of Barr J. in *M.Q. v. Gleeson*[168] is relevant as to the manner in which such information ought to be considered and acted upon. The learned judge in that case summarised these obligations as follows:

> "(i) to obtain details of the charges;
> (ii) to inform the applicant of them;
> (iii) to give him a reasonable opportunity to respond; and

[166] Children's Act 2005.
[167] Safeguarding Vulnerable Groups Act 2006.
[168] [1998] 4 I.R. 85.

(iv) to decide the question posed by the [health service executive] in the light of the information furnished by it and the applicant's response thereto."[169]

Furthermore, he commented on the need to conduct an objective assessment of the allegations made.

The 2007 report recommended that any legislation published in this field should be clear, concise, limited in application, provide for procedural safeguards and take account of the constitutional doctrine of proportionality. With that in mind the following suggestions were offered:

- Only consider information that has led to investigations into alleged abuses or crimes;
- Consider the circumstances surrounding the offence;
- Clearly stipulate the class of persons who will be subject to such disclosure;
- Strictly limit the number of persons to whom such disclosure can be made on the basis of necessity;
- Put in place appropriate safeguards for such information to be furnished to vetted persons and corrected if this is appropriate;
- If used to decline employment, then provide the vetted person with the reasons for this;
- Ensure that the entire process is transparent and reasonable, attributing due weight to each charge considered;
- Provide a mechanism through which a person can appeal his/her entry onto a soft information register to an independent third party;
- Conduct periodic reviews of the status of those included on a soft information register.

The Interim Report of the Joint Committee is to be welcomed, as is the intention to present draft legislation for consideration prior to Christmas 2008. However, it is submitted that regard must be had to the matters set out herein, and the 2007 report, to ensure that balanced, effective and constitutionally viable legislation is enacted.

5.3 Delay in Court Proceedings

[169] [1998] 4 I.R. 85, at 104.

The issue of delay in court proceedings involving children was brought to the fore in the well publicised "Mr. G." case. This was a child abduction case brought by a natural father seeking to have his twin boys returned from England following their removal by their mother. The children were removed in January 2007. In March 2007, Mr. G. appeared before the District Court in Ireland seeking orders pertaining to the welfare of his children, including guardianship. The District Court refused to hear the application voicing concerns as to jurisdiction due to the fact that the children were residing in England. Mr. G. then issued child abduction proceedings in England. The High Court in England requested the assistance of the Irish High Court in determining whether in fact Mr. G. had rights of custody within the meaning of the relevant international instruments which would entitle him to the return of his children. The High Court ruled in favour of Mr. G. having such rights, and indeed such rights been vested in the courts of Ireland.[170] The respondent mother appealed this decision to the Supreme Court. Her appeal was dismissed.[171] Ultimately it was one year before the children were returned back to Ireland. Clearly this case highlights the need to avoid systemic delays.

The issue of systemic delay in cases involving children was given detailed consideration in the case of *C. (A Minor) v. D.P.P.*[172]. This case involved an application brought on behalf of C., a minor, seeking an injunction restraining the respondent from taking further steps in a criminal prosecution against her. C. was charged with, and admitted to, the offence of arson. The offence was committed on the 5th December, 2005, when C. was 13 years and 3½ months of age. C. was formerly placed into voluntary care with the HSE and at the time of the issue of proceedings she was in fact residing in a High Support Unit. The court accepted that C. was quite a vulnerable child and had been identified with special needs. There was a delay of some 14 months between the date of the commission of the offence to the first date in court. It was submitted on behalf of C. that the respondent failed to

[170] *T. v. O.* [2007] IEHC 326 (Unreported, High Court, McKechnie J., 10 September, 2007).
[171] *T. v. O.* [2007] IESC 55 (Unreported, Supreme Court, 22 November, 2007).
[172] [2008] IEHC 39 (Unreported, High Court, Dunne J., 21 February, 2008). See also *D.M. v. D.P.P.* unreported, High Court, Hedigan J., March 2008. In that case, a much longer delay of nearly two and a half years had occurred from the date of the alleged incident to the date of the service of the Book of Evidence. Hedigan J. held that the State had a special obligation in relation to the prosecution of children not to delay.

comply with principles of natural and constitutional justice in failing to expedite the prosecution. The following specific reasons were pleaded:

(i) Failing to select the least expeditious manner for initiating the prosecution.

(ii) Failing to initiate the prosecution for nearly six months.

(iii) Systemic delay resulting in there being a delay of eight and a half months before the summons appeared in a court list.

In making submissions on the point of systemic delay the applicant relied on a number of cases including the Supreme Court judgment of Denham J. in *D.P.P. v. Byrne* wherein she stated:

> "The fact that approximately eight months of the elapsed time in this case occurred as a result of a delay in the court's issuing process is not a matter, or a delay, to be endorsed by this or any court, especially in the absence of an explanation. The fact that it is computer based should have made it even more efficient.
>
> It is highly undesirable that the court process should be as lengthy as in this case. It is a matter to be addressed by the appropriate authorities as a matter of urgency. Further, there may be an issue of statutory duty to be analysed."[173]

In seeking to argue that the effect of the delay in this case was further exacerbated by the fact that the accused was a child, and who in fact required special needs, thereby adding to her vulnerability, reliance was placed on the case of *B.F. v. D.P.P.* wherein Geoghegan J. stated:

> "To some extent by analogy, I also take the view that in the case of a criminal offence alleged to have been committed by a child or young person as in this case, there is a special duty on the State authorities over and above the normal duty of expedition to ensure a speedy trial, having regard to the obvious sensitivities involved."[174]

Quirke J. in the joined cases of *Jackson v. D.P.P.* and *Walsh v. D.P.P.*[175] made similar comments:

> "It is no secret that persons in their late teenage years have particular vulnerabilities. These vulnerabilities can be compounded by difficult or deprived family or social circumstances and by a variety of other causes. The interests of the community will not be served by subjecting such persons to substantial delay in confronting them with complaints of criminal activity made against them.

[173] [1994] 2 I.R. 236, at 259.
[174] [2001] 1 I.R. 656, at 666.
[175] [2004] IEHC 380.

> The interests of the community will surely be better served by efficient action on the part of the State authorities designed to ensure that young persons acquitted of criminal offences may be enabled to resume normal life and those convicted may be dealt with in such a manner as to reduce the risk to the community of further criminal activity."

Giving judgment Dunne J. considered the above authorities and agreed that there was a special duty on the state to expedite prosecutions in circumstances where the accused was a child. She found that the state had failed to comply with this special duty in the present case. The state was aware of the vulnerabilities of the applicant yet failed to progress matters, and it would appear that the main cause for matters progressing at all was due to the persistence of the applicant's solicitor. Finding in favour of the applicant Dunne J. commented:

> "I accept that the delay in this case is not the cause of the applicant's current state of difficulty but in her particular vulnerable state, the delay in dealing with the prosecution of the applicant in respect of the charge arising out of the 5th December, 2005, can only have exacerbated the situation as is borne out by the letter [of the applicant's solicitor] referred to above."

5.4 Children in Custody

Section 56 of the Children Act 2001 provides that, as far as practicable, a child detained in a Garda station shall not associate with an adult who is also detained, and shall not be kept in a cell unless there is no other secure accommodation available. This section was considered in the Court of Criminal Appeal judgment in *The People (D.P.P.) v. Onumwere*.[176] In this case the accused was arrested in relation to a sexual assault. At the time of his arrest he was two months short of his eighteenth birthday, thereby falling under the remit of the Children Act 2001. He was detained in a cell at Mountjoy Garda Station. Evidence was provided by a member of An Garda Síochána that whilst the accused was detained in a cell, there was no other person present in that cell. In addition there were no other forms of secure accommodation available at the Garda station. Finnegan J. giving judgment for the Court of Criminal Appeal upheld the decision of the Circuit Criminal Court judge that where a station had no secure accommodation other than cells and a child was detained in one of these cells, s.56 of the Children Act 2001 was complied with where there was no adult prisoner in the cell with the child.

[176] [2007] 3 I.R. 772.

APPENDICES

Appendix 1: Article 19 of the United Nations Convention on the Rights of the Child 1989

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or ill-treatment, maltreatment or exploitation including sexual abuse while in the care of parent(s) or guardian(s), legal guardian(s) or any other person who has care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment, and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Appendix 2: Child Trafficking and Pornography Act 1998 (as amended) sections 2-6

Interpretation

2.

(1) In this Act, except where the context otherwise requires—

"audio representation" includes—

(a) any such representation by means of tape, computer disk or other thing from which such a representation can be produced, and

(b) any tape, computer disk or other thing on which any such representation is recorded;

"child" means a person under the age of 17 years;

"child pornography" means—

(a) any visual representation—

(i) that shows or, in the case of a document, relates to a person who is or is depicted as being a child and who is engaged in or is depicted as being engaged in explicit sexual activity,

(ii) that shows or, in the case of a document, relates to a person who is or is depicted as being a child and who is or is depicted as witnessing any such activity by any person or persons, or

(iii) whose dominant characteristic is the depiction, for a sexual purpose, of the genital or anal region of a child,

(b) any audio representation of a person who is or is represented as being a child and who is engaged in or is represented as being engaged in explicit sexual activity,

(c) any visual or audio representation that advocates, encourages or counsels any sexual activity with children which is an offence under any enactment, or

(d) any visual representation or description of, or information relating to, a child that indicates or implies that the child is available to be used for the purpose of sexual exploitation within the meaning of section 3,

irrespective of how or through what medium the representation, description or information has been produced, transmitted or conveyed and, without prejudice to the generality of the foregoing, includes any representation, description or information produced by or from computer-graphics or by any other electronic or mechanical means but does not include—

(I) any book or periodical publication which has been examined by the Censorship of Publications Board and in respect of which a prohibition order under the Censorship of Publications Acts, 1929 to 1967 , is not for the time being in force,

(II) any film in respect of which a general certificate or a limited certificate under the Censorship of Films Acts, 1923 to 1992 , is in force, or

(III) any video work in respect of which a supply certificate under the Video Recordings Acts, 1989 and 1992 , is in force;

"document" includes—

(a) any book, periodical or pamphlet, and

(b) where appropriate, any tape, computer disk or other thing on which data capable of conversion into any such document is stored;

"photographic representation" includes the negative as well as the positive version;

"visual representation" includes—

(a) any photographic, film or video representation, any accompanying sound or any document,

(b) any copy of any such representation or document, and

(c) any tape, computer disk or other thing on which the visual representation and any accompanying sound are recorded.

(2) The reference in paragraph (a) of the definition of child pornography to a person shall be construed as including a reference to a figure resembling a person that has been generated or modified by computer-graphics or otherwise, and in such a case the fact, if it is a fact, that some of the principal characteristics shown are those of an adult shall be disregarded if the predominant impression conveyed is that the figure shown is a child.

(3) In any proceedings for an offence under section 3, 4, 5 or 6 a person shall be deemed, unless the contrary is proved, to be or have been a child, or to be or have been depicted or represented as a child, at any time if the person appears to the court to be or have been a child, or to be or have been so depicted or represented, at that time.

(4) For the purposes of this Act, except where the context otherwise requires—

(a) a reference to a section is to a section of this Act,

(b) a reference to a subsection or paragraph is to the subsection or paragraph of the provision in which the reference occurs,

(c) a reference to any enactment shall be construed as a reference to that enactment as amended, adapted or extended, whether before or after the passing of this Act, by or under any subsequent enactment.

Child trafficking and taking, etc., child for sexual exploitation

3.

(1) Any person who organises or knowingly facilitates—

(a) the entry into, transit through or exit from the State of a child for the purpose of his or her sexual exploitation, or

(b) the provision of accommodation for a child for such a purpose while in the State, shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for life.

(2) Any person who—

(a) takes, detains, or restricts the personal liberty of, a child for the purpose of his or her sexual exploitation,

(b) uses a child for such a purpose, or

(c) organises or knowingly facilitates such taking, detaining, restricting or use,

shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for a term not exceeding 14 years.

(2A) Any person who within the State—

(a) intentionally meets, or travels with the intention of meeting, a child, having met or communicated with that child on 2 or more previous occasions, and

(b) does so for the purpose of doing anything that would constitute sexual exploitation of the child,

shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for a term not exceeding 14 years.

(2B) Any person, being a citizen of the State or being ordinarily resident in the State, who outside the State—

(a) intentionally meets, or travels with the intention of meeting, a child, having met or communicated with that child on 2 or more previous occasions, and

(b) does so for the purpose of doing anything that would constitute sexual exploitation of the child,

shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for a term not exceeding 14 years.

(3) In this section "sexual exploitation" means, in relation to a child—

(a) inviting, inducing or coercing the child to engage in prostitution or the production of child pornography,

(b) using the child for prostitution or the production of child pornography,

(c) inviting, inducing or coercing the child to participate in any sexual activity which is an offence under any enactment,

(d) the commission of any such offence against the child, or

(e) inviting, inducing or coercing the child to participate in or observe any activity of a sexual or indecent nature.

Allowing child to be used for child pornography

4.

(1) Without prejudice to section 3, any person who, having the custody, charge or care of a child, allows the child to be used for the production of child pornography shall be guilty of an offence and shall be liable on conviction on indictment to a fine

not exceeding €31,743.45 [£25,000] or to imprisonment for a term not exceeding 14 years or both.

(2) For the purposes of this section —

(a) any person who is the parent or guardian of a child or who is liable to maintain a child shall be presumed to have the custody of the child and, as between parents, one parent shall not be deemed to have ceased to have the custody of the child by reason only that he or she has deserted, or does not reside with, the other parent and child,

(b) any person to whose charge a child is committed by any person who has the custody of the child shall be presumed to have charge of the child, and

(c) any person exercising authority over or having actual control of a child shall be presumed to have care of the child.

Producing, distributing, etc., child pornography

5.

(1) Subject to sections 6(2) and 6(3), any person who—

(a) knowingly produces, distributes, prints or publishes any child pornography,

(b) knowingly imports, exports, sells or shows any child pornography,

(c) knowingly publishes or distributes any advertisement likely to be understood as conveying that the advertiser or any other person produces, distributes, prints, publishes, imports, exports, sells or shows any child pornography,

(d) encourages or knowingly causes or facilitates any activity mentioned in paragraph (a), (b) or (c), or

(e) knowingly possesses any child pornography for the purpose of distributing, publishing, exporting, selling or showing it,

shall be guilty of an offence and shall be liable—

(i) on summary conviction to a fine not exceeding €1,904.61 [£1,500] or to imprisonment for a term not exceeding 12 months or both, or

(ii) on conviction on indictment to a fine or to imprisonment for a term not exceeding 14 years or both.

(2) In this section "distributes", in relation to child pornography, includes parting with possession of it to, or exposing or offering it for acquisition by, another person, and the reference to "distributing" in that context shall be construed accordingly.

Possession of child pornography

6.

(1) Without prejudice to section 5(1)(e) and subject to subsections (2) and (3), any person who knowingly possesses any child pornography shall be guilty of an offence and shall be liable—

(a) on summary conviction to a fine not exceeding €1,904.61 [£1,500] or to imprisonment for a term not exceeding 12 months or both, or

(b) on conviction on indictment to a fine not exceeding €6,348.69 [£5,000] or to imprisonment for a term not exceeding 5 years or both.

(2) Section 5(1) and subsection (1) shall not apply to a person who possesses child pornography—

(a) in the exercise of functions under the Censorship of Films Acts, 1923 to 1992, the Censorship of Publications Acts, 1929 to 1967, or the Video Recordings Acts, 1989 and 1992, or

(b) for the purpose of the prevention, investigation or prosecution of offences under this Act.

(3) Without prejudice to subsection (2), it shall be a defence in a prosecution for an offence under section 5(1) or subsection (1) for the accused to prove that he or she possessed the child pornography concerned for the purposes of bona fide research.