

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

A Report Submitted to the Oireachtas

Geoffrey Shannon

2011 Report

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EXECUTIVE SUMMARY

Section 1: Child Protection and Developments in International Law

The protection of children is not a uniquely Irish concern. It is a concern of the international community as a whole. A uniform approach must be taken to the protection of children so as to ensure their welfare. In that regard it is imperative to monitor, and, if necessary, incorporate, developments in international child protection.

Throughout Europe there are a variety of legal systems and conventions relating to the protection of children. Within the EU the recent decision of the Court of Justice of the European Union in the case of *Zambrano v. Office National de L'Emploi* establishing that non-EU parents of a dependent child who is an EU citizen are permitted to reside and work in the EU country of which the child is a citizen will have, and indeed has had already, a considerable impact in Ireland. It is now necessary to reassess state policy on this issue so as to ensure that the rights of such children are protected.

In recent years the rights of children have been brought to the forefront of EU law, most notably by the express recognition of those rights in Article 24 of the Charter of Fundamental Rights of the EU. Also, in an effort to ensure adequate protection and respect for these rights, the European Commission has recently published a document entitled *An EU Agenda on the Rights of the Child*. This seeks to outline measures that Member States ought to implement for the purpose of child-friendly justice, the protection of vulnerable children, the participation of children in matters affecting them and the raising of children's awareness of their rights.

Developments in respect of the European Convention on Human Rights have also taken place. For example, questions need to be asked of the recent increase in the number of children taken into the care of the State. Is enough being done to protect the rights of families at an early stage so as to prevent the necessity of taking a child into care? Support services and pre-proceedings work in Ireland need to be improved. This is not simply a funding issue but also one that needs to be addressed by management. Where a request arises under s.47 of

the Child Care Act 1991 to provide family services for parents as well as for children to ensure that “marital attachment” help or advocacy services for parents with mental health problems, or that parenting classes are made available for the parents of the children, there is anecdotal evidence to suggest that such applications are resisted by the HSE on the basis that s.47 is confined to the child.

The decision of the European Court of Human Rights in the case of *Neulinger and Shuruk v. Switzerland* reminds us of the need to ensure that Hague Convention cases on child abduction are processed and determined expeditiously so as to ensure that the rights of all parties, including the child or children, are properly upheld.

The Convention on the Rights of the Child, albeit that it has been signed and ratified by Ireland, has yet to be incorporated into Irish law. The failure to incorporate it is disappointing for it would have a positive impact on Irish law. The manner in which Wales has incorporated the convention is an example to consider, although a more comprehensive incorporation of the Convention on the Rights of the Child by legislation would surely be more desirable. This question of incorporation forms only a part of the general debate on proposals to amend the Constitution in respect of the rights of children; for rights-based child law is imperative, if for no other reason than that rights bring accountability with them, a fact highlighted by the recent decision of the UN Human Rights Council to adopt a text of an individual’s complaints mechanism for the convention. Incorporation of such a mechanism in Ireland would bring with it the enforceability of substantive rights in favour of children.

In 2011 the UN Committee Against Torture conducted its first examination of the implementation in Ireland of the UN Convention Against Torture. Disappointingly, it expressed some concerns, particularly at the lack of follow-up to the *Report of the Commission to Inquire into Child Abuse* (the ‘Ryan Report’). The UN Committee also urged Ireland to ensure all victims of abuse obtain redress and highlighted the seriousness of the failure of the State in respect of the survivors of the Magdalene laundries, who were once children, a failure at all levels. There has been a failure to properly investigate complaints, to provide redress for victims and to hold perpetrators accountable for the abuse and cruelty

suffered by their victims. The seriousness of this cannot be underestimated. Other issues highlighted by the UN Committee that require consideration include the use of detention facilities for children and the physical punishment, including chastisement, of children.

Article 19 of the Convention on the Rights of the Child sets out measures that states ought to adopt for the protection of children and the Committee on the Rights of the Child published a General Comment this year on the interpretation and application of that article. It provides a thorough analysis of the level of protection that states ought to provide for children. What is most noteworthy is the level of detail which Article 19 contains and the scope of protection which it seeks to impose. The failure to date to incorporate the Convention on the Rights of the Child into Irish law needs to be addressed to ensure that the same level of protection is afforded to children in Ireland as in states that have incorporated the convention.

Section 2: Child Protection Developments in the United Kingdom

Comparisons are often drawn between the systems and services provided in Ireland and those of our nearest neighbours, and it is no different in the context of child protection. There have been numerous reports and initiatives commissioned in the UK in recent times, particularly since the beginning of the current Conservative/Liberal Democrats coalition.

The most wide-ranging of the reports commissioned by that government is the *Munro Review of Child Protection*, which was published in three parts. The first part analysed child protection systems and in essence asks the question, why have previous initiatives and reforms not produced the expected results? The second part of the report then tracks the position of the child in the child protection system from the point of needing help to the point of receiving it. This concludes that the child protection system is not always child-centred. The third part of the report then sets out a comprehensive list of recommendations aimed at creating a child-centred system. Many of these recommendations could be adopted in Ireland and if adopted would ensure that our child protection system is also more child-centred.

The coalition government has also invested heavily in researching early intervention strategies, and while it has not yet published a formal response to all reports commissioned on this issue, it has made a commitment to grant over £2 billion for early intervention programmes in both 2011–2012 and 2012–2013. Three reviews have been published within the last number of months. Each lays heavy emphasis on the effectiveness and economic benefits of using early intervention strategies and strongly encourages a move towards investment in early rather than late intervention.

A report on the commercialisation and sexualisation of children, *Letting Children be Children*, was published in June 2011, and received strong backing from the government. There have been calls for its findings to be assessed and acted upon in the Irish context.

Two relevant pieces of draft legislation have been published in recent months: The Protection of Freedoms Bill 2011 and The Sexual Offences Act 2003 (Remedial) Order 2011. The Protection of Freedoms Bill contains wide-ranging changes to the vetting and barring system and to the freedom to obtain the biometric data of children in schools. The Sexual Offences Act 2003 (Remedial) Order 2011 provides for a review mechanism for sex offenders who have been placed for life on the sexual offenders register.

A comprehensive review of both the public and private law family justice system was also published by the UK government. An initiative called ‘the Family Drug and Alcohol Court’, described as a new approach to care proceedings, is being piloted at present and is showing early signs of success.

The UK government published a new strategy relating to human trafficking, including a part devoted to the issue of child trafficking, in July 2011.

The issue of child detention for immigration purposes has also been highlighted in recent months. The UK government published a review of the question of ending child detention in

immigration centres in December 2010, and subsequently promised to end such detention by May 2011. A High Court case in which it was ruled that detention of children in an immigration centre had been unlawful drew further attention to the issue.

The Coroners and Justice Act 2009 came into force in June 2011, providing greater rights for children in court for their protection when giving evidence. Similar provisions should be introduced in this jurisdiction.

Section 3: Criminal Justice System

The criminal justice system has often been characterised as an attempt to balance the need to protect society with the obligation to provide the accused with a fair trial. However, in recent times, the status of the victim of a crime has become an increasing topic of debate. This is particularly the case with vulnerable groups such as the victims of sexual offences, disabled persons and children. The protection of the rights of victims is a matter of international and domestic concern.

The EU has recently adopted a package of legislative proposals aimed at consolidating victims' rights in the EU. This package not only seeks to establish minimum standards in respect of rights, protection and supports for victims, but also seeks to establish a system of mutual recognition of protection measures in civil matters across the EU so as to protect victims who might travel from one Member State to another.

Ireland has declared that it will 'opt in' to the draft 2011 EU Directive establishing minimum standards on the rights, support and protection of victims of crime. This is to be welcomed because whilst Ireland provides some support and protection there is still room for improvement, most notably to the manner in which we treat child offenders, which requires significant improvement. To this day, children are still being detained in St Patrick's Institution. Whilst there were plans to redevelop the Oberstown Juvenile Centre these have not yet materialised.

An important development in the last year has been the publication of the Criminal Justice (Withholding Information on Crimes Against Children and Vulnerable Adults) Bill. This arose from the fallout from the Cloyne Report published in July 2011. The Bill proposes to make it an offence to be aware of a crime subject to arrest having been committed against a child, and having information that would be of material assistance to an investigation and failing to disclose the same, without reasonable excuse, to An Garda Síochána as soon as practicable.

The prevention of sexual abuse and sexual exploitation of children is a continuing battle. New forms and means of such abuse and exploitation constantly emerge and the law must be prepared to combat them. To assist in this, the EU Parliament has drafted a proposed Directive. Whilst a number of the matters covered in this proposed Directive are already subject to safeguards in Irish law there is still a need for reforms which can provide even better protection against the sexual abuse and exploitation of children in Ireland.

Draft Heads of the National Vetting Bureau Bill 2011 have been published. In my first *Report of the Special Rapporteur on Child Protection* published in 2007 new vetting legislation was called for as a matter of urgency. The publication of the heads of a Bill in 2011 is to be welcomed. The matter is still in the process of gestation and improvements are required so as to ensure a robust and effective vetting system is put in place.

Section 4: A Re-evaluation of Mandatory Reporting and Other Miscellaneous Issues

Three reports into the abuse of children within the Catholic Church in Ireland and my *Third Report of the Special Rapporteur for Child Protection* have called for the introduction by statute of the mandatory reporting of child abuse. The government has recently given a commitment to do so. This issue cannot be considered in isolation. An effective system of mandatory reporting also demands consideration of other policy documents such as the *Children First Guidelines*. It is noted that the government has also made a commitment to place the *Children First Guidelines* on a statutory footing.

An effective system is one by which all persons in society abide. To ensure that they abide, sanctions must be imposed on those who fail to do so. The systems in place in other jurisdictions should also be analysed, a need highlighted in my *Third Report of the Special Rapporteur for Child Protection*.

It is also proposed to amend the Child Care Act 1991 so as to allow any person, subject to limitations, to apply to a court for an order or direction in respect of a child believed to be receiving inadequate care and protection. Identification and detection of risks to children is the basis upon which any effective child protection system must operate. There is a fear that the HSE may not always identify such children, or that even if it does it may not detect a risk to such a child.

In some cases the actions of the HSE cannot be the end of the matter and court supervision of its decisions may be required. HSE care must be monitored as otherwise the case may become “unallocated” for lengthy periods after the child comes into care, or due to multiple moves in placement because of placement breakdown (for example, caused by a lack of support for the foster placement by the HSE). Moreover, planning for after care does not appear to occur unless there is a formal court review.

The court placed the child into care. It therefore has an ongoing obligation to ensure that the State care provided is superior to what was available within the family. The reality is that the State has a poor record as a good parent.

At present the only option open to a person with concerns who is not the guardian of a child is to institute judicial review proceedings or make a complaint to the Children’s Ombudsman. These avenues are not suitable to meet the needs of children and reform is required.

The recent majority decision of the Supreme Court in *Nottinghamshire County Council v. B.* provides some clarification on the adoption of children from a marital family. Whilst that was

not the central issue in the case, nonetheless it was raised, and we will have to await a relevant High Court judgment to measure the effect, if any, this judgment may have on the regulation of the law of adoption in Ireland.

RECOMMENDATIONS

Section 1: Child Protection and Developments in International Law

1 The Zambrano Judgment

Non-Irish national parents of Irish citizen children should be given permission to reside and remain in Ireland and this should be recognised as giving effect to the *Zambrano* judgment, not as a matter of discretion.

All non-Irish national parents of Irish citizen children who have been deported and any Irish children who left the state with parents who were deported should be promptly informed that they will now be given permission to return, reside and remain in Ireland, and be provided with assistance to do so.

2 Developments Relating to the European Convention on Human Rights

Research is needed on the matter of the various bases on which children are taken into care and whether adequate levels of family support at an early stage are currently being provided to prevent the taking of children into care.

Research is also needed on the specific vulnerability of children accommodated in the system of Direct Provision and the potential or actual harm which is being created by the particular circumstances of their residence including the inability of parents to properly care for and protect their children and the damage that may be done by living for a lengthy period of time in an institutionalised setting which was not designed for long term residence.

The matter of whether greater family support is now needed, because of the current economic climate, should be considered. This should include a review of the system of support for families in Direct Provision. The HSE should be obliged to establish what it did to provide

support and assistance for the family in advance of proceedings under the Child Care Act 1991.

Hague Convention cases should always be handled with the utmost expedition.

Training is needed on the Convention on the Rights of the Child for all judges in Ireland involved in decision-making relating to the rights and interests of children, particularly in Hague Convention cases, where the matter of the best interests of the child is somewhat fraught. Direct communication between judges in such cases should follow the Hague Protocol recommendations.

In particular the appropriate judges need a heightened awareness of the difficulties associated with Hague Convention cases because of the potential for conflict between the principles pertaining to the presumption in favour of return and the best interests of the child.

3 EU Agenda for the Rights of the Child

An approach based on children's rights should be taken to data collection on child well-being in Ireland. It should be achieved by working within the framework of the Convention on the Rights of the Child. 'Child well-being indicators' in Ireland should become 'children's rights indicators'. These indicators should be regularly updated in order to effectively monitor the situation of children's rights in Ireland. All children present in the state, regardless of immigration status, should be included in the collection of data.

The role of a lay advocate on behalf of the child at family welfare conferences should be considered because of the vulnerable position of children. Such a person should be independent and be guided by a code of conduct.

The use of the guardian *ad litem* facility should be revised and made more widely available as a form of legal representation for children.

Children should be given better information about proceedings affecting them and kept informed at all stages of such proceedings in an age appropriate and child focussed manner. Children should be consulted in all proceedings affecting them (bearing in mind the age and maturity of the child). This should include children in the asylum process, particularly separated children and those in families who are reaching adulthood.

Children should have access to free legal aid provided by lawyers trained specifically in representing children.

A comprehensive and compulsory programme should be integrated into existing school curricula to teach all children about human rights, particularly their own rights under the Convention on the Rights of the Child.

4 Convention on the Rights of the Child

The convention should be incorporated into Irish law. This would ensure that children's rights are considered when policy is being drafted. It would also permit individuals to invoke the convention in the court system and permit the courts to apply it as a matter of Irish law.

A referendum to include children's rights in the Constitution should be held as soon as possible.

The third draft of the wording of the amendment should include reference to the right of children to be heard in all judicial and administrative proceedings affecting them.

The rights of the child should be expressly recognised in Article 40 of the Constitution in order to demonstrate that the child is an individual constitutional persona entitled to rights and protections by virtue of its being. Alternatively, provision for children's rights and interests in Article 42 could also encompass personal rights enshrined in Article 40.3.

Ireland should sign and ratify the third optional protocol to the Convention on the Rights of the Child.

Ireland should also make a declaration submitting itself to the inter-state communication mechanism under that optional protocol.

Ireland should refrain from making a declaration to the effect that the State will not be subject to the inquiry procedure under the optional protocol.

Ireland should make widely known the existence of the third optional protocol to the convention, and should disseminate information to both children and adults in accordance with Article 17 of that instrument.

The principle of the "best interests of the child" should be incorporated into Irish immigration and asylum law so that every decision should be taken to conform with that principle.

The state should consider implementing into Irish law a requirement to safeguard and promote the welfare of the child when all immigration and asylum decisions are being taken, possibly in the form similar to section 55 of the UK's Borders, Citizenship and Immigration Act 2009.

5 Report of the UN Committee Against Torture

It is recommended that the opinions and recommendations expressed by the Committee Against Torture in its 2011 report be used in the drafting of law and policy to ensure that Ireland conforms with the Convention Against Torture to the greatest extent possible.

In particular, Ireland should ensure adequate implementation of the plan for the Ryan Report recommendations, ensure there are prosecutions where appropriate and provide adequate compensation to abuse survivors.

It is a positive step that an investigation has now been initiated into the treatment of women and girls in the Magdalene laundries. Criminal behaviour associated with the laundries should be investigated immediately and followed by prosecutions where appropriate.

The Irish government needs to create the services for which the courts are at present being asked to send children abroad for. We need a holistic approach to the problem in this jurisdiction. It is submitted that it would be infinitely more cost effective in the long run if all forms of care- secure care, special care, step down, and small units with more freedom – were available in a therapeutic setting on the one campus.

The Irish government needs to take immediate steps to devise interim measures for the treatment of 16 and 17 year olds who would otherwise be detained at St Patrick's Institution, and to expedite the building of a new Child Detention Facility. A date for its completion should be announced as soon as possible. The Ombudsman for Children should also have her remit extended to permit her to accept individual complaints from children in prison and detention.

It is very positive that Ireland has taken steps to deal with the legality of female genital mutilation through the Female Genital Mutilation Bill. It would be preferable, however, if the

Bill were to explicitly state that the practice constitutes torture, as recommended by the Committee Against Torture. The State should also follow-up the recommendations made by the Committee in respect of appropriate programmes, education and awareness-raising on the matter.

The State should also implement the recommendations of the Committee to ban all physical punishment of children and to take measures to protect separated and unaccompanied minors, including the collection of relevant data.

The particular needs of children in the Direct Provision system should be examined with a view to establishing whether the system itself is detrimental to their welfare and development and, if appropriate, an alternative form of support and accommodation adopted which is more suitable for families and particularly children.

In the interim, the state should implement without delay an independent complaints mechanism and independent inspections of Direct Provision centres and give consideration to these being undertaken through either HIQA (inspections) or the Ombudsman for Children (complaints).

6 General Comment No. 13

The UN Committee on the Rights of the Child, General Comment No. 13 highlights a large number of areas where State practice in Ireland needs improvement and reform. Many areas have already been highlighted and analysed in previous reports and will be again in the current report. For the purposes of this section, I have selected a number of points for recommendation. The list of recommendations is not necessarily exhaustive.

Ireland should move to a position of prohibiting all physical punishment of children through legislative change. Although proportionate responses can be taken to tackle the matter, the law should be clear and explicit that, as the Committee has outlined, all violence against children is unacceptable. Prior to the implementation of this recommendation, an extensive pre-implementation training and educational programme will be needed.

Ireland should reinforce the human rights imperative in attempts to eliminate violence against children. This requires consideration of the general principles of the Convention on the Rights of the Child in drafting all policies and laws concerning violence against children.

A national framework coordinating all efforts to prevent violence against children should be devised. The measures of General Comment No. 13 should be used to shape the framework.

This strategy should attempt to tackle the root causes of violence in all contexts – tackling the issue with children, perpetrators and communities, and from many other perspectives. This will require social and financial assistance as appropriate.

Educational measures should be implemented to change attitudes to violence against children.

There needs to be a renewed prioritisation of mental health services for children and young people. This is vital to tackle the psychological effects of violence by others against children, as well as the complex problem of self-harm.

The media should be a particular focus of the national coordinating framework. The matter of the undue use of negative images and the perpetuation of negative perceptions of children and young people in the media should be tackled, particularly those which associate children and young people with violence.

Such measures must be participative, allowing children themselves to be involved in both planning and evaluation.

The total financial provision for children, including measures to tackle violence against children, should be provided in every budget.

The current shortage in foster placements should be dealt with without delay. At present, private providers are being used to fill gaps in the system. However, when HSE foster placements become available the child is moved or the funding for private placement is only available for 3 months forcing multiple moves in placement which could not be described as child centred. It appears from anecdotal evidence that it is not uncommon for a child to

remain in institutional care for up to 2 years because a “suitable” foster family cannot be found. Research on this issue is vital.

The matter of the low prosecution rate in Ireland for reported incidents of violence against children must be examined. This should be part of an effort to achieve greater accountability in the area of violence against children.

The State should make reference to General Comment No. 13, and measures taken to implement it, in its report to the Committee on the Rights of the Child, due in 2012.

Section 2: Child Protection Developments in the United Kingdom

The developments in the neighbouring jurisdiction considered in Chapter 2 should be examined and mirror recommendations should be introduced in this country on early intervention.

The new policy framework for young people to be published in 2012 should include guidelines reflecting the recommendations of the report *Letting Children be Children* discussed in Chapter 2.

The National Vetting Bureau Bill 2011 should be reviewed having regard to the wide range of measures relating to child protection in the Protection of Freedoms legislation in the UK.

The recommendations of the *Family Justice Review* on hearing the voice of the child, the Family Justice Service, case management in child care cases, the relationship between courts and local authorities and alternatives to court proceedings should be implemented in this jurisdiction.

In particular, a time limit for the completion of care proceedings should be stipulated. Exemptions to the time limit should be allowed only by exception.

Alternatives to court in child care cases should be further developed, including Family Group Conferences and the use of mediation in child protection issues.

The Child Care Act 1991 should be amended to reinforce that in commissioning an expert's report, regard must be had to the impact of delay on the welfare of the child.

The Coroners and Justice Act 2009 came into force in the neighbouring jurisdiction in June 2011, providing a greater degree of choice for children in court for their protection when giving evidence. Similar provisions should be introduced in this jurisdiction.

The 2011 guidelines regarding female genital mutilation published in the UK should be considered as a template for guidelines to compliment new legislation in this area in this jurisdiction.

The national guidance for child protection in Scotland should be considered in the context of the new legislation on mandatory reporting and any guidance that might issue when this legislation is commenced.

Section 3: Criminal Justice System

1 The Proposal on the Mutual Recognition of Protection Measures in Civil Matters

Domestic violence against children is widespread and studies have revealed the link between domestic violence against women and physical abuse of children, as well as the trauma that witnessing violence in the home causes to children. The proposal should be fully implemented in Ireland in that it provides effective measures for the protection of victims of violence, in particular, domestic violence, stalking and violence against children. In domestic violence cases in this jurisdiction access is often set up without ever consulting children on the proposals and domestic violence is not always taken into consideration when fixing access arrangements.

2 The Draft European Directive on Establishing Minimum Standards of Rights, Support and Protection for the Victims of Crime 2011

The Directive identifies the particular risk to children created by their personal characteristics. Child victims are acknowledged to be vulnerable and in need of special measures of protection. The Irish data highlights a need for victim protection measures to focus upon the provision of assistance to child victims. Article 7 of the Directive, regarding access to information and advice, emotional and psychological support and practical assistance, should be the focus of such protective measures in Ireland.

The Directive should be recommended as a clear means of addressing the justice needs of child victims. This particularly vulnerable category of victim requires measures additional to increasing criminalisation and penalisation. The Directive should be welcomed as an important move in the trend towards the emphasis on victims as opposed to conventional legal responses which have focused solely upon 'symbolic justice' by way of increased convictions.

3 Child Offenders

The stated grounds for the continued exclusion of children in St Patrick's Institution from the Ombudsman for Children's complaints remit are unsustainable. Children held in Children Detention Schools, which come under the inspections regime of HIQA, can access the Ombudsman for Children complaints function: children held in St Patrick's Institution, which comes under the inspections regime of the Inspector of Prisons, however, have no access to an independent complaints mechanism.

Children are accommodated separately from adults within St Patrick's Institution. Therefore, claims that the facility accommodates both children and adults are no longer a valid reason to exclude children held there from the Ombudsman for Children's complaints remit. The extension of the remit of the Ombudsman for Children to St Patrick's Institution represents an essential safeguard which should be implemented immediately, particularly in light of the deferral of the Oberstown proposal.

4 Criminal Justice (Withholding Information on Crimes Against Children and Vulnerable Adults) Bill 2011

Mandatory reporting is likely to result in the improved reporting of welfare concerns. That said, to equate child protection solely with the reporting, investigation and prosecution of cases falls short of addressing children's justice needs. An innovative response to child protection should seek to attain a balance between censuring wrongs, vindicating victims and protecting society. We must also provide supports and services for offenders (who may also be children) and victims. The draft 2011 European Directive on establishing minimum standards of rights, support and protection for the victims of crime does not support a position of compelling victims to report crime. Article 7 of that Directive proposes instead a right to access victim support services that will apply whether the crime has been reported or not.

5 Draft Heads of National Vetting Bureau Bill 2011

Definitions

Terms such as 'ad hoc', 'occasional' and 'voluntary' should be clearly defined. It is recommended that the proposed vetting obligations need to include all those employees whose work places them in settings where there are children with whom they could come into contact, regardless of whether that contact is "regular or on-going unsupervised contact" or not.

Safeguards

Careful consideration should be afforded to the constitutional rights of those being vetted. My *2007 Report of the Special Rapporteur on Child Protection* highlighted certain safeguards for consideration, specifically the importance of clear, concise legislation which would be limited in application, provide for procedural safeguards and take account of the constitutional doctrine of proportionality. To that end, 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 to the basis of necessity;
- Put in place appropriate safeguards for such information to be furnished to vetted persons and corrected if this is appropriate;
- Provide the vetted person with the reasons if the opportunity to employ is declined;
- 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 on to a soft information register to an independent third party;
- Conduct periodic reviews of the status of those included on a soft information register.

Exchanges of Vetting Information between the State and Foreign Institutions

Whilst the existence of cooperation between Ireland and Britain is commendable, the fact that some European countries do not provide information should be addressed. Consideration should also be afforded to legal and cultural differences in different jurisdictions.

6 Child Witnesses: Recent Developments

Legislative amendment is recommended to clarify when a recording will not be admitted, specifically, examples of instances in which it is not in the interests of justice to do so.

Training should be provided to the judiciary, Gardaí and social workers on the most progressive method of interviewing young children. What is vitally important is that the interviewer is trained in the appropriate manner to conduct the interview.

Section 4: A Re-evaluation of Mandatory Reporting and Other Miscellaneous Matters

1 Amendment to Child Care Act 1991

If the HSE applies for an Interim Care Order or a Care Order and then decides to return the child to a parent both the court and the guardian *ad litem* have only a very limited opportunity to challenge the decision. The guardian can attempt to institute judicial review proceedings – but the costs may be prohibitive and *locus standi* may be an issue.

The Child Care Act 1991 should be amended so as to enable any person to apply to the court seeking an order or direction in respect of a child who is not the subject of proceedings under the Child Care Act 1991 or the Guardianship of Infants Act 1964 but who has been brought to the attention of the HSE, where there are reasonable grounds for believing that the child in question is not receiving adequate care and protection.

1.6 Report of the UN Committee Against Torture

The UN Committee Against Torture, the body responsible for monitoring implementation of the UN Convention Against Torture, conducted its first examination of implementation of that Convention by the Irish State in 2011.²⁰³ The State submitted a report to the Committee on implementation of the treaty in 2010.²⁰⁴ A number of 'shadow reports' (i.e. reports from non-governmental organisations and other interested parties) were also received by the Committee. Shadow reports were submitted by Amnesty International, the Global Initiative to End All Corporal Punishment of Children, the International Disability Alliance, the Irish Council of Civil Liberties and the Irish Penal Reform Trust, the Irish Human Rights Commission, Justice for the Magdalenas, and the Spiritan Asylum Service Initiative, reflecting the wide breadth of matters relevant to that treaty.²⁰⁵ A number of the areas covered concern children. The areas which affect children most directly are as follows.

1.6.1 Follow-Up to the Ryan Report

The Committee expresses concern at the lack of follow-up to the *Report of the Commission to Inquire into Child Abuse* (the "Ryan Report").²⁰⁶ I stated in my third report²⁰⁷ that in the aftermath of the Ryan Report, one of the most pertinent issues was the absence of a statutory framework regulating all aspects of child welfare and protection. I advocated the establishment of such a regime of child welfare, and recommended that the aspects of the Implementation Plan for the Ryan Report which related directly to the protection of child welfare should be implemented by statute.²⁰⁸

Although the Ryan Report Implementation Plan was well funded²⁰⁹ and contained some clear aims, the 'First Progress Report' was received with disappointment by children's groups.²¹⁰

²⁰³ Committee Against Torture, *Concluding Observations: Ireland* (CAT/C/IRL/CO/1) (17 June 2011).

²⁰⁴ Ireland, *First Report to the Committee Against Torture* (CAT/C/IRL/1) (26 January 2010).

²⁰⁵ Available at <http://www.ohchr.org/english/bodies/cat/cats46.htm>.

²⁰⁶ Committee Against Torture, *Concluding Observations: Ireland*, at para. 20.

²⁰⁷ Shannon, *Third Report of the Rapporteur on Child Protection*.

²⁰⁸ *Ibid.*, at p. 62.

²⁰⁹ See Office of the Minister for Children, '€15 million for Ryan Report Implementation Plan', 9 December 2009, available at <http://www.dcy.gov.ie>.

²¹⁰ See for example, Children's Rights Alliance, Press Statement: "'First Progress Report' on Ryan Report Implementation Plan: "Words are cheap. Action is Priceless"", 2 September 2010, available at

The report highlighted a number of achievements, including the initiation of a consultation project with children in care, the improvement of equal care for separated asylum-seeker children and the establishment of a group by the HSE to accelerate implementation of the *Children First Guidelines*.²¹¹ However, the Children's Rights Alliance stated at the time that

This 'First Progress Report' fails to provide us with any real transparency or accountability on the level of progress achieved. In key areas, there is little evidence that demonstrates progress, which you would rightly expect one year on. As a result, the Alliance, with regret, is disappointed with the 'First Progress Report' on the Government's Ryan Report Implementation Plan.²¹²

The Report failed to provide some crucial information. There was a failure, for example, to outline how the €15m budget assigned to the Implementation Plan was being spent, and further confusion about this matter followed when the HSE provided conflicting figures to the Department of Health.²¹³ It was also notable that there was no reference to the State's response to homeless children²¹⁴ or to the introduction of a mechanism to track whether services for children in care and in need of aftercare were improving.²¹⁵ Moreover, there were significant delays in provision of services promised under the Implementation Plan: for example, a wait of one and a half years for funds promised for counselling services for abuse victims.²¹⁶ The Ombudsman for Children observed:

Significant commitments under the plan have yet to be fulfilled. The Government should indicate how it proposes to implement the recommendations of the Commission to Inquire into Child Abuse and indicate the timelines for achieving this.²¹⁷

www.childrensrights.ie; and Pamela Newenham, "Government Criticised over Ryan Report Implementation" *The Irish Times*, 20 May 2010.

²¹¹ Children's Rights Alliance, Press Statement: "'First Progress Report' on Ryan Report Implementation Plan: 'Words are cheap. Action is Priceless'".

²¹² *Ibid.*

²¹³ See Jamie Smyth, 'No Charges Two Years after Ryan Report into Child Abuse' *The Irish Times*, 30 May 2011. It was reported that in 2010 the Department of Health was informed that €14.27 million of the €15 million budget had been spent, but that in 2011 the department was told that €4.68 million had been spent; apparently the differences between 2010 and 2011 arise from changes in decisions on what costs were to be considered as included in that figure.

²¹⁴ This point was emphasised by the Ombudsman for Children, *Submission for the 12th Session of the Working Group on Universal Periodic Review* (March 2011), at para. 14. See also the recommendations made in my previous report, Shannon, *Fourth Report of the Rapporteur on Child Protection*.

²¹⁵ Points noted by the Children's Rights Alliance, Press Statement: "'First Progress Report' on Ryan Report Implementation Plan: 'Words are cheap. Action is Priceless'".

²¹⁶ Smyth, 'No Charges Two Years after Ryan Report into Child Abuse' *The Irish Times*, 30 May 2011.

²¹⁷ Ombudsman for Children, *Submission for the 12th Session of the Working Group on Universal Periodic Review*, at para. 12.

The Committee Against Torture also noted this point,²¹⁸ and recommended that Ireland “Indicate how it proposes to implement all the recommendations of the Commission to Inquire into Child Abuse and indicate the time frame for doing so.”²¹⁹

The Government’s published its ‘Second Progress Report’ on the Ryan Report Implementation Plan in July 2011. There was an improvement in the quality and accountability in the second report, including an identification of key priorities for 2011 and an assessment of the status of each of the 99 actions has been developed for the first time. That said, much work remains to ensure the full implementation of the 99 actions, to both support the victims of past abuses and to uphold the rights of children at risk and those in care.

The Ryan Report Oversight Group, which is in place to oversee progress of the Implementation Plan, now aims to include “the voices of children and civic society”²²⁰ in its membership and this will undoubtedly renew the impetus to implement the Ryan Report recommendations. The fact that it includes non-governmental organisations will certainly ensure a more transparent process and hopefully a more effective one also.²²¹ This is also a positive step towards conforming to the recommendations of the Committee Against Torture for the better realisation of the Implementation Plan.

The Committee also expressed concern at the lack of prosecutions over matters dealt with in the Ryan Report. This point has been prominent in the Irish media.²²² The Convention Against Torture contains clear provisions for the right to redress for victims of torture. Article 13 stipulates that states which are parties to the Convention

shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities.

²¹⁸ Committee Against Torture, *Concluding Observations: Ireland*, at para. 20.

²¹⁹ Ibid.

²²⁰ See Children’s Rights Alliance, Press Statement: ‘Alliance Welcomes Invitation to Join Ryan Report Oversight Group’, 20 May 2011, available at www.eurochild.org.

²²¹ Ibid.

²²² Smyth, ‘No Charges Two Years after Ryan Report into Child Abuse’ *The Irish Times*, 30 May 2011.

The Committee noted that, despite the fact that the Commission had gathered extensive evidence, only eleven cases had been forwarded for prosecution, eight of which have so far been rejected. The Committee recommended that Ireland “Institute prompt, independent and thorough investigations into all cases of abuse as found by the report and, if appropriate, prosecute and punish perpetrators.”²²³

The Committee also made reference to the right to compensation for victims of torture. Article 14(1) stipulates that any state which is a party to the Convention

shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible.

The Committee further recommended that Ireland “Ensure that all victims of abuse obtain redress and have an enforceable right to compensation, including the means for as full rehabilitation as possible.”²²⁴

1.6.2 Accountability and Redress for Survivors of the Magdalene Laundries

The treatment of the survivors of the Magdalene laundries has been a topic of much debate in recent months. The Irish Human Rights Commission states that

during the twentieth century Magdalene Laundries operated as private-for-profit laundry enterprises in which the women and girls living in the institutions were expected to work in order to “earn their keep”.²²⁵

Some survivors were sent to the institutions by the courts, but most were detained there because they were unmarried mothers, had grown up in care, or were in a vulnerable position in other ways. Survivors report that they experienced violence, were made to work without pay, were kept behind locked doors, and returned by the Gardaí if they attempted to escape.²²⁶ Many detainees in these institutions were children – at least 70 children were found

²²³ Committee Against Torture, *Concluding Observations: Ireland*, at para. 20.

²²⁴ Ibid.

²²⁵ Irish Human Rights Commission, *Assessment of the Human Rights Issues Arising in Relation to the “Magdalene Laundries”* (November 2010), at para. 7.

²²⁶ See Justice for Magdalenes Ireland, *Submission to the UN Committee Against Torture* (May 2011), at p. 24.

to be detained in such institutions in 1970.²²⁷ The Irish Human Rights Commission states that “not only women, but girls as young as 13 years old, resided in these institutions”.²²⁸ The Committee Against Torture has acknowledged the seriousness of the matter by considering in its recent report how the Irish State has, thus far, failed the survivors. The Committee focused on three issues in its recommendations: the need for investigations; redress for victims; and the accountability of perpetrators.²²⁹

The Committee did not hesitate to conclude that the State had failed in its duties to these women at the time of their detention (I refer to it as ‘detention’ because the Committee emphasises that it was indeed involuntary) because of its failure to inspect the institutions:

The Committee is gravely concerned at the failure by the State party to protect girls and women who were involuntarily confined between 1922 and 1996 in the Magdalene Laundries, by failing to regulate and inspect their operations, where it is alleged that physical, emotional abuses and other ill-treatment were committed, amounting to breaches of the Convention.²³⁰

The Committee went on to comment on the handling of the situation by the State after the closure of the laundries. The Committee expressed “grave concern at the failure by the State party to institute prompt, independent and thorough investigations into the allegations of ill-treatment”²³¹ of the victims, and recommended that the State do so promptly. The Committee Against Torture was in agreement with the Irish Human Rights Commission on this point. The Irish Human Rights Commission carried out a human rights assessment of State responsibility for the laundries in 2010.²³² It concluded that it was necessary for the government to establish a statutory inquiry into the treatment of detainees at the laundries.

The seriousness of the alleged abuses of the rights of these women and girls cannot be overstated. The allegations of forced labour in the laundries are of particular gravity and certainly require investigation and redress where appropriate. Although a thorough

²²⁷ Ibid., at para. 5.3.9. The submission report refers to Eire, Committee on Reformatory and Industrial Schools, *Reformatory and Industrial Schools Systems: Report, 1970* (Dublin, The Stationery Office, 1970) at p. 39.

²²⁸ Irish Human Rights Commission, *Assessment of the Human Rights Issues Arising in Relation to the “Magdalene Laundries”*, at para. 4.

²²⁹ Committee Against Torture, *Concluding Observations: Ireland*, at para. 21.

²³⁰ Ibid.

²³¹ Ibid.

²³² Irish Human Rights Commission, *Assessment of the Human Rights Issues Arising in Relation to the “Magdalene Laundries”*.

investigation is pending, there are already extensive accounts from the survivors of the laundries of how they were forced to work in difficult conditions, for long hours, with no payment. The detention and use of women and girls as workers without pay would amount to 'forced labour' under the 1930 Forced Labour Convention of the International Labour Organisation, which Ireland signed in 1931.²³³ It appears from the reports provided by these women and girls that their treatment constituted slavery. The 1930 Forced Labour Convention stipulates that the definition of slavery includes forced or compulsory labour. Slavery is stated in Article 2.1 to include "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily". It is clear that the testimonies of the survivors indicate that their treatment fits this definition: they were sent to institutions, in which women and girls were made to work without pay, where physical punishment was practised, doors were locked and escapees were likely to be returned by the police.

The prohibition of slavery is a 'peremptory norm' of international law: that is a norm of state practice which is so fundamental that no derogation from it is ever permitted. A violation of a peremptory norm is also a violation of customary international law: that is international law that derives from the customary behaviour of states which believe they are obliged to so act. The prohibition of slavery is enshrined in numerous human rights instruments; for example the International Covenant on Civil and Political Rights (Article 8) states that:

1. No one shall be held in slavery; slavery and the slave- trade in all their forms shall be prohibited.
2. No one shall be held in servitude.
3. (a) No one shall be required to perform forced or compulsory labour.

Even where the State was not overseeing slavery directly the right to redress and remedy still exists, not least under the ECHR, which also prohibits slavery. Therefore the need to deal with the matter of accountability and redress in relation to the Magdalene laundries is of vital importance to ensure compliance with international human rights law.

The provision of financial redress for the survivors was another step which was recommended by the Irish Human Rights Commission. The Committee Against Torture again

²³³ This point has been emphasised by Maeve O'Rourke, Harvard University Law School Global Human Rights Fellow. See Patsy McGarry, 'Laundries Used "Forced Labour"' *The Irish Times*, 6 July 2011.

concluded with the Commission on this point, and recommended that Ireland “ensure that all victims obtain redress and have an enforceable right to compensation, including the means for as full rehabilitation as possible”.²³⁴ Unfortunately, until recently, the Irish government has denied outright that the State was in any way responsible for the abuses reported to have been perpetrated in and by the laundries. This is in spite of the various ways in which the State was involved with the matter: it failed to prevent the placement of innocent women and girls in the institutions; it did not monitor the treatment of those detained there; and various State entities used the services of the laundries.²³⁵ The Justice for Magdalenes advocacy group report that in September 2009, the then Minister for Education and Science refused to apologise for the treatment of the survivors or to provide a redress scheme, stating

In terms of establishing a distinct scheme [of redress] for former employees²³⁶ of the Magdalene Laundries, the situation in relation to children who were taken into the laundries privately or who entered the laundries as adults is quite different to persons who were resident in State run institutions. The Magdalene Laundries were privately owned and operated establishments and did not come within the responsibility of the State. The State did not refer individuals to Magdalen[e] Laundries nor was it complicit in referring individuals to them.²³⁷

The State specifically excluded survivors of the Magdalene laundries from a statutory compensation scheme for those abused from the 1930s to 1970s in residential institutions which were State-funded and Church-run. The scheme was established under the Residential Institutions Redress Act 2002.²³⁸ This refusal by the State to accept responsibility has served to deny the survivors the redress to which they are clearly entitled, a fact which has now been acknowledged by an international human rights monitoring body (i.e. the Committee Against Torture), the Irish Human Rights Commission and academic commentators.²³⁹

²³⁴ Committee Against Torture, *Concluding Observations: Ireland*, at para. 21.

²³⁵ See ‘State “Complicit” with Laundries’ *The Irish Times*, 4 July 2011 and Patsy McGarry, ‘Áras an Uachtaráin among Users of Magdalene Laundry’ *The Irish Times*, 22 June 2011, in which it is stated that “A ledger for a Magdalene laundry in Dublin’s Drumcondra reveals that its regular customers included Áras an Uachtaráin, Government departments...It discloses that, including those listed above, regular customers for the laundry, believed to be the one at High Park, included the Department of Justice, the Department of Agriculture, the Department of Fisheries and CIÉ.”

²³⁶ The then Minister later apologised for referring to the survivors as “employees”, stating that “I fully acknowledge that the word ‘workers’ would have been more appropriate.” Patsy McGarry, ‘Officials do Few Favours for Magdalenes’ *The Irish Times*, 18 June 2011.

²³⁷ Justice for Magdalenes Ireland, *Submission to the UN Committee Against Torture*, at para. 4.5.

²³⁸ *Ibid.*, at para. 4.1.

²³⁹ See for example, the work of Maeve O’Rourke, Harvard University Law School Global Human Rights Fellow.

There appears to have been a change in attitude towards the matter in recent months on the part of both religious organisations and the State, possibly because of increased public interest, as well as the recent report of the Committee Against Torture. It is very positive that in June 2011 separate statements (though no apologies)²⁴⁰ were made by relevant religious organisations, who expressed “willingness” to “bring clarity, understanding, healing and justice in the interests of all the women involved”,²⁴¹ and the government, who pledged to establish an independently chaired inter-departmental committee with the purpose of clarifying “any State interaction with the Magdalene Laundries and to produce a narrative detailing such interaction”.²⁴² There was also a pledge to discuss with relevant congregations the matter of making relevant records available and the matter of any survivors of laundries still in their care, as well as “the putting in place of a restorative and reconciliation process and the structure that might be utilised to facilitate such process”.²⁴³ It was established that the Minister for Justice, Equality and Defence, as well as the Minister of State for Disability, Mental Health and Older People, would be responsible for follow-up on the matter, and that an initial report would be made on the progress of the committee after three months.²⁴⁴

This is very welcome news. It is hoped that this process will provide the survivors of the Magdalene laundries with the acknowledgement, redress and accountability which they clearly deserve.

As regards an independent investigation, Senator Martin McAleese, the nominee of the Taoiseach to the Seanad, has been appointed as chair of the inter-departmental committee which has been established to investigate the treatment of detainees at the laundries. Advocacy group, Justice for Magdalenes, welcomed the appointment of Senator McAleese, who has been recognised for his positive work in Northern Ireland.²⁴⁵ It is a very positive move that an individual deemed suitable by survivors has been appointed and it is to be hoped that a thorough, impartial and illuminating investigation will be conducted.

²⁴⁰ Patsy McGarry, ‘Magdalene Group Welcomes Inquiry but Disappointed at the Lack of Apology’ *The Irish Times*, 15 June 2011.

²⁴¹ Department of Justice and Equality, ‘Government Statement on the Magdalene Laundries’, 14 June 2011, available at www.justice.ie; and Éanna Ó Caollaí, ‘Magdalene Move Welcomed’ *The Irish Times*, 11 June 2011.

²⁴² Ibid.

²⁴³ Ibid.

²⁴⁴ Ibid.

²⁴⁵ Patsy McGarry, ‘McAleese Welcomed as Magdalene Chair’ *The Irish Times*, 2 July 2011.

There remains the matter of accountability for any criminality which may have occurred in relation to the activities of the Magdalene laundries. The Committee Against Torture recommended in its report that the State, “in appropriate cases, prosecute and punish the perpetrators with penalties commensurate with the gravity of the offences committed” in the laundries.²⁴⁶ There has been no extensive discussion of the possibility of prosecutions for criminal activity at the laundry. Lengthy statements are extant, however, which refer to beatings at the institutions,²⁴⁷ and even whippings,²⁴⁸ with Justice for Magdalenes stating that “Some women recall severe physical punishment (including beatings and having one’s hair forcibly cut off) for infractions of the rules or as a general threat”.²⁴⁹ Where the perpetrators of such violence on vulnerable adults and girls are still living, there is no reason, on the face of it, not to seek to prosecute them. The recommendations of the Committee should provide additional impetus to prosecute the perpetrators of such violence in the laundries.

The State has long resisted taking responsibility for its part in the horrendous treatment of these vulnerable members of Irish society. The initiation of an investigation is a very positive step, but it is crucial that this is accompanied by concrete provision for the survivors. The abuses which they experienced should also be investigated with a view to criminal prosecutions where appropriate. This should be a priority for the government because of the seriousness of the alleged abuses and in particular because of the slow and inadequate response over many years.

1.6.3 Other Recommendations of the Committee Against Torture Relating to Children

The Committee Against Torture made a number of other recommendations relating to children and it is useful to note them here briefly. The Committee considered the issue of children in detention. The report of the Irish Human Rights Commission²⁵⁰ and the joint

²⁴⁶ Committee Against Torture, *Concluding Observations: Ireland*, at para. 21.

²⁴⁷ See Justice for Magdalenes Ireland, *Submission to the UN Committee Against Torture*, at p. 34.

²⁴⁸ *Ibid.*, at p. 25.

²⁴⁹ *Ibid.*, at para. 5.2.6.

²⁵⁰ Irish Human Rights Commission, *National Human Rights Institution Submission to the UN Committee Against Torture on the Examination of Ireland’s First Report* (1 April 2011).