THE LAW REFORM COMMISSION

AN COIMISIUN UM ATHCHOIRIU AN DLI

(LRC 32-1990)

REPORT

ON

CHILD SEXUAL ABUSE

IRELAND
The Law Reform Commission
Ardilaun Centre, 111 St Stephen's Green, Dublin 2

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THE LAW REFORM COMMISSION

The Law Reform Commission was established by section 3 of the Law Reform Commission Act, 1975 on 20th October, 1975. It is an independent body consisting of a President and four other members appointed by the Government.

The Commissioners at present are:

The Hon Mr. Justice Ronan Keane, Judge of the High Court, President;
John F. Buckley, Esq., B.A., LL.B., Solicitor;
William R. Duncan, Esq., M.A., F.T.C.D., Barrister-at-Law, Associate Professor of Law, University of Dublin;
Ms. Maureen Gaffney, B.A., M.A., (Univ. of Chicago), Senior Psychologist, Eastern Health Board; Research Associate, University of Dublin;
Simon P. O'Leary, Esq., B.A., Barrister-at-Law.

The Commission's programme of law reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas on 4th January, 1977. The Commission has formulated and submitted to the Taoiseach or the Attorney General thirty-one Reports containing proposals for reform of the law. It has also published eleven Working Papers, two Consultation Papers and Annual Reports. Details will be found on pp114-117.

William Binchy, Esq., B.A., B.C.L., LL.M., Barrister-at-Law, is Research Counsellor to the Commission.

Ms. Una O'Raifeartaigh, B.C.L., Ms. Elizabeth Heffernan, LL.B. and Patrick Dillon-Malone, B.A. (Mod. in Legal Science), Dip in Advanced European Law (College of Europe, Belgium) are Research Assistants.

Further information from:

The Secretary,
The Law Reform Commission,
Ardilaun Centre,
111 St. Stephen's Green, Dublin 2.
Telephone: 715699.

NOTE

This Report was submitted on 17th August, 1990 to the Attorney General, Mr. John L. Murray, SC, under Section 4(2)(c) of the Law Reform Commission Act, 1975. It embodies the results of an examination of, and research in relation to, legal problems arising in the area of Child Sexual Abuse which were carried out by the Commission at the request of the former Attorney General, Mr. John Rogers, SC, together with the proposals for reform which the Commission were requested to formulate.

While these proposals are being considered in the relevant Government Departments the Attorney General has requested the Commission to make them available to the public at this stage, in the form of this Report.

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INTRODUCTION

1. On the 6th March 1987, the then Attorney General, in pursuance of section 4(1)(c) of the Law Reform Commission Act 1975, requested the Commission to formulate proposals for the reform of the law in a number of areas. Among the topics was:

> "Sexual offences generally, including in particular the law relating to rape and the sexual abuse of children."

In response to that request, the Commission submitted a Report on *Rape and Allied Offences* to the Attorney General on the 3rd May 1988. This Report embodies the results of the Commission's examination of the second aspect of the topic, i.e. the sexual abuse of children, and contains its proposals for reforms in the law. At the same time, the Commission is presenting to the Attorney General its Report on another aspect of sexual offences, i.e. *Sexual Offences Against the Mentally Handicapped.* It is also completing an examination of a topic referred to in the First Programme of Law Reform, i.e. *Oaths and Affirmations*, and will shortly be submitting a Report to the Taoiseach on this topic in pursuance of s4(2)(b) of the Law Reform Commission Act 1975.

2. In the course of its lengthy examination of the topic dealt with in this Report, it became obvious to the Commission that the issues raised were by no means confined to the criminal law, but extended over a wide area of law, both civil and criminal. Its examination proceeded on the basis that no single source should be exclusively relied upon from which to derive general findings about the nature of child sexual abuse and the precise requirements of law reform. The approach throughout has been to adopt a balanced inter-disciplinary perspective. Recognising that a solid foundation of fact was a

prerequisite to the reform of the law in relation to child sexual abuse the Commission endeavoured, within the financial and practical means at its disposal, to obtain as much basic and applied data on child sexual abuse as possible. As well as collecting relevant research information, the Commission sought opinions and endeavoured to gain some practical experience on such matters as the credibility of children as witnesses and children's reactions to court involvement. It also attempted to identify the practical problems experienced by victims and their families, as well as by health and social workers, the Gardai, the Director of Public Prosecutions and the courts. To this end, it supplemented its research into substantive and comparative law reform with consultations by practitioners in the areas of health, child care and law enforcement, as well as with the families of some victims of child sexual abuse. It also received a number of letters from individuals directly affected by child sexual abuse and briefs from professional associations and other interested groups.

3. The results of this research were contained in a Consultation Paper published by the Commission on *Child Sexual Abuse* in August 1989. That Paper was divided into three sections, the first relating to the civil law generally, the second to the criminal law generally and the third to other aspects of the law not dealt with in detail in the preceding parts. It contained the initial and tentative conclusions of the Commission in relation to the various problems that arose. It is unnecessary to set out again the provisional recommendations of the Commission: they are referred to as they become relevant during the course of this Report. A detailed summary of them is contained in Chapter 10 of the Consultation Paper.

4. A wide range of written submissions was received relating to various aspects of the Consultation Paper and, in addition, a Seminar was held at the Law Society premises in Blackhall Place on 25th November 1989 which was attended by 124 people, including judges, lawyers, doctors, psychologists, social workers, officers of the Departments of Health and Justice and of various health boards, representatives of concerned organisations, parents of victims of abuse and representatives from the offices of the Director of Public Prosecutions and the Chief State Solicitor's Office. The Seminar was divided into three working groups, each chaired by a Commissioner, the first dealing with the civil law proposals, the second with those relating to sexual offences generally and the third with problems of evidence. All the submissions and views advanced to the Commission have been exhaustively considered and the Commission is now making its final proposals to the Attorney General.

5. Some features of the proposals require special mention. It has already been indicated that, while the Attorney General's reference to the Commission was of "sexual offences generally", emphasis was placed on rape and the sexual abuse of children. It became obvious, however, to the Commission at an early

stage that no sensible proposals for the reform of the substantive criminal law in the area of child sexual abuse could be formulated unless it was prepared to undertake an examination of the entire law relating to what might be broadly described as consensual sexual activity. That in turn led the Commission to examine the present state of the law as to consensual homosexual offences in the light of the decisions of the Supreme Court[1] and of the European Court of Human Rights in *Norris*.[2]

6. As has already been pointed out, it was also found necessary to address the civil aspects of the problem. In this context, particular attention has been given to the provisions of the Child Care Bill 1988 which, at the time of the presentation of this Report to the Attorney General, has completed its committee stage in Dail Eireann. As will be apparent from this Report, a number of proposals in the Consultation Paper have already been embodied in the Bill during its progress through the Oireachtas. The Commission has also, however, recommended appropriate amendments which it considers might usefully be made to the Bill at this stage.

7. It has already been mentioned that Reports are being presented to the Attorney General and the Taoiseach on two separate but related topics, *Sexual Offences Against the Mentally Handicapped* and *Oaths and Affirmations*. Each of these three Reports contain cross references to materials and proposals contained in the other Reports and the Commission would stress the importance of bearing this in mind when each Report is being studied. It is also, of course, the case that references are made at many points in this Report to materials and proposals contained in the Consultation Paper on Child Sexual Abuse.

8. A list of persons and organisations from whom written submissions were received and of those who participated in the Seminar at Blackhall Place in November 1989 will be found in Appendix B. The Commission wishes to express its deep gratitude to all of them for their invaluable assistance. It should be emphasised, however, that while it much appreciates the help which they freely gave, the Commission itself is solely responsible for the contents of this Report.

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1 [1984] IR 36.
2 Eur Court HR, Norris judgment of 26 October 1988, Series A No. 142.

PART I THE CIVIL LAW

CHAPTER 1: MANDATORY REPORTING OF CHILD SEXUAL ABUSE

General

1.01 As might be expected our provisional conclusion in favour of a mandatory reporting law gave rise to substantial comment, both in written submissions to the Commission and at the Commission's seminar. The division of opinion in those submissions which included comment on the matter was approximately two thirds in favour of mandatory reporting and one third against. It was generally accepted that the arguments for and against mandatory reporting were presented fairly in the Consultation Paper at paragraphs 201-203. There is no need to repeat them in full here.

1.02 There was more support for, than dissent from, the belief expressed in the Consultation Paper that the current level of reporting of child sexual abuse is probably, despite increases in recent years, still low. There was also substantial support for our view that "the introduction of mandatory reporting would represent a clear and unequivocal public statement that child sexual abuse is something that society will not tolerate and ... its potential for damaging children is such that the uncomfortable feelings that many professionals have about reporting must be put aside". The issue of confidentiality did not feature in many of the submissions. There seems in any case to be a growing, if not universally accepted, belief among child care/health professionals that a promise of absolute confidentiality when dealing with a child victim or an alleged abuser is usually inappropriate. Nor did we receive any objections to our proposals from representative bodies in the medical profession.

1.03 There was one emphasis common to both supporters and opponents of mandatory reporting. If mandatory reporting is to be of benefit, the system of child protection must be capable of responding sensitively and efficiently to the likely increase in reported cases. Certain conditions, it is argued, need to be met. First, those given legal responsibility for reporting should have

training in how to discharge that responsibility: this is particularly so where the responsibility is placed on professionals such as teachers who do not have specific expertise in the recognition of abuse. Second, the health boards must be given adequate resources to investigate and manage an increased case load. Third, changes in the legal system are necessary to enable it to respond more sensitively and effectively to individual cases. Many of the views expressed here reflected our own comments at paragraph 2.04 of the Consultation document.

> "Mandatory reporting laws are clearly not a complete solution to the problem of under-reporting child sexual abuse. They can only be part of the solution. One of the most important factors likely to influence levels of reporting is the degree of confidence which exists in child protection services, and we acknowledge the efforts made by the Department of Health and the Health Boards in recent years to improve such services. If doctors, teachers or social workers know that reports made by them will be followed up quickly, effectively and with sensitivity, they will be more likely to act. If that confidence does not exist, then even mandatory reporting laws are unlikely to have much impact, particularly if it is known that sanctions are seldom if ever applied."

1.04 We wish to re-emphasise that a mandatory reporting law was never suggested as a panacea, but as one part of a series of legal and social reforms designed to protect children from the scourge of sexual abuse. At the same time, any system of child protection will be defective if it lacks an effective mechanism for bringing cases of suspected abuse to the notice of the authorities. We remain convinced that there exist at present serious inhibitions to reporting, and that a major contributing factor is the absence of clear legal authority for so doing. We recognise that a mandatory reporting law will result in an increased case load and may place serious strain on the limited resources available to health boards. On the other hand, it is in the public interest that the full extent of the problem of child sexual abuse should be brought to light. If the health boards lack the resources to deal adequately with the problem, it is better that that fact be known. A worrying implication in some submissions was that the continued effectiveness of the child protection services depends on many children who require protection not coming to the attention of the authorities.

Resource limitations cannot be ignored and difficult choices have to be made. But it is not in our view a rational policy to attempt to contain expense in the area of child protection by relying on a defective reporting mechanism. There is no guarantee that under the present system it is the most serious cases which come to the attention of the authorities. It is better to have a system which encourages more comprehensive reporting; if decisions then have to be made about how priorities among cases are determined (something which already in fact occurs), those decisions can be made on the basis of reasoned judgment and experience. It is understandable that those who are

at present engaged in the difficult work of child protection, and who already are carrying heavy case loads with limited resources, should hesitate at the prospect of having to investigate and manage even more cases. However, we would be failing in our duty if we were not to recommend desirable reforms solely on the basis of their resource implications.

1.05 A further concern is the possible increase in the number of unsubstantiated reports and the danger that scarce resources may be wasted in pursuing them. Mandatory reporting is likely to lead to an increase in the number of reports, and some of these will be unsubstantiated. It seems that in any system of reporting, whether voluntary or mandatory, a substantial number of cases of suspected child sexual abuse will remain unsubstantiated. Many of the problems associated with over-reporting (e.g. the over-zealous doctor or the interfering or malicious neighbour) are not confined to jurisdictions with mandatory reporting laws. Also, a careful understanding is required of what is meant by "unsubstantiated reports". We pointed out in the Consultation Paper that in this country, in the absence of mandatory reporting, in 1987 only 456 of the 926 reported cases of child sexual abuse were confirmed. In a recent study (M Hynes and S Jennings, "Community Notification of Child Sexual Abuse", *Irish Medical Journal*, Volume 82 (1989) p. 115) of cases of child abuse (including non-accidental injury) notified to one community care area in North Dublin between 1982 and 1987, abuse was confirmed in only 42% of cases. This, of course, does not mean that other reports were without any foundation. In a further 13% of cases abuse was strongly suspected and in only 19% of cases was there no evidence of abuse following investigation. It is not obvious to us that the *proportion* of unsubstantiated reports will rise with the introduction of mandatory reporting. Mandatory reporting will be confined to certain professional groups who will be operating under clear statutory guidelines. Arguably this may introduce more, rather than less, discipline into reporting practices. We emphasise that we have been careful not to propose a mandatory reporting law which will give a licence to prurient members of the general public to cast stones at their neighbours with impunity.

1.06 As for the concern that a mandatory reporting law would be ineffective if in other respects the legal system fails to command the confidence and respect of those mandated to report, we agree. Our proposal is, however, made in the context of many other proposals for the reform of the criminal and civil law designed to make the system more sensitive to the needs of children and less potentially damaging to them.

Discussion of our provisional conclusions reveals some misunderstandings about the consequences of reporting. It was assumed by some that the filing of a report would in some way inevitably lead to legal proceedings of some sort. It should be emphasised that the submission of a report to a health board is not the same as the institution of legal proceedings. The submission of a report should be viewed as a means of alerting the health board to the possibility that a child is at risk. It is then for the health board to investigate

the matter further and, if abuse is confirmed, to decide what further measures are necessary to protect the child, including the possibility, but certainly not inevitability, of legal proceedings.

1.07 *In summary, our consultations have confirmed our initial view in favour of the introduction of a mandatory reporting law*, and we repeat here the basic reasons given in paragraph 2.04 of the Consultation Paper.

> "We believe that the current level of reporting is probably, despite increases in recent years, still low. The introduction of mandatory reporting would represent a clear and unequivocal public statement that child sexual abuse is something that society will not tolerate and that its potential for damaging children is such that the uncomfortable feelings that many professionals have about reporting must be put aside. We think that the duty to prevent harm to a child overrides the normal obligation of confidence which may arise in a professional relationship. The existence of a mandatory reporting law would offer the clear guidance that many professionals desire as to where their duty lies and in what manner that duty must be performed. The existence of statutory exemptions would relieve bona fide reporters of any lingering fear of being sued or prosecuted.
>
> "We acknowledge the importance of avoiding the phenomenon of over-reporting, with its attendant danger of injustice and damage to innocent families. We think that a carefully and tightly drawn reporting law should reduce this risk to a minimum."

1.08 It would in our view be appropriate, given the advanced stage of the Child Care Bill, to embody mandatory reporting laws in separate legislation.

The Elements of a Mandatory Reporting Law

1.09 The general principles which should inform a mandatory reporting law were set out in the Consultation Paper at paragraph 2.05 as follows.

> "The law should be specific enough to discourage over-reporting, whether by the over-zealous or the defensive reporter; it should, on the other hand, be broad enough to facilitate identification of children who are genuinely at risk. It should be based on a definition of child sexual abuse which lays down a minimum rather than an optimum standard of care towards children. This derives from the need to recognise that methods of child care may properly vary between different families, and that the capacity of the child care services to respond to reported abuse is limited by finite resources. Finally a mandatory reporting law should be readily understood and easily applied."

Our final recommendations concerning the specific elements for a mandatory reporting law follow for the most part our provisional recommendations.

They are set out in the immediately following paragraphs.

Reportable Conditions

1.10 *For the purpose of a mandatory reporting law we recommend the definition of child sexual abuse proposed by the Western Australia Task Force in its 1987 Report, viz:*

> *"(i) Intentional touching of the body of a child for the purpose of the sexual arousal or sexual gratification of the child or the person;*
>
> *(ii) intentional masturbation in the presence of a child;*
>
> *(iii) intentional exposure of the sexual organs of a person or any other sexual act intentionally performed in the presence of a child for the purpose of sexual arousal or gratification of the older person or as an expression of aggression, threat or intimidation towards the child; and*
>
> *(iv) sexual exploitation, which includes permitting, encouraging or requiring a child to solicit for or to engage in prostitution or other sexual act as referred to above with the accused or any other person, persons, animal or thing or engaging in the recording (on video-tape, film, audio-tape, or other temporary or permanent material), posing, modelling or performing of any act involving the exhibition of a child's body for the purpose of sexual gratification of an audience or for the purpose of any other sexual act referred to in subparagraphs (i) and (iii) above."*

We do not believe that there should be a mandatory obligation to report a suspicion that a child may at some future date be subjected to child sexual abuse.

1.11 We re-emphasise the need for a reasonably specific definition of child sexual abuse. Whether reporting is mandatory or voluntary, the risks of over-reporting are narrowed by the adoption of such a definition. The definition includes conduct which by common consent would be regarded as inappropriate and potentially damaging to a child. It is true that in many cases a mandated reporter will be alerted to possible abuse, not by an allegation or disclosure of specific acts as set out in the definition, but rather by observing certain behaviourial and other indices of sexual abuse such as those set out in the Department of Health, *Guidelines*[3] (at Appendix A,

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3 Department of Health, *Child Abuse Guidelines* (Guidelines on Procedures for the Identification, Investigation and Management of Child Sexual Abuse), Revised Edition - July 1987.

paragraph 1.3). The reporter may in such a case form a suspicion that abuse has occurred without being in a position to know what precise form that abuse has taken. We believe that it would be wrong to place a reporter under a legal duty to report unspecified abuse; the scope of mandatory reporting should be strictly defined. It should remain as at present a matter of judgment in individual cases (i.e. a voluntary matter) whether to report a suspicion of non-specific abuse.

1.12 One objection raised to the West Australian definition is that it is subjective in the sense that most of the prohibited acts are qualified by the word "intentional". We recognise the difficulties involved in proving intention but believe that the element of intention must remain part of the definition. As with "non-accidental" injury, the presence or absence of intention is central to the question of whether the child is genuinely in need of protection, and, as with non-accidental injury, the circumstances surrounding the conduct complained of (whether it has been repeated etc.) will often indicate whether the conduct was intentional or had a particular purpose.

1.13 One common reaction to our provisional recommendation was that, if reporting of suspected child sexual abuse is to become mandatory, then so *a fortiori* should reporting of suspected cases of non-accidental injury to children. We agree. We have not however made detailed proposals in this regard, because cases of non-accidental injury do not come within our terms of reference.

The Persons Placed Under an Obligation to Report

1.14 *We recommend that doctors, psychiatrists, psychologists, health workers, social workers, probation officers and teachers should be placed under a legal obligation to report cases of suspected child sexual abuse.*

The obligation to report would be a personal obligation attaching to each mandated reporter. This is not say that we do not welcome the development of procedures for reporting, for example, in schools, which often involve consultation with superiors as a first step after suspicions have been aroused. Consultation with a colleague who has greater expertise or experience in identifying and dealing with child sexual abuse may help the reporter to assess whether initial suspicion is well founded. However, in the last analysis we believe that the legal duty of reporting must rest on the individual who has reasonable grounds for believing that abuse has occurred. When, for example, a child discloses to his class teacher that he has been sexually abused by a parent or another teacher, the class teacher might well initially discuss the matter with the principal or some other designated person such as a guidance counsellor, within the school. In most cases where there is clear evidence of abuse one would expect the school authorities to support the class teacher in making the necessary report to the health board. If, however, the school authority for whatever reasons proves unreasonably obstructive, the class teacher should know that it is his or her personal responsibility, as the

original recipient of the information or complaint, to file a report, provided always that he or she personally has knowledge or a reasonable belief that abuse has occurred.

The Nature of the Obligation to Report

1.15 *We recommend that the obligation to report should arise when the mandated reporter knows or has good reason to believe that child sexual abuse has occurred. The test of knowledge or belief should be objective rather than subjective, the question being whether the individual ought reasonably to be aware that sexual abuse has occurred.* What is reasonable should be tested in the light of the expertise which would normally be expected of a person in his or her professional position.

1.16 A higher standard of awareness would be expected of a social worker specialising in child protection than of a class teacher with little training in the identification of abuse. We emphasise this point because of certain reservations expressed to us about the imposition of a reporting duty on persons who may have had little opportunity to develop their knowledge of child sexual abuse, particularly teachers. The position would be that any question as to whether a particular teacher should have been aware that one of his or her pupils had been abused would be judged in the light of current standards and expectations within the teaching profession itself.

How to Report and To Whom

1.17 *We recommend that a mandated reporter should be required to make an initial oral report followed by a written backup report identifying the child and the nature and basis of the suspicion that he or she has been subjected to sexual abuse.* We do not consider that there should be a mandatory obligation to report a suspicion that a child may at some future time be subjected to sexual abuse. The reasons for these recommendations have been set out in the Consultation Paper, at paragraph 2.09.

1.18 *We recommend,* in line with the Department of Health guidelines, *that the person to whom all reports should be made should be the Director of Community Care and Medical Officer of Health within each health board. It should also be open to a mandated reporter to submit his or her report to the Gardai.*

Sanctions for Failure to Report

1.19 *Failure without good reason to report should constitute a summary offence with a maximum penalty of six months imprisonment and/or a fine of £1,000. Prosecutions for failure to report should be subject to the consent of the Director of Public Prosecutions.*

Immunity Provisions

1.20 *We recommend that express statutory immunity from legal proceedings should be given to any person who bona fide and with due care reports a suspicion of child sexual abuse to the appropriate authority.*

The need for such provision is explained in the Consultation Paper at paragraph 2.08. We would emphasise that *the need for this statutory immunity arises whether or not mandatory reporting laws are introduced.* At present, fear of legal proceedings, though frequently misplaced, is operating as a serious disincentive to the reporting of suspected child sexual abuse.

CHAPTER 2: INVESTIGATION AND MANAGEMENT OF CHILD SEXUAL ABUSE

General

2.01 We noted in our Consultation Paper the Department of Health *Guidelines on Procedures for the Identification, Investigation and Management of Child Abuse*, which were last revised in 1987, and we indicated reluctance to question the detailed procedures contained in the *Guidelines* which have been carefully developed by a multi-disciplinary team. We emphasised also that excessive legal regulation of health boards in their investigative and management functions is dangerous because it may result in the commitment of scarce resources to satisfying formal requirements, and may reduce the flexibility of procedures and their ability to respond to unique or changing circumstances. At the same time representations have been made to us that the *Guidelines* are not uniformly applied in health boards throughout the country. This led us to consider whether there might be a case for giving some of the *Guidelines* statutory or regulatory force. We concluded (at para 2.13):

> "that there are certain key points within the health board decision-making process in respect of which it is appropriate to insist on the maintenance of certain minimum legal standards. There is a difference between flexibility and procedural laxity and the danger of a completely discretionary procedure is that it may provide an excuse for inaction, delay or idiosyncratic decision-making. There should therefore be some measure of legal accountability for the key decisions and actions taken by health boards in response to reports of child sexual abuse."

There were two other principal concerns which we had in relation to health board procedures, namely, whether the principles governing co-operation between health boards and Gardai are adequate and effective and whether the procedures give adequate recognition to the rights of parents.

Investigation

2.02 In our Consultation Paper we detailed the investigative procedures set out in the *Guidelines*, but noted that health boards are not placed under an express statutory duty to investigate reports of alleged abuse. We recognised the need for great sensitivity in investigative procedures, and noted the *Guidelines'* emphasis on the need for locally agreed arrangements relating to co-operation between health boards and Gardai. We remain of the view that *there should be an express statutory duty on health boards to take certain minimal steps in response to a report of alleged child sexual abuse.* We view this as one of the minimum conditions to secure accountability within health board procedures and to instil confidence in reporters. *Health boards should be under a general obligation to investigate or cause to be investigated reports of alleged child sexual abuse. The obligation to investigate should not be absolute but, where a decision is made not to investigate following a report of alleged abuse, the onus should be on the health board to give reasons.* We have reconsidered our provisional proposal that the law should specify in broad terms the matters to be investigated. We now think that these are matters which might more appropriately be detailed in the guidelines.

Co-operation with the Gardai

2.03 We believe that the development of a better mechanism for co-operation between the Gardai on the one hand and health boards and hospital/clinic personnel on the other is a key requirement of the system. The failure to develop a more structured basis for co-operation is, it seems to us, one factor contributing to the low prosecution rate in child sexual abuse cases. Part of the explanation was given in the Consultation Paper:

> "From our discussion with health care professionals it has become apparent to us that there is often a reluctance to involve the Gardai in the early stages of investigation of alleged child sexual abuse. The motives are understandable. In many cases the evidence is simply insufficient to warrant Garda involvement. In other cases, there may be a fear that parental consent to further examination of, or interview with, a child will not be forthcoming, or will be withdrawn if the parents know that the Gardai are likely to be involved. There is also the prevailing ethos within the health care profession that the welfare of the patient/child should be the primary concern.
>
> One of the consequences of excluding Gardai from the early stages of investigation is that it may ultimately make it more difficult to mount a successful prosecution against the alleged offender. If disclosure by the child is first made in the context of a purely therapeutic interview without Garda involvement, there is a danger that any subsequent formal statement made by the child to a Garda may be attacked in court as tainted by the earlier interview. Another disadvantage of not involving the Gardai at an early stage is that the number of interviews which the child may have to undergo is increased."

2.04 In addition, in the introduction to our Consultation Paper we stated that "those charged with the responsibility of caring for children fear the loss of control which comes with the institution of criminal proceedings, which appear to take on a life of their own". There is an unfortunate yet widespread perception that the criminal justice process, once triggered, engages in relentless pursuit of the perpetrator and is thereby incapable of responding sensitively to the needs of the victim.

2.05 The perceived conflict between the demands of the criminal justice process and the needs of the victim must be addressed if procedures for the protection of children are to work successfully. What must be avoided are extreme positions. If law enforcers take the view that the successful prosecution of offenders is the one overriding objective, and health professionals regard the welfare of the individual victim as superseding all other considerations, tension will remain and prosecution rates will continue to be low.

2.06 We concluded in our Consultation Paper that what may be needed is a procedure which allows the health care professionals some degree of influence on the decision whether to institute criminal proceedings or not. Full co-operation with and involvement of the Gardai in the early stages of investigation is unlikely to come about unless health care professionals are convinced that prosecutions will not proceed without regard to the welfare of the child victim. We suggested that part of the solution may be to give the multi-disciplinary case conference a role in advising on the question of prosecution. We re-affirm this proposal, which is set out in detail in the next section.

2.07 It remains the case that the DPP must make the ultimate decision as to whether prosecution is appropriate in a particular case. However, the welfare of the victim is one of the relevant and influential factors affecting that decision. At present the decision on prosecution may be delayed while the Director seeks a report, if not already included on the file, from relevant health professionals, or further information from them, as to how, for example, a court appearance might affect the victim. Giving the case conference the right to make its views known to the DPP on the matter of prosecution would therefore involve no more than formalising and giving added structure to an existing practice.

2.08 The fears referred to above as to the relentless nature of the criminal process should be allayed to some extent by referring to the statistics in Chapter 9 of the Consultation Paper in the section headed "The Role of the DPP". The facts that out of 90 cases not proceeded with in 1986, the decision in 1 in 9 related to potential harm to the victim and that a further 12 victims were "spared" giving evidence when a better case was selected, together with the other "non-prosecution" headings, indicate the broad range of considerations influencing the decision to prosecute. These considerations have to be grounded on information largely flowing from health professionals

and, to that extent, the decision to prosecute is controlled by them.

2.09 When the DPP decides that a prosecution is warranted, he can only prosecute effectively when the Gardai have been involved in the investigative process from an early stage. Once health professionals realise the extent to which they do in fact influence the DPP's decisions and that the welfare of the child is at all times a paramount consideration, we can envisage no obstacle to the fullest co-operation between them and the Gardai. To maintain this co-operation, the Gardai should not themselves make prosecutorial decisions appropriate to the DPP alone. The DPP has issued a practice direction requesting the Gardai to refer all sexual offences to him for the decision whether or not to prosecute and this should be scrupulously honoured.

Case Conferences

2.10 In our Consultation Paper we referred to the central role ascribed by the *Guidelines* to the case conference in the management of child sexual abuse cases. A number of submissions commented on the role of case conferences and have indicated a degree of procedural informality, or even laxity, in relation to the holding and conduct of case conferences in some areas which must give rise to concern.

We confirm our provisional recommendation that *the Director of Community Care/Medical Officer of Health should be under a general legal duty to hold a case conference in cases of suspected child sexual abuse which have not been rejected as unfounded. When he or she decides not to hold a case conference, he or she should be obliged to record the reasons for the decision. We also believe that there is a need for standard procedures to be adopted governing the conduct at case conferences, regulating in detail such matters as membership, minute taking and circulation of minutes, interviewing and other procedural matters.* These are matters which might best be spelled out in the context of the Department of Health Guidelines.

2.11 We confirm our provisional view that *the case conference should, where a criminal offence is suspected, consider the question of whether criminal proceedings are appropriate.* (This should not detract from the principle that in all cases where an offence is suspected the Gardai should be notified). There should be a Garda present at the case conference when this matter is under discussion. We would add the rider that *the advice or observations given by the case conference relating to prosecution should primarily concern matters relevant to the child's welfare*, e.g. the possible or likely impact of criminal proceedings on the child's health and wellbeing or on plans for the child's future which are being considered by the case conference. We recognise that in many cases the case conference will prefer not to advise on the question of prosecution but merely to furnish the Director of Public Prosecutions with information on the child relevant to his decision. Nevertheless, it should be open to the case conference to offer advice as well as information. We

reiterate that ultimately it must be for the Director of Public Prosecutions to determine whether a prosecution is or is not appropriate.

2.12 Our comments on the role of parents in case conferences drew several comments, some of which questioned the advisability of allowing parents any attendance rights, and others which suggested much more emphasis on parental rights, including the right to representation at case conferences. We take the general view, which has a constitutional basis, that parents should be involved in decisions relating to their children unless there are strong reasons, based on considerations of the child's welfare, for limiting their involvement. If one of the parents is the suspected abuser, it may not always be appropriate for the two parents to attend at the case conference together. Where a parent's behaviour has been excessively aggressive, and it is probable that his or her attendance at a case conference will lead to disruption, it may be necessary to exclude him or her. We therefore confirm our provisional recommendations. *Parents should be informed of case conferences. They should, if available and as a general rule, be invited to attend for at least part of the conference and should be given an opportunity to comment on any action proposed by the conference. The conference should have the power to exclude parents altogether only in exceptional circumstances.*

2.13 Finally, we confirm our view that *professional legal advice should be available to the case conference* to assist it in assessing evidence, for the purpose of deciding whether care or criminal proceedings should be undertaken, and to give advice on other legal aspects of the case including the question whether, and in what form, a case should be listed.

Child Abuse Lists

2.14 We understand that the system of maintaining lists of suspected and confirmed cases of child abuse envisaged in the guidelines is not uniformly adhered to and appears in some areas to have broken down. This is disturbing as the maintenance of child abuse registers is generally regarded as an important element in any national scheme of child protection. The matter is, we understand, currently being reviewed by the Department of Health. We confirm our recommendations that certain safeguards should be incorporated into any system of listing.

(a) The circumstances in which a case is listed as confirmed should be carefully defined. In our Consultation Paper we questioned whether medical/social validation, in the absence of an admission of abuse or successful criminal or civil proceedings in respect of the alleged abuse, is an adequate basis for listing a case as confirmed. *We re-affirm our proposal that a refined system of classification be used.* This is not strictly a matter of law reform. The listing system is probably better left in the form of guidelines. We would, however, suggest the adoption of a category of "confirmed or admitted" to cover cases where there has been an admission or a judicial determination that abuse has occurred.

This does not preclude the possibility of other cases being listed as, for example, "suspected abuse supported by medical evidence".

(b) *Parents should have a legal right to be informed of any entry or change of entry on any health board child abuse list which relates to them or their child.*

(c) *There should be an obligation on health boards to review regularly entries in child abuse lists and a procedure whereby a parent may apply to have his or her child's name removed from a list.*

CHAPTER 3: CARE, SUPERVISION, BARRING AND PROTECTION ORDERS

Care and Emergency Care Proceedings - Recent Developments

3.01 An outline of the present law relating to care and emergency care proceedings is contained in paragraphs 1.06 to 1.10 of our Consultation Paper. Before discussing reforms, it is necessary to refer to certain developments that have taken place since the publication of our Consultation Paper.

In *The State (D & D) v G and Others*,[3] the parents of a child who had been made the subject of a District Court fit person order were successful in their appeal to the Supreme Court to have the order declared invalid. The Health Board, in whose favour the order had been made, had alleged that the child had been sexually abused by her father. Central to the Health Board's case was evidence of a physiological examination carried out while the child was anaesthetised, and evidence given by a doctor who had interviewed the child with the aid of anatomical dolls. The latter interview was recorded on video. Prior to the District Court hearing, the parents' solicitor was given a loan of a copy of one of the medical reports: he was not given a report of the physical examination, nor did he see the video of the interview. The Supreme Court decided unanimously, first that the District Court should have had sight of the video, which constituted "basic evidence" from which the doctor had drawn the conclusion that abuse had occurred, and, in addition, "a demonstration .... of the precise use, and the expert witnesses' belief in the meaning of the use by the child, of the anatomical dolls".[5] Second, the lawyer acting for the parents should, according to required standards of natural justice, have had "in good time before the trial, reports or summaries of the evidence which was to be given and, in addition, an examination of any video recording by him and by any medical witness he proposed to call".[6]

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4 [1990] ILRM 10.
5 *Id*, at p12.
6 *Id*.

In a later judgment given in the same case,[7] the Supreme Court reached a number of further conclusions:

(1) that the health board had no power to act as a fit person for the purposes of the Children Act 1908,

(2) that, where an application is made for an order under s21 or s24 of the Act of 1908, "there is a very definite and positive obligation on a court ... carefully to consider whether the welfare of the child clearly requires its removal from the custody of the innocent parent. A justification for so doing could only be if the innocent parent was unwilling or, as might well be the case, unable to protect the child from the risk of harm from the other parent",[8]

(3) that a fit person order should nominate the person with whom, or the head of any institution in which, the child is intended to reside,

(4) that the identity and location of the fit person may be kept from the parents only in exceptional circumstances. "Such an exclusion of knowledge should not .... be lightly undertaken, having particular regard for the fact that questions of proper access and communication between such parents and the child may in some instances still be a very necessary ingredient in the welfare of the child".[9]

Following this decision, emergency legislation, *The Children Act 1989,* was enacted giving health boards power to act as fit persons under *The Children Act 1908* both prospectively and retrospectively.

3.02 In *MF v Superintendent of Ballymun Garda Station and others*,[10] five children were taken from the care of their mother and removed to a place of safety by two social workers (employed by the Eastern Health Board) and a Garda under s20 of the Act of 1908. The mother was not informed of the basis for this action. Three days later, without notice to the mother, the District Court made a place of safety order in respect of the children under s24 of the Act of 1908. For various reasons, which were not due to any dereliction on the part of the social workers, the mother had no contact with the health board or the Gardai, and did not know where her children were being kept. Two weeks after the children were taken into care, the mother was informed by telephone that they were with foster parents. The foster parents were not identified and the mother was not offered the opportunity of access to her children until nearly three weeks had elapsed. The decision by Barron J in the High Court that the children's detention was unlawful was

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7 *The State (D and D) v G and Midland Health Board (No. 2)* [1990] ILRM 130.
8 *Id*, at 138 (*per* Finlay CJ).
9 *Id*, at 139 (*per* Finlay CJ).
10 [1990] ILRM (High Ct, Barron, J, 1989), reversed by Supreme Ct, 3 May 1990.

successfully appealed to the Supreme Court. A number of matters referred to by the court (for example the relationship between ss20 and 24 of the Act of 1908) will cease to be of significance when the Child Care Bill 1988 becomes law. However, a number of general principles were referred to which are of interest in the context of current reform proposals.

In the High Court Barron J stated that the "deprivation of liberty" authorised by the place of safety procedures in ss20 and 24 of the Act of 1908 "must be subject to at least as stringent safeguards as in the case of persons accused of crime".[11] The mother was entitled to adequate information within a reasonable time following the children's detention. And, on the analogy with criminal proceedings, the matter should have been before the court "within eight days of the detention and then at intervals of not more than eight days".[12] However, in the Supreme Court, the analogy with the criminal law was regarded as "inappropriate".[13] The detention of the child is "with reference to preserving the life and health of a child or young person and for the purpose of vindicating his constitutional rights. It is in no sense to be construed as meaning a deprivation of liberty or of any of his other constitutional rights".[14] As regards the time within which the matter must be brought back to court following a place of safety order, the Supreme Court preferred not to stipulate a specific number of days, but stated:

> "As soon as practicable after the making of the *ex parte* Order under s24 in respect of the children, it was necessary to issue a summons directed to their parent and served on her, seeking the ruling of a fit person order.
>
> "The return date for such summons should be as short as is reasonable, having regard to the necessity for both the applicant and the respondent under it to have an opportunity of preparing for a proper hearing of the application for the fit person order."[15]

As regards the information which should be supplied to the parent, the Court decided that, save in exceptional cases, the parent should be informed of the location of the place of safety where the children were detained pending the "fit person" application. And in "fit person" proceedings, the parent should be informed of the identity of the "fit person" proposed and of the location where such person would detain the children.

It is also noteworthy that the Supreme Court commented on the absence of any provision for independent representation for children in cases in which

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11 [1990] ILRM, at 248.
12 *Id.*
13 At p26 of O'Flaherty J's judgment, which is the judgment of the Court.
14 *Id*, at pp26 and 27.
15 *Id*, at p29.

their fundamental rights are in issue.[16] Barron J had also criticised a decision not to grant the mother legal aid on the "unworthy excuse" that her case was not sufficiently urgent.

3.03 At the time of writing the *Child Care Bill 1988* has completed its special committee stage. We have already, in our Consultation Paper, expressed agreement with, and welcome for, many of the Bill's provisions as they relate to child sexual abuse. These were outlined in paragraph 1.11 of our Consultation Paper. A number of amendments proposed by the Minister for Health correspond with provisional recommendations made in our Consultation Paper. These will become apparent below.

Emergency Care Procedures

3.04 It is worth re-stating certain general principles which informed our discussion on emergency care procedures in our Consultation Paper. *Ex parte* emergency procedures to protect children are only justifiable in cases of serious and imminent risk. Such procedures are not appropriate in all, nor even in most, cases of suspected child sexual abuse. The removal of a child from his or her home is a step which should never be taken lightly or as a matter of routine. Following *ex parte* proceedings, parents should be given the opportunity to state their case without any unnecessary delay. The recent case law cited above has given fresh emphasis to some of these principles. We believe that the provisions of the Child Care Bill largely reflect these principles and, as in our Consultation Paper, our observations and recommendations are confined largely to matters of detail.

The Application for an Emergency Care Order

3.05 We re-emphasise the need for safeguards to prevent the mis-use of emergency care orders and to avoid any possibility that their grant by the District Court might become a matter of routine or anything other than a last resort. The Cleveland episode illustrated the hazard of using emergency care orders in the first stages of management and intervention without proper scrutiny and in the absence of evidence of immediate danger to the child. Nor should an emergency care order be used, in the absence of immediate risk, solely for the purpose of making the child available for "disclosure" work. The District Justice will continue to be the person primarily responsible for ensuring that emergency care orders are not abused. His ability to do this depends in part on the manner in which the application is made by the health board. We noted in our Consultation Paper that the Child Care Bill will not require a health board, when applying for an emergency care order, to make a sworn information. We recommended that *the present procedure*

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16 At p. 10 of O'Flaherty J's judgment, and at p. 2 of the assenting judgment of Finlay CJ.

whereby all applications for place of safety orders are on the basis of a sworn information should be retained. The reason is that this requirement assists the justice in assessing the strength of the case, imposes a necessary discipline on the health board in presenting its case and helps to ensure accountability. These views have been supported in submissions made to us and we therefore confirm our provisional recommendation.

Duration of an Emergency Care Order

3.06 Our provisional recommendation that it should be possible for a District Justice, on application, to extend the initial eight day period in emergency care proposed in the *Child Care Bill*, up to a maximum of a further eight days, is in part reflected in an amendment to the Bill which allows a District Justice to grant an interim care order. The amendment, as amended at committee stage, now reads:

> "15. (1) Where a justice of the District Court is satisfied on the application of a health board that -
>
> (a) an application for a care order in respect of the child has been or is about to be made (whether or not an emergency care order is in force); and
>
> (b) there is reasonable cause to believe that pending the determination of that application the health or well-being of the child so requires,
>
> the justice may make an order to be known and in this Act referred to as an 'interim care order'.
>
> (2) An interim care order shall require that the child named in the order be placed or maintained in the care of the health board -
>
> (a) for a period not exceeding eight days, or
>
> (b) where the health board and the parent or person acting in *loco parentis* consent, for a period exceeding eight days,
>
> and an extension or extensions of any such period may be granted (with the consent, where an extension is to exceed eight days, of the persons specified in *paragraph (b)*) on the application of any of the parties if the justice is satisfied that this is necessary in the best interests of the child.
>
> (3) An application for an interim care order or for an extension of such an order shall be made on notice to a parent having custody of the child or to a person acting in *loco parentis* except where

the justice otherwise directs.

(4) Where an interim care order is made, the justice may order that any directions given under *subsection (6)** of *section 11* may remain in force subject to such variations, if any, as he may see fit to make or the justice may give directions in relation to any of the matters mentioned in the said subsection and the provisions of that section shall apply with any necessary modifications."

**[This is the appropriate reference if amendment No. 67 is accepted.]*

3.07 We accept that there are cases, particularly where sexual abuse is alleged, in which it is necessary for the period of "emergency care" to be extended beyond 8 days. The assessment of a child and the gathering of other evidence necessary for the bringing of full care proceedings will often not be possible within a week. However, we reiterate our concern that any extension of the period pending the full care hearing, particularly when made in *ex parte* proceedings, should be as short as possible, and an application for such extension, or its grant, should never become a matter of routine.

One of the difficulties with s15, as presently drafted, is that it would in theory permit an indefinite number of 8 day extensions, and without notice to the parents if the District Justice so directs. The requirement that the case must return to court after each period of 8 days is itself an important safeguard, but in our view it is not enough. *We recommend that s15 be amended to restrict the making of an interim care order on an ex parte basis to one period of 8 days.*

3.08 In order to prevent the grant of an interim care order becoming a matter of routine we recommend the following:

The District Justice should be required, before making an interim care order, to satisfy himself that preparations for full care proceedings are advancing with all possible speed and that an interim care order, particularly when it is applied for ex parte, is not only necessary but also the only appropriate means of protecting the child.

An application for an interim care order (without consent) should be made on the basis of a sworn information.

The right to apply for an interim care order (without consent) should be confined to the Director of Community Care/Medical Officer of Health or a senior official of the health board acting on his/her behalf.

3.09 We further recommend that *s15(2)(b) be amended to make it clear that an interim care order may not be granted for a period exceeding 8 days without the consent of both parents, where both have custody rights prior to the order.*

Emergency Care Orders, Medical Inspections and Assessments

3.10 In our consultation document we proposed that *the District Court should be given power to authorise a health board to arrange for the medical examination and other assessment of a child where the level of suspicion of abuse is sufficiently high. Where such an authorisation is granted, the parent should be under an obligation to present the child for examination at a given place and at a certain time or times. It should be open to the health board to apply for the order on an ex parte basis.*

The arguments in favour of this recommendation in summary were:

(a) that cases arise where the level of suspicion that abuse has occurred is not high enough to justify an emergency care order, but is sufficient to warrant a medical assessment of the child despite the opposition of the parent,

(b) that the availability of an assessment order will make it less likely that a health board will be tempted to use the emergency care order as a preliminary step in intervention, and

(c) that the availability of an assessment order may be helpful in those cases where possible Garda involvement makes parents reluctant to consent to medical or other assessment of their child.

3.11 Under s16(3) of the *Child Care Bill* a court may require a parent to cause a child "to attend for treatment or attention at a hospital, clinic or other place specified by the court", but only following the making of a supervision order. This does not meet our objective. A supervision order may only be made (under section 16(1) of the Child Care Bill 1988) where the Court is satisfied *that grounds for a care order already exist.* What we are proposing is a procedure whereby the child may be examined in order to determine *whether grounds for a care order exist.*

3.12 It may be noted that s43 of the English *Children Act 1989* has introduced child assessment orders which make it possible for a court, in cases where there is "reasonable cause to suspect that a child is suffering or is likely to suffer, significant harm", and where the assessment is required in determining whether the child is in fact suffering, or is likely to suffer, significant harm, to make an assessment order effective for a period of up to 7 days. It was not our intention, in making our provisional recommendation, to propose an assessment procedure which would involve the child being taken into care for a number of days. We had in mind a procedure whereby the parents would be required to present the child for assessment at a given time or times, but not overnight. The procedure would be particularly helpful in those cases where it is possible that physical signs of abuse may remain. (Indeed, the procedure would for this reason be particularly useful in cases of suspected non-accidental injury). In our view, a compulsory assessment order, particularly where made on an *ex parte* basis, involving the child's

admission to care for several days, could only be justified in circumstances where grounds exist for an emergency care order, which would then be the appropriate order for the health board to seek. We therefore confirm our provisional recommendation, but with the proviso that *an assessment order should not involve the child being separated from his parents for more than eight hours in respect of each occasion on which an examination or assessment is ordered.* We would also recommend the adoption of the rule contained in s43(8) of the English Act that *a child who is of sufficient understanding to make an informed decision may refuse to submit to assessment.*

3.13 We also provisionally recommended that "legislation should make it clear what are the minimum rights of medical examination and assessment implicit in an emergency care order and, where the health board proposes to go beyond those limits, specific authorisation from the District Justice should be necessary". We note with satisfaction that a proposed amendment to section 11 of the *Child Care Bill*[17] gives a justice the power, on his own motion or on application, to give directions relating to the medical or psychiatric examination or treatment of the child.

Parental Rights in the Context of Emergency Care

3.14 In our Consultation Paper we provisionally recommended that a District Justice should, before making an emergency care order, "be satisfied that the risk to the child is such as to make *ex parte* proceedings necessary". We note with satisfaction that a proposed amendment to the *Child Care Bill*[18] provides that an application for an emergency care order may be made *ex parte* "if the justice is satisfied that the urgency of the matter so requires".

3.15 We also expressed concern over the absence of provisions relating to parental access to children subject to emergency care orders, viz:

> "First, if denial of access is to be the rule, this should be made explicit in the legislation. Second, there may be circumstances in which it would be wrong to deny both parents access during the period of emergency care. Where, for example, it is suspected that a child is being seriously sexually abused by its father, the court may be justified in granting an emergency care order and excluding the father from access, but it does not necessarily follow that the mother should also be excluded. Much will depend on the circumstances. In our view it is worth considering whether the justice, when granting the emergency care order, should be required to take the circumstances into account and to approve access where this would not jeopardise the child's safety."

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17 Section 11 (8)(a)(iii).
18 Section 11 (4)(c).

3.16 We note with satisfaction that a proposed amendment to the *Child Care Bill*[19] gives the justice a power, on application or on his own motion, to give directions with respect to "the access, if any, which is to be permitted between the child and any named person and the conditions under which the access is to take place". No doubt a district justice will interpret his powers under the amended section in the light of the Supreme Court's decision in *The State (D) v G and Others*.[20] There the court referred to "a very definite and positive obligation on the court carefully to consider whether the welfare of the child clearly requires its removal from the custody of an innocent parent". The obligation on the court would presumably be even greater where it is considering the question of access by an innocent parent to a child who has in fact been removed from him or her.

3.17 In the same case, the Supreme Court was concerned that the identity and location of a fit person should only be held back from the parents in exceptional circumstances. Section 12 of the *Child Care Bill* gives a parent a general right to be informed by the health board as soon as possible where the child is detained in a place of safety. Unfortunately the section does not indicate expressly what precise information is to be given to the parent; indeed, it may be sufficient under the section for the health board merely to inform the parent that the child has been detained in a place of safety. An amendment to the *Child Care Bill* (s11(6)(a)(i)) empowers a justice, on making an emergency care order, on application or on his own motion, to give such directions (if any) as he thinks proper with respect to whether the address or location of the place at which the child is being kept is to be revealed to the parents. Having regard to the Supreme Court's judgement, *it would in our view be more appropriate for the legislation to place an express obligation on the health board to inform the parents of the location at which the child is being kept, and to indicate that a justice may order such information to be withheld from the parents only in exceptional circumstances.*

Protection and Exclusion Orders in Emergency Situations

3.18 This matter is discussed in the section below on barring and protection orders.

Grounds for the Making of a Care Order

3.19 In our Consultation Paper we welcomed the fact that "sexual abuse" would be a specified ground for the making of a care order under s15 of the *Child Care Bill 1988*. We confirm our provisional recommendation that *a statutory definition of child sexual abuse should be included in the legislation along the lines of that proposed by the Western Australia Task Force.*[21] The principal arguments in favour of the adoption of a definition outlining those

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19 Section 11 (6)(a)(ii).
20 *Supra.*
21 See above, para 1.10.

activities which justify intervention are that:

(a) it would help to ensure that intervention takes place only in those situations where the conduct in question is generally recognised to be unacceptable;

(b) it would give parents and others fair warning of the types of conduct or activity which may bring them into conflict with the law;

(c) it would give to those who are considering reporting suspected child sexual abuse, whether mandated to do so or not, clear guidance on what constitutes abuse.

The Supervision Order

3.20 In our Consultation Paper we welcomed the introduction of the Supervision Order, but drew attention to certain reservations which had been expressed in relation to s15(5) of the *Child Care Bill* which allows a District Justice, where application has been made for a care order, to make instead a supervision order if he thinks it proper to do so. The perceived danger was that the justice might use the supervision order as a too ready alternative to a care order, with consequent risks for the child. We remain of the opinion that the option given to the Justice in s15(5) should remain. Otherwise there is a danger that a child might be left completely exposed in a case where a District Justice is not satisfied that grounds for taking a child into care have been fully established. We confirm our provisional recommendation that *the legislation should be amended to place a positive obligation on the Justice to be satisfied that a supervision order will adequately protect the child, where he or she proposes to make it in lieu of a care order.*

Publicity in Care Proceedings

3.21 We confirm our provisional recommendation that *the general principle that care proceedings should be otherwise than in public should be subject to exceptions in the case of the press and bona fide researchers.* The anonymity of the child is, in our view, adequately protected by s23 of the *Child Care Bill*, which prohibits publication of any matter likely to lead to the public identifying the child.

Representation of the Child and the Child's Right to be heard in Care Proceedings

3.22 In our consultation document, we made provisional recommendations for amendments to the *Child Care Bill* which would give the child the possibility of a more independent voice in care proceedings. The arguments in favour of this approach, particularly in relation to older children, are set out in paragraph 2.27 of the Consultation Paper. The recent observations of the Supreme Court in *MF v Superintendent of Ballymun Garda Station and Others* (see above, para. 1.36) have added weight to these arguments. We

confirm our provisional recommendations as follows:

(1) *A child should have a right to be heard in care proceedings relating to him or her, except where it appears to the court that this would not be in the child's interest.*

(2) *Provision should be made for the appointment by the Justice of an independent representative for the child where, in the opinion of the Justice, this appears to be necessary in the interests of the child.*

(3) *The person providing representation should be legally qualified. He or she should be appointed by the court from among lawyers who by reason of training and experience are competent to represent children. A panel of such lawyers should be established. The criteria for appointment to the panel, including the possibility of specialist training, are matters which should be considered by the two professional bodies.*

Parental Access to Children in Care

3.23 In our Consultation Paper, we suggested that "there should be a presumption that the parents enjoy access rights unless the court otherwise decides". We note with satisfaction that a proposed amendment to the *Child Care Bill*[22] obliges a health board, as a general principle, to allow reasonable access to the child by his parents. A parent who is dissatisfied with the health board's arrangements would be able to apply to court for an order. The health board could apply to court for access to be refused where necessary for the child's safety or welfare.

3.24 In our Consultation Paper, we expressed reservations about s15(4) of the *Child Care Bill*, which is broad enough to allow a health board to return a child who is subject to a care order to the charge or control of his parent or parents. We thought that there might be a danger, in a case where a court has formally determined that a child is at risk from a parent, in allowing the health board unilaterally, and without court approval, to return the child to his parents. It has been suggested to us that our reservations are inconsistent with the policy of seeking wherever possible to promote and support the relationship between the child and his parent, a policy which is reflected in our views on the importance of parental access to children in care.

We do support such a policy and are opposed to any restrictions on parental contact which are not clearly necessary. Nevertheless, where a child has been taken into care on the basis of a judicial finding that he has been sexually abused by a parent, we remain doubtful whether a decision to restore the child to the parent's custody should be capable of being taken by the health

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22 Section 17.

board alone. If there has been a judicial determination that a child is at risk from a parent, and that the degree of risk justifies the exceptional course of removing the child, the safeguard of further judicial scrutiny of the circumstances is in our view required before the child is returned to the source of risk. We therefore recommend that *a health board should not be entitled, without seeking the sanction of the court, to restore a child who is in compulsory care to the custody of a parent where abuse or neglect by that parent was the reason for the care order.*

Barring Orders

3.25 In the Consultation Paper a number of provisional recommendations were made to extend the scope of the barring order remedy, at present governed by the *Family Law (Protection of Spouses and Children) Act, 1981*, in the context of child sexual abuse. There was a good deal of support for these recommendations. There were also some reservations, including one view that we had not sufficiently explored the implications of our proposals or the possibility of using alternative remedies to achieve our objectives.

The Use of Barring Orders in Cases of Child Sexual Abuse

3.26 Discussion of barring procedures in the context of child sexual abuse is important because in some cases the most appropriate and the least distressing way of protecting a child who has been the subject of abuse is to order the removal of the abuser from the child's household. Clearly, where physical separation of the child from an abuser who is a member of the same household is necessary, there are two basic alternatives - to remove the child or to remove the abuser. In many cases the removal of the child will be more appropriate, particularly where it offers a better guarantee of the child's safety. Nevertheless, removing the child does have certain disadvantages. As we stated in the Consultation Paper, at paragraph 2.24:

> "Feelings of guilt are common in the child who has been sexually abused, and the child's removal from its home may sometimes tend to reinforce her sense of responsibility for what has happened. The sudden removal from family members with whom the child has a strong bond of affection may also cause considerable distress both to the child and to its family, most of whom may not have been aware that abuse was taking place."

The barring procedure can be, and is sometimes, used at present in cases of child sexual abuse, but its scope is limited. The three principal limitations are that only a spouse can be barred, only a spouse may apply for a barring order, and a barring order is not available on an emergency *ex parte* basis.

Who May be Barred?

3.27 We pointed out in the Consultation Paper (paragraph 2.31) that a barring order is not at present available where a child is sexually abused by an unmarried parent, a step-parent, a co-habitee, a brother or a sister, an uncle or an aunt, or any other person who may be a member of the child's household. We provisionally recommended that *a barring order should be available in respect of any person who is or has been a member of the abused child's household. We also thought that there was no reason why such an order should not also be available against other persons who, while not members of the child's household, come into regular contact with the child.*

The arguments in favour of these reforms are set out in paragraph 2.31 of the Consultation Paper, and appear to have been broadly accepted. We therefore confirm our recommendations.

3.28 It has been suggested in one submission that our recommendations might result in a person who is not a parent of the child being barred from his own home, as for example where a child is living in the home of an uncle or indeed a friend of the family, and the uncle or friend is accused of sexually abusing the child. Could the child and her parents thereby gain exclusive occupation of a house in which they have no rights of ownership? Our concern was primarily to give the court power to exclude an abuser who is living in the family home of the child whose protection is in question. We would therefore recommend that, *in relation to a person who is not a parent or a sibling of the child, the barring order should, save in exceptional circumstances, be made only in respect of the child's family home.*

3.29 In this same context, it was also suggested to us in one submission that more discussion was needed on the balance to be struck between the protection of the right to live in one's own home and the protection of the child's right not to be abused. In relation to parents, the present barring procedure already operates on the assumption that the protection of a child's (or indeed a spouse's) safety or welfare does sometimes justify an order requiring a parent who owns his own home to leave it. In constitutional terms, the child's right to bodily integrity and to have his welfare protected is set above parental rights relating to property. This is a common feature of protective family legislation in this and other countries. (The *Judicial Separation and Family Law Reform Act 1989*, for example, gives the court wide powers to adjust property rights in the marital breakdown context). It should also be recalled that the Supreme Court in *O'B v O'B*[23] has itself stressed the drastic nature of a barring order, but has nevertheless supported the making of such an order against a parent or a spouse who is guilty of serious misconduct.

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23 [1984] IR 182.

Who May Apply for a Barring Order?

3.30 In our Consultation Paper we recommended that *health boards should be given power to seek barring orders in certain cases as an alternative to a care order.* Again there has been little dissent from this proposal. Because of the radical nature of the proposal, it is worth repeating the arguments made in the Consultation Paper at paragraph 2.29.

> "A barring order is available only on the application of a spouse. A spouse may be unwilling to initiate barring proceedings to protect a sexually abused child. Yet it is not possible either for a third party, such as a health board, or for the child himself or herself (acting through a next friend) to seek the protection of a barring order. A health board may therefore sometimes be obliged to seek an order committing a child to the care of a fit person, when an order requiring the abuser to leave the home may be more appropriate.
>
> "Granting health boards the power to seek barring orders implies a radical broadening of the function of a barring order. At present a barring order constitutes a private law remedy available, if they wish to use it, to spouses. Our recommendations would bring the barring system into the public domain, giving health boards a power to initiate proceedings which may have serious effects on matrimonial relationships. In all cases the granting of a barring order will result in disruption of the marital relationship; in some, it may actually signal the beginning of its complete breakdown. The question must therefore be asked whether such a radical development is justifiable. We think that it is, provided that the District Court confines the grant of barring orders to appropriate cases. There undoubtedly do occur cases of parental abuse which may best be remedied by removing the abuser rather than the child. This may be particularly so where abuse of more than one child has occurred, or is likely to occur. If the non-abusing spouse is unavailable, unwilling or unable himself or herself to take the necessary measures to protect his or her children, it should be open to the health board to do it in his or her place. The court would, however, need to be satisfied that a barring order, in these circumstances, adequately protects the child or children at risk. If it is unlikely that the remaining parent will cooperate in keeping the barred parent out of the house, then a care order may be the safer alternative."

3.31 It should be stressed that the health board's power to seek a barring order would derive from its duty to protect children at risk. The exercise of this form of intervention by a public body should be strictly limited to the circumstances in which State intervention in the family is justified under the Constitution. Those circumstances are reflected in the conditions which are laid down in the *Child Care Bill* for the making of a care order. For this reason, where a health board is the applicant for a barring order, it would be essential, not only that the conditions for the grant of a barring order under the Act of 1981 are met, but also that grounds for the making of a care order

exist.

We therefore recommend that health boards be given power to seek a barring order as an alternative to a care order, and that the court be given power to grant a barring order as an alternative to a care order where the justice is satisfied that this is the most appropriate method of securing the protection of the child. Before making a barring order, the justice should be satisfied (a) that the conditions have been met for the making of a barring order, and (b) that grounds exist for the making of a care order.

3.32 Although our recommendations are specific to the problem of child sexual abuse, it would obviously be appropriate to extend the health board's power to seek a barring order to other forms of abuse.

3.33 We also recommend, for reasons explained in paragraph 2.30 of the Consultation Paper and in paragraph 3.93 of our Report on Illegitimacy, that *the right to seek a barring order should be extended to the child.*

The Use of Barring Orders in Emergency Situations

3.34 In our Consultation Paper (paragraph 2.24) we stated the following.

> "In emergency situations at present, where the protection of a child necessitates separation from its parents, it is generally the child who is removed from the family home rather than the alleged abusing parent. The only mechanism for removing the parent on an *ex parte* basis is the injunction, a complex and sometimes costly remedy whose enforcement requires further court proceedings. A barring order is not available on an *ex parte* basis. A protection order is available, but it does not affect a physical separation between the abuser and the abused, and it is only available on the application of a spouse."

3.35 We emphasise that, if removal of an alleged abuser by a barring order made on an *ex parte* basis were to be contemplated, it could only be in the most extreme circumstances. Removal of a parent on an *ex parte* basis is clearly a drastic remedy in terms of its effects on the rights and on the welfare of the parent. In addition it may not always guarantee the safety of the child. As we stated in the Consultation Paper at paragraph 2.24, "there is also always some risk attached to leaving a seriously at risk child within its home. If the alleged abuser is the father, the child's protection will depend on the mother being prepared to enforce the order excluding the father. She may not be fit, willing or able to do so. There may also be occasions on which it would not be clear who the abuser is".

3.36 We have also been asked to consider whether, given that an *ex parte* barring order is likely to be such a rare event, it is worth making the necessary legislative changes. Is it not sufficient, in those rare cases where a health board deems it necessary to remove a parent on an emergency basis,

to use the criminal law or the traditional injunction? There is some merit in this argument. However, in our view, the barring order would be the most appropriate mechanism for removing a parent on an emergency basis. The procedure involved is not complex and the mechanisms for enforcing a barring order are far better than those applicable to an injunction.

3.37 We therefore confirm our provisional recommendations that *the District Court should, when dealing with an emergency situation, have at its disposal the option of removing the alleged abuser on an ex parte basis, as an alternative to an emergency care order. The grounds for such exclusion should be the same as the grounds for an emergency care order. Application for such an order should be restricted to a health board or a parent of the child. The order should be available against any member of the child's household, including siblings and perhaps against any other persons, such as babysitters, who are likely to be regularly in contact with the child. However, in any case where there is doubt as to the identity of the abuser, an emergency care order would be the more appropriate one. The mechanism for the enforcement of an exclusion order should be the same as that applicable to a barring order under the Family Law (Protection of Spouses and Children) Act, 1981. We think that a Justice should be entitled to make an exclusion order as an alternative in proceedings for an emergency care order, and vice versa. However, the Justice should not make an exclusion order unless he is of the opinion that it would, having regard to the circumstances, secure the safety of the child. The order should last for the same maximum period as an emergency care order (eight days), and should be renewable for a further period of eight days. It should be made in contemplation of a full hearing involving care and/or barring order applications.*

Protection Orders

3.38 There has been no dissent from our provisional recommendations, made in paragraph 2.24 of the Consultation Paper, for modifications to the existing system of protection orders. We therefore recommend that *a health board should be entitled to seek a protection order in respect of a child on an ex parte basis on the same grounds as those which at present apply where a spouse makes the application. We also recommend that the class of persons against whom protection orders may be sought should be expanded. Any person who is a member of the household of the child against whom abuse is alleged, and any other person who is likely to have regular contact with the child, should be capable of being made subject to a protection order.*

Barring and Protection Orders in Criminal Proceedings

3.39 We recommend, for reasons given in paragraph 2.32 of the Consultation Paper, that *criminal courts should have power to make barring or protection orders, as appropriate, against persons found guilty of offences involving child sexual abuse.*

PART II THE CRIMINAL LAW

CHAPTER 4: SEXUAL OFFENCES WITH THE YOUNG

General

4.01 Any study of child sexual abuse in the context of law reform must review the range of offences available. Abuse in this context includes not only assault but the exploitation and corruption of the young. The fact that strict liability attaches to sexual intercourse with girls up to the age of 17 denotes of itself that society seeks to give special protection to girls up to that age and we therefore consider it necessary to review the law relating to sexual activity with persons up to the age of 17 in this report. The abuse of parental authority, in particular, can extend into late teenage.

4.02 When the present members of the Commission came into office, the then Attorney General requested us to examine and report on (in addition to other areas of the law)

> "sexual offences generally, including in particular the law relating to rape and the sexual abuse of children."

Because of the emphasis placed in this reference on rape and child sexual abuse, the Commission have given priority to those topics. It became obvious to us at an early stage of our consideration of the matter that no sensible proposals for the reform of the substantive criminal law in this area could be formulated unless we were prepared to undertake an examination of the entire law relating to what might be broadly described as consensual sexual activity.

This in turn led us to examine the present state of the law as to consensual homosexual offences in the light of the decisions of the Supreme Court[24] and

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24 [1984] I.R. 36.

of the European Court of Human Rights[25] in *Norris*. Some of those consulted have criticised us for addressing the question of the possible reform of the law relating to homosexuality for the first time in the context of child sexual abuse. They may not have appreciated the actual circumstances in which it arose for consideration by the Commission.

4.03 The function of the criminal law in this sphere has been well described as:

> "... to protect from injury and from the use of coercion to secure sexual gratification; to preserve public order and decency, and to provide sufficient safeguards against the exploitation and corruption of those who are open to it, particularly where they are too immature to make rational decisions or are in a state of physical, relational or economic dependence. It is not the function of the criminal law to enforce standards of morality further than is necessary to effect the above purposes."[26]

4.04 In Chapter 4 of our Consultation Paper we outlined all the relevant consensual and non-consensual sexual offences. Most instances of child sexual abuse consist of contraventions of the ordinary criminal law of sexual assault. As we point out in that paper, if there are too few prosecutions for sexual offences with the young at the moment, this should not be attributed to an absence of appropriate offences. We have no recommendations to add to those in our Report on *Rape*[27] regarding non-consensual offences.

Despite representations to the contrary, we are also satisfied that there is no need to provide a distinct code of sexual offences for the young. The laws of the State, criminal and civil, apply to young and old alike. Special statutes or exceptional measures are, however, enacted to provide for the disabilities of the young, reflecting the emphasis of the Constitution on the right of the legislature to have due regard to "differences of capacity, physical and moral".

Heterosexual Offences: General

4.05 Under the present law (contained in the Criminal Law Amendment Act 1935) any person who "unlawfully and carnally knows" any girl under the age of 15 years is guilty of a felony. He is liable to a sentence of penal servitude for life or for any term not less than three years or to imprisonment for any term not exceeding two years. An attempt to commit the same offence is a misdemeanour, the penalty on a first conviction being penal servitude for any term not exceeding five years nor less than three years or imprisonment for

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25 Eur Court HR, Norris judgement of 26 Oct 1988, Series A No. 142.
26 Richard Card, *Sexual Relations with Minors*, [1975] Crim L Rev 370 at p371.
27 LRC 24-1988.

a term not exceeding two yeais. There are increased penalties in the case of a second or subsequent conviction. Any person who "unlawfully and carnally knows" any girl who is of or over the age of 15 years and under the age of 17 years is guilty of a misdemeanour and liable, in the case of a first conviction, to penal servitude for any term not exceeding five years nor less than three years or to imprisonment for any term not exceeding two years. There is provision for increased sentences in the case of a second conviction. An attempt to commit such an offence is also a misdemeanour.

We provisionally recommended in our Consultation Paper, that, to maintain consistency of definition, the expression "carnal knowledge" and similar words used in the 1935 Act should be replaced by the expression "sexual intercourse" as defined in s1(2) of the Criminal Law (Rape) Act 1981. *There was no dissent from this uncontroversial recommendation and we adhere to it.*

4.06 We provisionally recommended that, subject to redrafting, to a possible revision of penalties and to the enactment of a defence of reasonable mistake as to age, the law should remain basically the same. Thus, it would continue to be an offence to have sexual intercourse with a girl under 17 years. We had, however, also recommended provisionally that it should not be an offence to engage in any consensual sexual activity *other than sexual intercourse* with a girl between the ages of 15 and 17 *unless the perpetrator was a person in authority over her.* (This was on the assumption that the age at which the penalty is increased to penal servitude for life remained at 15). We had also provisionally recommended that where the present offence of sexual intercourse with a girl between the ages of 15 and 17 years was committed by a person in authority, there should be an increased penalty.

Age of Consent

4.07 So far as the age of consent was concerned, we expressed a tentative view in the Consultation Paper[28] that, while the age was a year higher than in other countries with similar legal systems and broadly comparable social conditions, such as the United Kingdom and the United States, the law did not appear to be presenting any particular problems in practice. There was some support for this view among those whom we consulted and it was also suggested to us that it would be more logical to fix the age at 18, thereby bringing it into line with other age limits affecting the young. But it was also strongly urged upon us that the present age limit of 17 was too high and that fixing it at 15 or even 14 would be a more realistic approach. This argument was, however, directed to sexual relations between persons of similar age.

We think that the balance of the argument, on the whole, is in favour of retaining the present age of consent at 17. Raising it to 18 would result in

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28 LRC Consultation Paper, *Child Sexual Abuse* para 4.11 (1989).

a law even more out of touch with the reality of sexual behaviour among the young today. The case for lowering it in an unqualified manner has not been established in our view. *We accordingly recommend that it should continue, except in certain circumstances, to be an offence to have sexual intercourse with a girl under the age of 17 years.* The maximum penalty available for the offence should also continue to depend on the age of the girl involved. There was, however, strong support among those we consulted for confining the offence in the higher age band to cases where the male participant was significantly older than the girl or was a "person in authority". We consider this question further in paras 4.11 and 4.12 below.

Maximum Penalties

4.08 The next question to be addressed is as to the age at which the maximum penalty - at present penal servitude for life - should be available. We pointed out in the Consultation Paper that until 1935 the age was the same in Ireland and the United Kingdom, i.e. 13, which was then generally accepted as the approximate age of puberty. We noted that there was virtually no debate on any of the provisions of the relevant legislation (the Criminal Law Amendment Act 1935) in the Dail when it was enacted and that there was, accordingly, no guidance as to why the age had been raised to 15. (The Bill was dealt with in a special committee whose proceedings and report are not published in the official report).[29]

We observed that, while age limits in this area are necessarily arbitrary, the age in this country of 15 on one view seems particularly difficult to justify. It exposed, theoretically at least, the 18 year old boy to penal servitude for life if he had intercourse with a girl nearing her 15th birthday. However, we pointed out that this had to be balanced by the concern that might be felt by providing a maximum sentence of five years' penal servitude for a mature man who had intercourse with a girl of 13. We concluded that, if it were thought desirable to fix the age for the more serious offence at a more realistic and appropriate level having regard to considerations of comparative physical and emotional maturity, such as 13, one would have to consider the desirability of increasing the maximum penalty for the lesser offence to, say, 10 years.[30]

We also observed that, while prosecutorial discretion and flexible sentencing could, and probably do, avoid the grosser injustices which the present law could produce, its retention on the statute book in this form is at least questionable. We also recognised, however, the practical problems involved in actually lowering an age limit of this nature, at a time when many parents are understandably concerned by the perils to which children are exposed today. We accordingly invited views on the matter generally and in particular as to:

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29 *Id*, para 4.12.
30 *Id*, para 4.13.

(a) whether there is a justification for the age limit of 15 which may have escaped us; and

(b) how the law is operating in practice.[31]

Our consultations did not throw any further light on the reasons for the fixing of the age limit at 15. Nor indeed was there any general concern expressed either at retaining the age at 15 or lowering it to 13, although the latter suggestion did evoke one strong dissent from Family Solidarity. Our general impression that the law was not creating any particular problems in this area was confirmed.

4.09 It is probably unnecessary to repeat what we said in our Consultation Paper as to the wholly different nature of the consent given by an innocent 7 year old to sexual intercourse proposed by an adult and the consent of a teenager, albeit emotionally immature, to a similar proposal.[32] The Criminal Law Revision Committee in England accepted the "strong" advice of the Home Office Policy Advisory Committee on Sexual Offences that the earlier onset of puberty had not been matched by an earlier onset of psychological maturity and that lowering the age from 13 to 12 would be undesirable, having regard to the possibility that 12 year old girls moving into senior school may be initiated into premature sexual experience by older girls.[33]

We remain of the view that the retention on the statute book of an offence which equates sexual intercourse with a willing 14 year old girl, in terms of the gravity of the available sentence, to murder and rape is questionable. We recommend at a later stage that the defence of reasonable mistake as to the age of the girl, not available at present under our law, should be introduced and this, if implemented, will reduce the possibility of serious injustice, already remote, still further. However, on further consideration, the Commission is not satisfied that the supposed anxiety of parents at seeing age limits of this nature interfered with is a sufficient ground for retaining the law in its present anomalous state. Most of those whom we consulted as to the law in this entire area were strongly of the view, as we point out later, that parental guidance, improved sexual education and a greater availability of contraceptives, and not the constraints of the criminal law, provide today a better framework for the sexual development of the young.

We recommend that a person who has sexual intercourse with a girl under the age of 13 years should be liable to penal servitude for life and that, accordingly, the relevant age of the girl in this context should be lowered from 15 to 13.

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31 *Id.*
32 *Id*, para 4.12.
33 15th Report on Sexual Offences, para 5.5.

4.10 As to the desirability of increasing the maximum penalty so as to provide for the more serious range of cases which would arise with a lower age limit, we had in the Consultation Paper suggested a maximum of ten years.[34] Making every allowance, however, for judicial flexibility in sentencing, this is still, in our view, too high, given that the upper age limit will remain at 17 under our proposals. A seven year sentence would seem a reasonable maximum and would be in harmony with our proposal to the Attorney General that this should also be the new maximum sentence in cases of unlawful sexual intercourse with the mentally handicapped. We accordingly recommend that *the maximum sentence for any offence of unlawful sexual intercourse with a girl between the ages of 13 and 17 should be seven years imprisonment. This represents an increase from 5 years' penal servitude where the girl is aged between 15 and 17 and a reduction from penal servitude for life where the girl is aged between 13 and 15.*

Person in Authority

4.11 As we have noted, we had confined ourselves in our Consultation Paper to proposing that sexual activity falling short of sexual intercourse should not be a criminal offence where committed with girls between the ages of 15 and 17, unless the other participant was a person in authority. The consensus among those we consulted was that it was unreasonable for the criminal law to intrude on sexual relations between persons of the same age and, consistently with this view, it was urged upon us that sexual intercourse in the case of girls aged 15 and 16 should not be a criminal offence where the other participant was also a young person and was not abusing any position of authority or trust. It was suggested by many that parental guidance, improved sexual education and the greater availability of contraceptives, and not the constraints of the criminal law, provided in modern circumstances a better framework for the sexual development of the young.

It would follow that consensual sexual intercourse with girls of 15 and 16 should not be criminal unless the male is "a person in authority". *Our suggested definition of such a person was*:

> *"A parent, step-parent, grandparent, uncle or aunt, any guardian or person in loco parentis or any person responsible, even temporarily, for the education, supervision or welfare of a person below the age of 17."*

Age Difference

4.12 A problem arises, however, where a person not falling within the definition may none the less be seen as such. An experienced adult male may exude an aura of authority so far as many 15 year old girls are concerned.

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34 *Op cit*, para 4.13.

It was, accordingly, suggested to us that we change our definition to allow for the commission of an offence in such circumstances.

While we are broadly sympathetic to this view, we must rule out the subjective approach to criminality as productive of too much uncertainty. We have in these circumstances come to a conclusion contrary to that arrived at in our Consultation Paper,[35] i.e. that the best solution is to make consensual sexual intercourse also criminal when there is a significant age difference between the male and the 15 and 16 year old girl. This is the approach adopted in other jurisdictions. Thus, in Tasmania, there can be a prosecution if the male is more than five years older, where the girl is 15 or more, or three years older where the girl is between 12 and 14. In South Australia, only a one year difference is allowed. A four year age gap is adopted in the United States Model Penal Code and in several American States a four or five year gap is the norm. There are similar provisions in Denmark, Sweden and New Zealand. We had said in our Consultation Paper that we would not favour the creation of a necessarily arbitrary age band between victim and offender which would involve the incurring of liability or the infliction of greater penalties. For that reason, we had suggested confining the relevant offences to actions committed by "persons in authority".[36] However, on further consideration of the arguments advanced to us, we have come to the conclusion that the "person in authority" solution is not sufficient of itself and that the "age gap" solution is a necessary additional protection.

We accordingly recommend that, in the case of a girl between the ages of 15 and 17, sexual intercourse or sexual conduct falling short of intercourse (as defined later on in this Report) should be a criminal offence where the male participant is "a person in authority" as defined above. Similarly, it should be an offence to have sexual intercourse with a girl between the ages of 15 and 17 when the perpetrator is, at least, 5 years older than the girl in question.

Reasonable Mistake

4.13 We had also recommended that consideration should be given to the provision of a defence of reasonable mistake as to the age of the girl.[37] This could be available where the accused genuinely believed at the time of the act on reasonable grounds that the girl was older than she was. Under the law as it stands, carnal knowledge of an under age girl is an offence of strict liability, i.e. the male is guilty once the girl is under age, notwithstanding the fact that he believed her to be over the relevant age. It can be argued with force that the normal requirement for an indictable offence, i.e. guilty knowledge of what one is doing, should be an essential ingredient, particularly where the girl is 15 or 16 years of age, may look older than she is and may

35 *Id*, para 4.20.
36 *Id.*
37 *Id*, paras 4.15, 4.16.

have been the instigator of the offence. Against any change, it is argued, again with force, that persons who have sexual intercourse with young girls should be careful first to ascertain their age and, if in any doubt, to abstain from intercourse. It could also be argued that, where the girl's appearance becomes relevant, she becomes to that extent an exhibit as well as a witness at any trial. A girl loses the protection of the law the more advanced her physical maturity.

4.14 It might also be said that, once the age of consent is lowered to 15 with the qualifications we have recommended in the case of persons in authority or older by a specified number of years than the girl, the argument for having a defence of reasonable mistake loses some of its force. Thus, it could be said that persons in authority or above the relevant age might be presumed to know how old the girl actually was. Clearly, depending on the circumstances, this could be so: equally, there could be many cases in which it simply was not the case. Moreover, if this were to be a decisive consideration in deciding *not* to provide a defence of reasonable mistake, one would to an extent be adopting the same line of thinking that led to the enactment of the unhappy compromise known as "the young man's defence" in the early 1920's in England. That was universally regarded as a wholly unsatisfactory approach to the problem and we are satisfied that the balance of the argument remains in favour of providing a defence of reasonable mistake, notwithstanding the lowering of the age of consent on the basis which we have proposed.

There appeared to be little dissent from the view that the Irish law in this area was unduly harsh and wholly out of step with the law in other jurisdictions. While it may be again that a combination of prosecutorial and judicial discretion is ensuring that no problems arise, the possibility of serious injustice should none the less, in the view of the Commission, be removed. The Commission accordingly *recommends that, in the case of the offences under consideration, there should be a defence available to the accused that he genuinely believed at the time of the act on reasonable grounds that the girl had attained the age of consent or an age attracting a less serious penalty.*

4.15 We had also considered in our Consultation Paper whether a defence of this nature should be subjective or objective.[38] We had provisionally suggested that a similar approach might be adopted to that taken by the legislature in the Criminal Law (Rape) Act 1981 in relation to an admittedly different issue, namely whether the accused knew the woman, in the case of an alleged rape, was not consenting to the intercourse. The 1981 Act had provided for a compromise between the subjective and objective positions. There has been no dissent from our provisional conclusion that a similar approach should be adopted to the issue now under consideration. We accordingly recommend that *the accused, in the case of the offences under*

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38 *Id*, para 4.17.

consideration, should be entitled to be acquitted if he genuinely believed that the person concerned had reached the relevant age, but in arriving at a conclusion as to whether he did so believe, the court should be entitled to take into account whether there were reasonable grounds on which he could hold such a belief.

'Indecent Assault with Consent'

4.16 Section 14 of the 1935 Act provides that consent is no defence to a charge of indecent assault on a person under 15 years of age. The term "assault" is usually used to include both an assault and a battery even though assault is an independent offence. Where "assault" is used to include a battery, Archbold defines it as "an act by which a person intentionally or recklessly causes the complainant to apprehend immediate unlawful personal violence or to sustain unlawful personal violence".[39] Glanville Williams describes an indecent assault as "an assault in the generic sense, accompanied by a circumstance of indecency"[40] and states that ... "an indecent physical assault requires that the defendant should have touched the victim".[41]

> "There is thus no assault if the defendant, without force or threats or touching with his own hands, induces a child to undress before him, or to touch him (the defendant) indecently".[42]

4.17 Because of the existence of this lacuna, derived from treating all offensive sexual activity as a species of assault, the Westminster Parliament enacted the Indecency with Children Act 1960 which renders such activity an offence when committed "with or towards a child".[43] Inciting a child to engage in such activity with oneself or another is also made an offence. Similar provisions should be introduced into Irish law. We think it would be wise if such legislation also captured "permitting" certain acts as well as "committing" and "inciting" them. In introducing them, we should take the opportunity of expunging the senseless concept of "assault with consent" from our law. Addressing what they describe the "fiction of assault",[44] the Criminal Law Revision Committee, *unanimously* considered:

> "...that the law on this subject should be reformulated so as to deal in a more realistic way with acts to which a girl under 16 has in fact consented but to which the present law by a legal fiction presumes she has not. The fiction is in itself a source of confusion and its removal

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39 Archbold, *Criminal Pleading, Evidence and Practice*, Vol 2 para 20.114 (43rd ed, 1988).
40 Glanville Williams, *Textbook of Criminal Law*, 230 (2nd ed, 1983).
41 *Id*, 232.
42 *Id.*
43 Indecency with Children Act 1960, s1.
44 15th Report on Sexual Offences, para 7.4.

> will clear the way for a proper description of what the offence should be. The proposal to this effect in our Working Paper commanded almost universal support."[45]

4.18 Having proscribed consensual activity with the young how does one describe it? It is not an assault. It is rather Victorian to describe the activity itself as indecent. It is, rather, the exploitative nature of the activity, the exposure of the very young to sexual activity appropriate to the mature and the abuse of trust, which offends. Surprisingly, the CLRC while acknowledging that for the last hundred years the expression "gross indecency" has been exclusively applied to homosexual activity recommends the use of that expression in this context.[46] The activity surely does not have to be "gross" to be profoundly offensive when the victim is very young. We have already recommended in our report on Rape that the expression "indecent assault" be replaced by the expression "sexual assault". In at least one recent trial, the vagueness of the expression "gross indecency" gave rise to difficulty in ascertaining whether or not certain activities were in fact captured by the expression.

In Chapter 1 we have recommended the adoption of the Western Australian definition of child sexual abuse for civil proceedings.[47] We can think of no good reason why the same definition defined so as to include the procuring of the sexual activity as encompassed in the English Act of 1960, should not form the basis of a *crime* of "sexual exploitation" or indeed of "child sexual abuse". Precisely the same activity is involved in each case. Only activity engaged in for the purpose of sexual gratification of the accused or another or as an expression of aggression, threat or intimidation would be proscribed. Thus, for example, contact in the course of bathing a child or of bona fide medical treatment would not be an offence. In any prosecution, the onus would be on the accused to establish that the particular contact was *not* for an improper purpose. The law would remain largely as it is at the moment. It would simply be expressed in a more coherent fashion.

4.19 We have been urged to maintain the law as it is on the basis

(a) that there are no practical difficulties in prosecuting under the law as it is;

(b) that the existing law is comprehensive; and

(c) that the offence of indecent assault is well established.

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45 *Id.*
46 *Id* paras 7.14 to 7.18.
47 At p8, *supra.*

Anybody with prosecutorial experience in the field, however, finds considerable intellectual difficulty in treating as an assault an activity which is not an assault. Acts procured with the young are not assaults. The law of assault, however well settled, is simply irrelevant. A definition can set out specific acts of abuse or exploitation without purporting to be all-inclusive and thus, sexual intercourse and anal penile penetration could be included in the definition.

Surprisingly, one experienced criminal law practitioner, while acknowledging that the present law was difficult to justify, recommended that it be left alone for pragmatic reasons. However, the Commission has to bear in mind that practitioners do not always encounter cases which cannot be prosecuted because of inadequacies in the law, but should be. While the legislature for pragmatic reasons may decide to "leave alone" what it perceives to be "well", this course is not open to a law reform agency where the result is the perpetuation of inadequate and nonsensically worded laws.

We accordingly *recommend the creation of a new offence of "child sexual abuse" or "sexual exploitation", to replace the present offence of "indecent assault with consent". The definition should be based on the Western Australian definition of child sexual abuse which we have recommended for adoption in civil proceedings in Chapter 1 (and should include sexual intercourse and anal penile penetration). Only sexual activity engaged in for the sexual gratification of the accused or another, or as an expression of aggression, threat or intimidation should constitute an offence. In any prosecution for the offence, the onus should be on the accused to establish that he had no improper motive. The offence should be prosecutable summarily or on indictment at the election of the D.P.P. While the penalty for the offence would to some extent depend on its nature, we would suggest a maximum penalty of 5-7 years imprisonment.*

4.20 We also *recommend that the present law under which the crime of indecent assault with consent can only be committed with children under the age of 15 should be extended so as to provide that the new offence can be committed by a "person in authority", defined as recommended in para 4.11 above, with a person of 15 or 16 years.* This recommendation is aimed particularly at the sexual abuse of young persons of this age by their parents or step-parents.

Criminal Liability of Under-Age Girls and Boys

4.21 We also, considered the question in our Consultation Paper as to whether, in the case of the present offence of unlawful carnal knowledge of a girl of 15 or 16, the girl herself should be guilty of the same offence. In our Consultation Paper, we had provisionally recommended that she should not be so guilty.[48]

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48 *Op cit*, para 4.21.

There were divided views on this question among those consulted, some thinking the present law to be objectionable either because it is unduly paternalistic in its approach or unfairly discriminatory between boys and girls, there being undoubtedly cases where the girl is the instigator.

4.22 In this connection, it is necessary to recall the provisions of s3 of the Criminal Law Amendment Act 1935. This provides inter alia that, where an accused is acquitted of a charge of rape or of having carnal knowledge of a girl between the ages of 15 and 17, the jury may find him guilty of the offence of having carnal knowledge of a girl between these ages or of indecent assault, whichever may be appropriate. Under the law of rape as it stands, with its subjective approach to the guilt of the accused, a jury can acquit an accused of rape and convict him of the lesser offence while still being satisfied that the girl did not consent to sexual intercourse. If the law is altered as now suggested, a jury finding the accused guilty of the lesser offence could be perceived, in effect, as finding the complainant guilty of the same offence. The Commission is concerned by the possible consequences of such an alteration in the law: fear of being disbelieved is a very real element in discouraging some bona fide victims of rape from coming forward. If a fear of being exposed or of being perceived as exposed to criminal liability were added to existing fears, one could, for the best possible motives, create a highly unwelcome deterrent.

4.23 We also pointed out in our Consultation Paper that the imposition of equal criminal liability where, for example, the girl is very young and the man significantly older, might be considered unfair and unduly severe on the girl.[49] An exceedingly high premium would also be placed on the use of prosecutorial discretion. Since that discretion appears to cope well with the anomalies that undoubtedly arise from time to time under the present law, *we recommend that there should be no change in the present law that where a person is charged with having sexual intercourse or sexual activity falling short of intercourse with a girl under a specified age, the girl is not subject to any criminal liability. The same should apply to any offence of anal penetration where committed by a person in authority or a person five years older than the boy in question or other sexual activity with boys under a specified age.*

Homosexual Activity

4.24 The discussion, argument and provisional recommendations as to homosexual activity in our Consultation Paper were grounded on the hypothesis that the State would wish to continue as a party to the European Convention of Human Rights and, accordingly, would in due course repeal the legislation which the court in *Norris v Ireland*[50] had found to be in breach of that Convention. It will be recalled that the court held, by a majority of eight votes to six, that the maintenance in force of the relevant sections of the

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49 *Id.*

50 [1984] IR 36.

Offences Against the Person Act 1861 and the Criminal Law Amendment Act 1885 violated article 8 of the Convention which deals with the right to privacy. The majority rejected an argument advanced on behalf of Ireland that the impugned legislation was saved by article 8(2), which permitts interference by public authority with the exercise of the right of privacy where it is

> "necessary in a democratic society ... for the protection of health or morals ...."

4.25 Article 15 of the Convention provides that:

> "In time of war or other public emergency threatening the life of the nation any high contracting party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."

It has not been seriously suggested in any responsible quarter that the State could conceivably avail of this article in order to retain the impugned statutory provisions as part of our law. Accordingly, it would appear that the only option open to the State is either to denounce the Convention under article 65 or to take such steps as are necessary to bring our laws into conformity with the ruling of the court in the *Norris* case. Again, we are not aware of any suggestion from any responsible source that Ireland should denounce the Convention of Human Rights.

We have, accordingly, proceeded both in our Consultation Paper and in this final Report to the Attorney General on the assumption that our laws will in due course be brought into conformity with the decision of the European Court of Human Rights in *Norris v Ireland*. The Commission has, therefore, found it unnecessary to enter into the debate as to whether it would be desirable, in the absence of the decision of the European Court of Human Rights, for Ireland to decriminalise homosexual activity between consenting adults.

4.26 The discussion in our Consultation Paper concentrated on the appropriate age to be fixed at which consensual homosexual activity would be lawful. The discussion took place within the framework of a passage from the minority judgment of Henchy J in *Norris v Attorney General*[51] which we quote again.

> "One way or the other, the impugned provisions seem doomed to extinction. Whether they be struck down by this court for being unconstitutional or whether they be deemed invalid elsewhere in accordance with the decision in *Dudgeon v United Kingdom*,[52] (for being

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51 *Id*, at 78-79.
52 (1981) 4 EHRR, 149.

> in contravention of the European Convention for the Protection of Human Rights and Fundamental Freedoms) they will require to be replaced with appropriate statutory provisions. It would not be constitutional to decriminalise all homosexual acts, any more than it would be to decriminalise all heterosexual acts. Public order and morality; the protection of the young, of the weak willed, or those who may readily be subject to undue influence and of others who should be deemed to be in need of protection; the maintenance inviolate of the family as the natural, primary and fundamental unit of society; the upholding of the institution of marriage; the requirements of public health; these and other aspects of the common good require that homosexual acts be made criminal in many circumstances. The true and justifiable gravamen of the complaint against the sections under review is that they are in constitutional error for overreach or overbreadth. They lack necessary discrimination and precision as to when and how they are to apply."[53]

We also considered the majority decision of the Supreme Court in *Norris*, (the only judgment being delivered by O'Higgins CJ), other judgments of the European Court and the law and expert opinion in other jurisdictions.

Having considered the various problems that arise, and in particular making proper allowance for differences in sexual function, we provisionally recommended that in general the same legal regime should obtain for consensual homosexual activity as for heterosexual and that, in particular, no case had been established for providing that the age of consent should be any different.

4.27 There was little dissent from these provisional recommendations. One submission, however, took issue strongly with our proposals in this area and suggested that they were in disregard of the decision of the Supreme Court in *Norris*. We would indeed take very seriously a suggestion that we have either deliberately or carelessly disregarded a relevant decision of the Supreme Court on a topic in relation to which we were proposing reforms. The criticism would be well founded if the Supreme Court in *Norris* had decided that legislation decriminalising sexual activity between consenting adults in private would be invalid having regard to the Constitution. The case, of course, decided nothing of the sort: the only issue before the Court was whether the existing law rendering all homosexual behaviour between males at any age criminal was inconsistent with the Constitution. Any remarks in the judgment of O'Higgins CJ which might suggest that he viewed legislation which decriminalised homosexual actions between consenting adults as constitutionally suspect - and it is by no means clear that this is what he intended to convey - were accordingly not necessary for the purpose of that decision and *obiter*.

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53 At p18.

4.28 An argument was also advanced, based on the passage already cited from the judgment of Henchy J in *Norris*, that constitutional considerations, including protection of the family, argued against any necessary identity of approach as between heterosexual and homosexual conduct.

The passage referred to in the judgment of Henchy J addressed a situation where the impugned provisions were extinct and there was no restriction on homosexual activity by or with any person of any age. While the reference to "the maintenance inviolate of the family" certainly merits clarification in the particular context, the passage could hardly adopt a more neutral approach when it suggests that it would not be constitutional to decriminalise all homosexual acts any more than it would be constitutional to decriminalise all heterosexual acts. The final sentence in paragraph 4.25 of our Consultation Paper, to which exception was taken by one commentator, was an attempt by the Commission to elaborate on Henchy J's reference to the family. We may indeed be mistaken in our view as to what the learned judge intended to convey, but our conclusions remain unaffected.

4.29 We have, accordingly, not been persuaded by any argument against our provisional proposals. We therefore *recommend that ss61 and 62 of the Offences Against the Person Act 1861 and s11 of the Criminal Law (Amendment) Act 1885 which render criminal acts of buggery and gross indecency between male persons be repealed and that there should be the same protection against both homosexual and heterosexual exploitation of the young. It follows from this recommendation that the "child sexual abuse" offence which we have recommended should be created to replace the present offence of "indecent assault with consent" should apply equally in the case of homosexual activity.*

4.30 Under these proposals, anal penile penetration will remain a criminal offence when committed with a person under the age of 15 years. We had provisionally recommended in our Consultation Paper that the carnal knowledge offence in the case of girls of 15 and 16 should be mirrored by an offence of anal penile penetration in the case of males of those ages. We had proposed the creation of this "mirror" offence for homosexuals in the light of the age of consent in other jurisdictions and of our desire to impose the same constraints on homosexuals and heterosexuals. We pointed out that the alternative would be to legalise consensual buggery with boys between 15 and 17 or to prohibit all homosexual conduct between those ages. The first of these courses would mean a significantly lower age for consensual buggery than in many other countries and would probably be an impractical recommendation. It would also take no account of any medical risks associated with anal intercourse involving young persons. The second course would discriminate between heterosexual and homosexual activities. No evidence or arguments establishing the need for such discrimination were advanced to us.

We also provisionally recommended that, to preserve consistency in the treatment of heterosexual and homosexual activity, it should be an offence for

acts of a homosexual nature to be committed by a person in authority with persons over the age of 15 but under the age of 17.

4.31 These provisional proposals did not meet with any significant dissent, other than from those who objected to any decriminalisation of homosexual activity. However, they undoubtedly require re-examination in the light of our recommendation in this Report that vaginal sexual intercourse with girls between the ages of 15 and 17 should cease to be an offence, save where the male participant is a person in authority or is more than five years older than the girl. Providing a "mirror" offence in the case of homosexuals would have as a consequence the legalising of consensual buggery of persons between the ages of 15 and 17 except where the other participant was a person in authority or was more than five years older than the person concerned.

Having carefully considered these problems, we adhere to the view expressed in the Consultation paper that legalising consensual buggery with boys between the ages of 15 and 17 would probably be an impractical recommendation and would disregard the medical risks associated with such activity involving young persons, even if the proposal were confined to cases of buggery between boys in approximately the same age band and where no abuse of authority or trust was involved. Consistently with this approach, consensual buggery of girls between those ages should also remain an offence. *We accordingly recommend that anal penile penetration of boys and girls between the ages of 15 and 17 should continue to be an offence.*

4.32 We have already recommended that the new offence of "child sexual abuse" should continue to be an offence in the case of girls aged between 15 and 17 where the perpetrator is a "person in authority". We have no doubt that it *should also be an offence in the case of boys between the ages of 15 and 17 where the perpetrator is such a person.*

Incest

4.33 In our Consultation Paper, we pointed out that if an offence based on abuse of authority were introduced, it would render incest to that extent less necessary and relevant an offence. We invited views as to its retention as a separate offence independent of the criminal law, e.g. for brothers and sisters. There was some strongly voiced opposition to any change in the present law and it is in any event the fact that the considerations involved are to a large extent outside our present terms of reference. *We accordingly recommend no change in the present law of incest* and content ourselves with pointing out the need for prosecutorial and judicial discretion in unusual cases of long parted siblings who embark on an emotional relationship in later life, such as have occurred in other jurisdictions.

PART III THE LAW OF EVIDENCE

CHAPTER 5: THE COMPETENCE OF CHILDREN AS WITNESSES

General

5.01 In our Consultation Paper,[54] we considered in detail the present law as to the competence of children to give evidence. We examined the general question as to whether there should be a specific threshold requirement as to competence in the case of children and, on the assumption that there should be such a threshold, how competence is to be determined. This, in turn, necessitated a critical examination of the two requirements of the present law, i.e., the requirement that in certain circumstances the evidence of the child be corroborated before it is accepted, and the general requirement that oral evidence should only take the form of sworn evidence.

The Threshold Requirement as to Competence

5.02 We considered at the outset the fundamental policy question as to whether there should be any threshold requirement of competence for children. Our review of the psychological evidence on children's competence led us to the conclusion that the witnessing powers of children may have been seriously under-estimated by the law. We expressed the view that children's ability to answer questions about witnessed or experienced events is better than both law and common belief formerly recognised and that even very young children can respond to the demands of testimony when questions are posed in a developmentally appropriate way. While we came to the tentative conclusion that it was not desirable to remove completely a competence test for children, we also expressed the provisional view that this test need not be a distinctive one. We went on to consider three possible approaches to determining a child's competence:

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54 *Op cit*, paras 5.01 to 5.35.

(1) Prescribing a specific minimum age for competence;

(2) Letting experts decide;

(3) Letting the courts continue to decide.

5.03 We rejected option (1) on the grounds that some children mature at a faster pace than others and that it would be futile to attempt to state when *children* acquire competence when what is at issue is whether *this child* has acquired competence. We were of the view that prescribing a minimum age would be likely to do harm unless the minimum age were so low that it would lose all efficacy. In addition, we were persuaded by the empirical research on children that competence is a contextual rather than an absolute quality. For example the younger child may not have mastered the concept of logic, but can nonetheless answer simple questions.

5.04 We rejected the second option on the grounds that it would enable experts to usurp the decision making role of the court. However, we suggested that, in appropriate cases, experts could give useful evidence on this question to the court.

5.05 Our provisional recommendation was that the best approach to determining a child's competence was to continue to reserve to the court the task of making the ultimate decision. We pointed out two possible disadvantages to this recommendation. First, the matter of determining competency is one in relation to which the court has no particular expertise, thus increasing the likelihood of subjective and widely varying determinations. Second, the court is involved in a tiresome exercise every time it is proposed that a child should give evidence. As to the first objection, we argued that the whole of the judicial process involves the court, judge and jury, making findings on matters of considerable scientific complexity. As to the second objection, we did not consider that it amounted to a serious one, judicial enquiries being the hallmark of a sensitive and sophisticated system of justice.

5.06 We received no submissions which addressed these arguments. However, in our discussions following the publication of the Consultation Paper, doctors, psychologists and social workers who work in the child abuse area repeatedly expressed bewilderment as to why child victims, with whom they were familiar and who seemed able to give perfectly clear accounts of offences committed against them, were not permitted to do so in court. It was acknowledged that some of these children did not appear as witnesses because prosecutors were reluctant to subject them to the rigours of an ordinary court procedure. But there was a widespread belief that an informal age threshold operated which made it extremely unlikely that children of eight years or younger would appear as witnesses.

5.07 Since the publication of our Consultation Paper, the Report of an advisory group on *Video Evidence* established by the Home Secretary in the

United Kingdom and chaired by Judge Thomas Pigot Q.C. has been published, as has the Report of the Scottish Law Commission on *The Evidence of Children and Other Potentially Vulnerable Witnesses.*[55]

The Pigot Report points out that in the case of *Wallwork*[56] the English Court of Appeal deprecated the calling of a witness of five years of age to give evidence. (It appears that she did not in the event actually testify). Lord Goddard observed that it was "ridiculous" to suppose that any value could have been attached to the evidence of such a witness. The Report adds:

> "The effect of *Wallwork*, it appears to us, is that prosecutors will not generally adduce, or courts receive, evidence from young children unless they seem to have the understanding normally to be expected of a child of about 8. In a more recent unreported case, *Wright and Ormerod* (1987), the Court of Appeal Criminal Division reiterated the policy of *Wallwork*. Mr Justice Ognall said that the validity and good sense of the judgment remained 'untrammelled' and that 'it must require quite exceptional circumstances to justify the reception of this kind of evidence'."[57]

5.08 The Report goes on to state that the effect of *Wallwork* has been to substitute an age limit in such cases where the intention of parliament had been to have a test of understanding in each case. Having regard to what the committee considered to be the important principle that the courts should consider all "relevant understandable evidence", they concluded that the competence requirement as applied to potential child witnesses should be dispensed with and should not be replaced. The committee considered that the power of a judge to rule any witness to be incompetent, where he or she has begun to testify but appears to be of unsound mind, to be incoherent or to fail to communicate in a way that makes sense, was all that was required.

5.09 There is no decision of which we are aware in Ireland which could possibly give rise to the rule of practice derived, rightly or wrongly, in England from *Wallwork*, i.e. that the evidence of children under the age of 8, whether sworn or unsworn, can never be received. The law in this jurisdiction remains as stated by Kennedy CJ delivering the judgment of the Court of Criminal Appeal in *O'Sullivan*[58] in the passage cited in our Consultation Paper, i.e.[59]

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55 Scottish Law Commission, Report No. 125.
56 (1958) 42 Cr App R 153.
57 Report of the Advisory Group on Video Evidence, (Chairman, His Honour Judge Thomas Pigot QC), Home Office, London, December 1989, p47.
58 *AG v O'Sullivan*, [1930] IR 552.
59 *Op cit*, para 5.08.

> "The purpose of that section (s30 of the Children Act 1908) is to enable a child 'of tender years' (age not defined by the statute) who does not, in the opinion of the court, understand the nature of an oath, to give evidence not upon oath if, in the opinion of the court, the child has sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth .... *The section does not, in our opinion, alter the previous law as to the reception of the evidence of children given on oath, that is to say, it was and is a question, not of age, for there is no precise limit of age fixed by any rule within which the evidence of children on oath is to be excluded, but it is a question of the intelligence and actual mental capacity of the child witness, 'its sense and reason of the danger and impiety of falsehood'.*" (emphasis added).[60]

It may be that in practice children under the age of 8 are rarely, if ever, allowed to give evidence on oath in Ireland. Given the present requirements of the law as to the understanding by the child of the nature of the oath and the age at which religious education normally begins, the situation could hardly be otherwise. It is also not surprising that judges exercise considerable caution in receiving the unsworn evidence of children under that age. But that is very far from saying that a rule equivalent to that purportedly based on *Wallwork* has evolved in this country.

5.10 In this context, it is worth noting that the Irish position appears to be closer to that in Scotland. In their Report, the Scottish Law Commission refer to a passage in a previous Discussion Paper in which it was stated that while there might be some uncertainty about where Scots law stood on the question of the competency of child witnesses, the modern practice appeared to assume that a child of any age was legally competent to give evidence subject to his or her verbal abilities and understanding of truth and falsehood being adequately confirmed in the course of a preliminary conversation between the judge and the child. They suggested that there might be advantage in having express statutory provision to clarify this matter. Subsequent, however, to the publication of the Discussion Paper, the High Court in a case of *Rees v Lowe*[61] made it clear that the law was indeed as stated in the Discussion Paper and, in these circumstances, the Commission deemed it unnecessary to have any form of statutory clarification.[62]

5.11 Later in this Report we shall be recommending that the requirement that evidence should be given on oath should be abolished in the case of persons under the age of 14. The question remains as to whether our law should move to the position advocated in the Pigot Report,[63] i.e. that there

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60 [1930] IR at p556.
61 High Court of Justiciary, 7 Nov 1989 (unreported).
62 *Op cit* para 3.6.
63 *Op cit*, ch 5.

should be no preliminary assessment by the court as to whether a child is competent to give evidence, all children being presumed to be so competent.

5.12 In the Consultation Paper, we referred to the discussion on this matter in other jurisdictions. In particular, we noted that the American Bar Association's National Legal Resource Centre for Child Advocacy and Protection had made such a proposal[64] and that legislatures in a growing number of States in the U.S. had enacted statutes on those lines. In Canada, a similar view was taken by the Badgley Committee.[65] We also referred, however, to the reservations expressed by Professor Myers, viz:

> "There is little argument about the need for testimony by victims of sexual offences, but the courts will not ignore defence arguments that abolition of any competency requirements may offend principles of basic fairness and due process of law in some cases."[66]

5.13 There are two basic objections to the total abolition of an assessment as to competency. In the first place, where the trial is before a jury, the witness may already have recounted some of his or her "evidence" before it becomes apparent that he or she, by reason of age or mental impairment, is not a witness on whom reliance should be placed. In that event, the jury would have to be discharged or the risk taken that a judicial warning to disregard this evidence would be a sufficient protection to the accused. In the second place, it would be impossible, on any view, to operate in practice on the assumption that all children are competent to give evidence. If that were so, to take an extreme example, a day old baby would have to be presumed to be competent. Less fancifully, a two year old would be presumed to be competent, although in many cases he or she would not have begun to talk. Even when a child begins to talk, he or she has some distance to travel before he or she can give anything amounting to a comprehensible account of a particular experience upon which a court could safely act. The Badgley Committee acknowledges this, since in its recommendations it states:

> "1. Every child is competent to testify in court and the child's evidence is admissible. The cogency of the child's testimony would be a matter of weight to be determined by the trier of fact and not a matter of admissibility.
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> 2. *A child who does not have the verbal capacity to reply to simply framed questions could be precluded from testifying ....*" (emphasis added)[67]

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64 Recommendations for Improving Legal Intervention in Intra-Family Child Sexual Abuse Cases, 30 (1982, 1985).

65 Sexual Offences Against Children: Report of the Committee on Sexual Offences against Children and Youths, Canadian Publishing Centre, (1986), "The Badgley Report" 383.

66 Myers, *The Testimonial Competence of Children*, 25 J of Family Law 287 at 308.

67 *Op cit* at 373.

It is, accordingly, implicitly acknowledged that in some cases at least - and the category would normally be confined to very young children - some test as to competence is necessary. In other words, it is not correct, in our view, to assume that all children under a specified age are incompetent to give evidence. The law should, however, recognise that in some instances, usually confined to cases of very young children, the court may need to satisfy itself as to their competence. The real issue is as to what form that test should take.

5.14 In the Consultation Paper, we had suggested the adoption of the test proposed by the Law Reform Commission of Australia, i.e.

> "A person who is incapable of understanding that, in giving evidence, he or she is under an obligation to give truthful evidence is not competent to give evidence.
>
> A person who is incapable of giving a rational reply to a question about a fact is not competent to give evidence about the fact."[68]

While there might be different views as to whether the wording of the second limb is altogether satisfactory, there would presumably be little conflict as to the acceptability of the underlying approach. Since there is universal acceptance of the necessity to have at least some test of competence in the case of very young children, even if it is confined to the minimum verbal skills, it would seem to follow that the test should be framed, as the Australian Law Reform Commission suggest, in terms of the child's cognitive development.

5.15 There might be more reservations about the first limb of this test, since it involves the court in what might be a difficult exercise in establishing whether the child understands that he or she is under an obligation to tell the truth. On one view, it might be thought that this is not so very different from the present procedure under which the court has to assess the child's understanding of the nature of the oath. The real objection to the oath, however, is that it presents an irrational and irrelevant obstacle to the giving of evidence by children in cases where they have valuable and relevant evidence to provide. It is not that the court has to undertake a difficult and necessarily subjective assessment of the child's mental capacity. Judges are constantly required to make difficult and subjective assessments of this nature and indeed the whole process of weighing evidence is a succession of such assessments. Moreover, in the area now under discussion, there is nothing to prevent the judge in a particularly difficult case from drawing on the assistance of psychologists or other experts, while not, of course, abdicating the ultimate judicial function to such experts.

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68 The Australian Law Reform Commission, Report No. 38, *Evidence*, 150.

5.16 The Commission is impressed by the force of the contention that the account of the victim of an offence, even where he or she is too young to understand the concept of being under an obligation to tell the truth, should at least be heard during the course of the trial. As against this, the danger of convicting an innocent person on the uncorroborated testimony of an immature child who does not understand the difference between truth and falsehood can hardly be overestimated. One of the most persuasive advocates of the minimalist test of competency, JR Spencer, has suggested that this fundamental dilemma might be resolved by adopting a suggestion of Glanville Williams and requiring the judge to stop the case at the end of the evidence for both prosecution and defence if he thinks a conviction on the totality of the evidence would be unsafe or unsatisfactory.[69]

It must be at least doubtful whether this does in truth provide a solution. It would mean that, in a borderline case, there would be an additional assessment of competency after the child had given evidence. This would seem to introduce further complications into the trial process which might even result in cases being withdrawn from juries where there was other evidence on which the jury might have convicted, had the child's own evidence been ruled out at the outset.

5.17 The Commission accepts that this is not an easy area in which to arrive at a solution which will command universal acceptance. We think that the balance of the argument is, on the whole, in favour of confining the test to one limited to ascertaining whether the child has the necessary verbal skills to give an account of the relevant events which is intelligible to the Tribunal. We have carefully weighed the risk that innocent people may be convicted on the uncorroborated testimony of immature children. We are, however, satisfied that, given the inherent safeguards of the criminal process itself, tilted as sharply as it is in favour of the accused, the possibility of any serious miscarriage of justice occurring is so remote that it can reasonably be discounted.

5.18 We accordingly *recommend that the court should continue to make the ultimate decision as to the competence of children to give evidence. The test of competency of children should be the capacity of the child to give an intelligible account of events which he or she has observed.*

Restrictions on the Acceptance of Children's Testimony

5.19 We considered in detail in our Consultation Paper two restrictions which the law at present imposes on the acceptance of the evidence of children.

First, as the law stands there can be no conviction without corroboration on the unsworn evidence of children of tender years. In the case of sworn

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69 Spencer, Child Witnesses: *Corroboration and Expert Evidence*, [1987] Crim L Rev 239 at 246-7 and see Williams, *The Corroboration Question* (1987) 137 New LJ 131.

evidence, the jury must be warned of the dangers of convicting on the uncorroborated evidence of:

(i) the complainant in a sexual offence;

(ii) children and young persons (in all cases).

Second, as we have already seen, the requirement that all evidence be given on oath means that in the case of young children the court must be satisfied that the child understands the nature of the oath. (There is also, as we have seen, provision for receiving the unsworn evidence of young children in criminal cases subject to the requirement of corroboration). There is thus as the law stands an indirect test of competency in the case of young children. In the Consultation Paper, we considered the question of whether the requirement of the oath should be abolished in the case of children. It would, of course, be a logical consequence of its abolition that the direct test of competency proposed in the last section would then be the sole criterion for the admissibility of children's evidence.

(1) Corroboration

5.20 We noted that the present approach has come under attack in other jurisdictions in relation to rape and allied offences and that the trend in the present century has been towards the removal of testimonial disabilities. We ourselves have already recommended in the case of rape that there should be no requirement of corroboration, nor should the trial judge be required to warn the jury of the dangers of convicting when there is no corroboration.

Our provisional recommendation was that the corroboration and warning requirements should be abolished, whatever option was adopted for assessing competence. Once any person of whatever age was found to be competent, no special conditions should apply to his or her evidence.

In coming to that conclusion, we reviewed a significant body of psychological research which showed that many of the assumptions on which the special corroboration requirements for children's evidence were based were largely untested and unfounded, i.e. that children are so inherently unreliable and their witnessing ability so frail that the procedures and rules that apply to adult witnesses are not sufficient and that further safeguards are accordingly required.

We also noted that the legal tests for the reception of children's evidence either upon oath or not upon oath had come very close together in practice. Yet the corroboration requirement is completely different depending on whether the child gives sworn or unsworn evidence.

5.21 In our discussions following the publication of the Consultation Paper, there has been general support for our recommendation regarding

corroboration. However there were dissenting views. These could be summarised as follows:

- Even if there were no corroboration requirement the warning should be maintained, as the Commission's proposals were based on having "too much faith in juries".

- If all the Commission's proposals were implemented it would virtually abolish all the present stages of the trial process, leading to the possibility of a person being convicted on the basis of video evidence alone.

- The Commission's comments on the dangers of "over-interviewing" a child conflict with their premise that a child's evidence is not inherently weak.

We have given serious consideration to these objections although we have already addressed many of them in our Consultation Paper.

5.22 We are not persuaded by the suggestion that, though there be no requirement of corroboration, the warning should be maintained. It can be expected that in a case where a warning is called for, a judge will continue to warn juries of the dangers of convicting when there is no evidence which supports or confirms the complainant's version of events. Outside of these cases, the mandatory warning is superfluous and may raise unnecessary doubts in the mind of jurors.

5.23 We reject the suggestion that the Commission's proposals, designed to make it easier for children to give evidence, would in the words of one barrister "virtually abolish all the present stages of the trial process" by making it possible to convict on the basis of video evidence alone. For example, in our proposals, the video recorded evidence would consist of both examination-in-chief and cross-examination. The child could be cross-examined at the trial if the court considered it necessary in the interests of justice and fair procedures. The right of an accused person to a fair trial is adequately protected as well by the duty of the judge to comment when necessary on the weight to be given to a particular testimony. As we pointed out in our Consultation Paper, in jurisdictions where the corroboration requirement has been removed, there are no reports of miscarriages of justice.

5.24 With regard to the argument that the Commission's expressed comments on the dangers of over-interviewing a child conflict with our premise that children's evidence is not inherently weak, we would make this reply. Children's reactions to multiple interviewing have no bearing on the question of their competence as witnesses. A child subjected to repeated interviewing by different personnel may become confused and upset and may no longer have any independent memory of the events that transpired. This, of course, can also happen to adult witnesses. If children have yielded to suggestion, the

research evidence suggests that they are later likely to revert to the truth or will simply be unsure of the answer. This implies that even if children have been coached in their evidence, or if their evidence has been distorted by leading questions during the investigation process, it is likely that later questioning immediately preceding or during the trial will expose the problem.

5.25 We remain convinced that the existing safeguards which apply in all criminal cases will be sufficient for those cases which involve child sexual abuse. If a case depends on the evidence of a single witness and this is so unsatisfactory, perhaps because of the effects of multiple interviewing, that the judge thinks a conviction would be unsafe, he may remind the jury of its right to return a not-guilty verdict without hearing further evidence. Handicapping children's evidence because they have been subjected to multiple interviews seems to us neither necessary or desirable.

It is clear that many of the anxieties pertaining to our recommendations to abolish the corroboration requirement and the warning requirement are based on fundamental fears as to children's competence. We were persuaded by our review of the research evidence that it is time to change fundamentally our stance in relation to children, and to challenge these untested and unfounded assumptions about their unreliability as witnesses. Throughout our consultations, no empirical evidence has been advanced to us which has made us reconsider that position.

5.26 Three Reports have been published in neighbouring jurisdictions since the publication of our Consultation Paper which contain proposals on this topic. The Pigot Report also recommended the abolition of the warning and corroboration requirements in the case of children. The English Law Commission in a Working Paper on the *Corroboration of Evidence in Criminal Trials*[70] have provisionally recommended their abolition, but have invited views as to whether they should be replaced by a statutory provision in similar terms to that recommended by the Australian Law Reform Commission in their Report on *Evidence*.[71] Their proposals - which apply, inter alia, to prosecutions for offences of a sexual nature - can be shortly summarised as follows:-

(1) The warning and corroboration requirements should be abolished.

(2) In their place, there should be a provision requiring the judge, where there is a jury and a party so requests, to give a warning to the jury, "unless there are good reasons for not doing so".

(3) Where the judge gives such a warning, he should inform the jury of the matters that may cause the evidence to be unreliable and should warn

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70 Working Paper No. 115.
71 *Op cit* draft Evidence Bill, clauses 139 and 140.

the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.

(4) Subject to (3), it should not be necessary for any particular forms of words to be used in giving the warning or information.[72]

5.27 The Scottish Law Commission did not recommend the abolition of either the warning or corroboration requirement. This, however, was because of the unusual Scots provision under which there is a general requirement of corroboration for the proof of all crimes and offences (save only a few trivial statutory offences). The Commission was of the view that it would be unprincipled to depart from that requirement in respect only of a certain class of witness or certain classes of crime.[73]

This important new material, accordingly, overwhelmingly supports our provisional conclusion that the warning and corroboration requirements should be abolished in this jurisdiction. We have also carefully considered the proposal of the Australian Law Reform Commission for its replacement by a form of statutory guidance to the judge. While we appreciate the factors which weighed with the Commission in making that proposal, we are not persuaded that it should be adopted in Ireland. The facts of individual cases differ so much that the question as to whether a warning should be given and, if so, the terms in which it is couched are best left to the discretion of the trial judge. If he is in error in the manner in which he exercises that discretion, his decision can be reviewed by an appellate court. We are not convinced that, in practice, the situation would be very much different under the proposed Australian regime where the judge may refuse to give the warning even when requested to do so, if there are "good reasons" for doing so. Introducing new and relatively detailed legislative provisions in this area would seem to give rise to the possibility of confusion and litigation where the paramount consideration should be to sweep away the technical rules which have impeded the administration of criminal justice.

5.28 We accordingly *adhere to our provisional recommendation that the requirement to warn a jury before they can convict on the sworn evidence of a child and the requirement of corroboration of the unsworn evidence of a child should be abolished.*

(2) The requirement that evidence be given on oath

5.29 In our Consultation Paper our provisional recommendation was to abolish the oath and substitute a new test of competence. We rejected the option of providing a parallel test of competence while retaining the oath. We argued that while it was perfectly permissible in law to have twin co-existing tests of competence or reliability, we were of the view that religious

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72 Law Commission WP No. 115, *op cit*, pps 80-83.

73 Scot Law Comm *op cit* para 3.3.

practice and awareness of the significance of an oath was such a feature of Irish life that many jurors consciously or unconsciously would attach greater weight to sworn evidence than to affirmed evidence. We were also of the view that replacing the oath by a form of affirmation for all had the great attraction of absolute universality.

There was widespread acceptance of our provisional recommendations. Barristers and judges expressed the view that the oath serves to add an unnecessary layer of complication since the judge must explain not only the question of telling the truth but also the importance of the oath. The critical issue was for the child to know the difference between telling the truth and telling a lie, as one judge said, and the oath only served to confuse the issue.

5.30 We received only one submission, from Family Solidarity, which argued against the abolition of the oath. This submission argued that "to deny people the opportunity to call on God to witness the truth of what they say in court would limit their human freedom, as well as denying the judge and jury the opportunity to hear evidence supported by as solemn a guarantee of truthfulness as it is possible to have".

This objection does not address our central concern about the use of the oath, i.e., that it is used as a test of *competence* for children. Thus the test of competence is one of moral and religious understanding and does not deal directly with the issue of psychological competency. Factors such as intelligence, memory, the ability to make inferences and the capacity to be appropriately informative and relevant are not tested by the oath. We argued in our Consultation Paper that it would be better to use a more direct and complete test of competence, rather than an indirect test, such as the oath.

5.31 The second issue is the use of the oath as a test of the child's capacity to be truthful. The argument in the submission from Family Solidarity objecting to the abolition of the oath is that "the calling of God to witness the truth of what one has said is so much part of human experience (and by no means only Irish culture) that its extirpation would need a coherent justification". The submission acknowledges that this is not "to suggest that every witness who takes the oath tells the truth or that a solemn non-religious affirmation would not be treated in a moral and responsible way by most witnesses".

A recent study of children's understanding of court proceedings found that children of all age levels generally had a good understanding of the need to tell the truth in court, although the reasons changed with age. The results of that study and several other studies suggest that knowing how a particular child understands the consequences of telling the truth or telling a lie may be more helpful in determining the quality of their evidence than knowing

whether they believe in God.[74]

5.32 A third issue is the religious significance of the oath. We pointed out in our Consultation Paper that "nobody in the State is *required* to believe in any god and we see no reason why the evidence of a young, ignorant or unbelieving but competent witness should have any less weight or efficacy than the evidence of a young, believing, competent witness. In fact, the present dispensation might have difficulty in surviving constitutional scrutiny".[75]

We rejected the option of providing a parallel test of competence while retaining the oath precisely because it was thought that the religious significance of the oath in Irish life would mean that many jurors consciously or unconsciously would attach greater weight to evidence on oath than to affirmed evidence.

The submission objecting to the abolition of the oath also took issue with this conclusion, arguing that no evidence is available that an Irish jury would in fact attach inappropriate weight to sworn rather than affirmed evidence. Yet, in the same submission, it is asserted that the oath is "as solemn a guarantee of truthfulness as it is possible to have". We take the view that there is a clear implication in that argument that evidence on oath is more of a guarantee of truthfulness than a solemn non-religious affirmation. Individual jurors may or may not share that perception. One way or the other, the question of the religious belief of the jurors and the witness enters into the perception of the truthfulness of the witness. This is an unsatisfactory state of affairs.

5.33 Apart from that one submission, there was widespread support for the provisional recommendation that the oath should be replaced in the case of children. We have already recommended that, in their case, there should be an adjudication on competence which would simply test the child's capacity to give an intelligible account of events.

5.34 This Report is dealing solely with questions relating to child sexual abuse and, accordingly, our proposals are necessarily confined to cases, criminal or civil, in which young persons are called to give evidence. It would be undesirable and premature to make any recommendation in this report as to the abolition of the oath generally. In the Consultation Paper, however, we pointed out that it would clearly be anomalous and unjustifiable to confine consideration of alterations in the law to this area or even to children generally. Since the Commission's First Programme of Law Reform[76] expressly

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74 Cashmore, J and Bussey, K, Children's Constructions of Court Proceedings. Paper presented at International Conference on Child Witnesses. Selwin College, Cambridge, June, 1989.

75 *Op cit*, para 5.41.

76 Law Reform Commission, First Programme for Examination of Certain Branches of the Law with a view to their para 11 (Prl 5984, 1977).

required the Commission to examine the question of the desirability of retaining the oath for witnesses and jurors, we are in the process of examining the subject of oaths generally and we will be presenting a Report to the Taoiseach in the near future on this topic. While we would not wish to anticipate our final proposals on the topic, it is clear that there are two broad options: either to abolish the oath for witnesses and jurors in all proceedings, civil and criminal, or to permit all witnesses and jurors to affirm, while allowing those who wish to take the oath to do so. We must, accordingly, consider in the present context whether the same regime in regard to oaths and affirmations should be required in the case of young persons. Having regard to the fact that, under our proposals as to substantive offences, the age of consent in relation to both heterosexual and homosexual activity will be 17, we confine our present recommendations to witnesses who are under that age.

5.35 It would clearly be illogical and anomalous to absolve witnesses of, say, 15 or 16 from a requirement to give evidence on affirmation while imposing such an obligation on witnesses of 17 and upwards. It would be equally illogical and anomalous to allow witnesses of 17 and upwards the option of either giving evidence on oath or affirming, while denying that option to those who are a few years younger. We are satisfied that the appropriate course is to provide for the same regime for young persons as for adult witnesses and jurors, but to dispense with the necessity for either the oath or the affirmation in the case of young children, provided, of course, the court is satisfied that they meet the test of competence already proposed. Having given the matter careful consideration, we do not think that the existing provision in s30 of the Children Act 1908, which enables the court in certain circumstances to hear the unsworn evidence of a child of "tender years", provides a satisfactory model. It introduces an undesirable element of subjectivity and uncertainty into this area of law and we would accordingly propose that a specific age be fixed below which neither the oath nor an affirmation would be required. We acknowledge that any such age limit suffers from the disadvantage of being to some extent arbitrary: bearing this in mind, we have concluded that it would be sensible to fix it at 14.

5.36 We accordingly *recommend that s30 of the Children Act 1908 should be repealed and replaced by a provision enabling the court to hear the evidence of children under the age of 14 without requiring them to give evidence on oath or affirm where the court is satisfied that the children are competent to give evidence in accordance with the criteria as to competency already proposed. In the case of young persons between the ages of 14 and 17, the same regime as to the giving of sworn evidence should apply as is proposed for adults and jurors generally in our forthcoming Report to the Taoiseach on that topic.*

CHAPTER 6: THE USE OF EXPERT WITNESSES IN CHILD ABUSE CASES

6.01 In our Consultation Paper, we provisionally recommended that expert evidence be available as to children's competence and typical behaviourial and emotional reactions to sexual abuse. Over all, there has been widespread support for the approach towards the use of expert witnesses adopted by the Commission.

However in our discussions which followed the publication of our Consultation Paper, we have been made aware of the mixed feelings that there are with regard to the use of expert witnesses. Widespread dissatisfaction was expressed in relation to many aspects of expert evidence including:

- The multiplicity of expert evidence that may be provided in a single case and the consequent danger that the child's evidence may be overlooked in the confusion which may arise from such evidence.

- The quality of some of the expert evidence available to the court.

- The trauma involved in medical examinations for the child, particularly, if additional medical examinations are required by the defence.

- Expert witnesses being introduced late into the trial process who have minimal exposure to the child and persons close to the child, thus creating difficulties in making an accurate diagnosis and causing delays in the trial process.

Nevertheless, there was general agreement that expert evidence had a useful role to play.

6.02 In our Consultation Paper, we had addressed many of the problems outlined above.[77] For example, in relation to the problem of multiple interviews of children by experts called by the defence and the prosecution, we were of the view that this could be avoided if expert witnesses were called by the court, rather than by the defence and the prosecution. We pointed out that this was already happening in civil proceedings and that the judge in criminal proceedings has the same power, i.e., he can call a witness who has not been called by either of the parties, but that this power is rarely exercised.

If both the prosecution and the defence agree to a court appointed assessor, this would require no change in current law. But it would require a significant change in the law if the parties were to be forbidden to call their own experts when an expert witness was appointed by the court. We also noted that in civil cases the judge sometimes has the option of appointing an assessor who is not a witness but sits with him on the bench to help him assess the expert evidence. We pointed out that this may also be possible in a criminal court.

6.03 The idea of a court appointed expert was enthusiastically endorsed by most of the people we consulted. Some wanted to go even further, suggesting that an independent expert should be involved throughout the entire proceedings, in which case he or she should be appointed by the DPP. However, this would not solve the problem of multiple interviewing of the child, as such a witness would have to be considered an expert for the prosecution, and, to be put on the same terms, the defence would have to be entitled to an expert of its own.

Although there is widespread dissatisfaction with the multiple interviewing of children, there was no support for the suggestion that the prosecution and the defence should be forbidden to call their own experts when a witness was appointed by the court. This, of course, would require a significant change in the law. The Commission is of the view that such legislation is neither necessary or desirable and this seems to be the view of those we consulted.

6.04 The need for expert witnesses to use high work standards and practices in the assessment, diagnosis and reporting of child sexual abuse cases to the courts was repeatedly emphasised. The clear advantage of a multi-disciplinary approach towards the assessment of child sexual abuse was also endorsed.

Our discussions have also made clear to us the need to establish standards in the quality of expert evidence on child sexual abuse.

Accordingly, we recommend that experienced multi-disciplinary sexual abuse assessment teams, together with the professional associations representing those from whose ranks expert witnesses are normally drawn, consider establishing and

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77 *Op cit*, paras 6.06 to 6.16.

agreeing on a Code of Practice for the assessment of child sexual abuse cases, and in particular, for the quality and form of court reports.

We also recommend that consideration be given by the Presidents of the various courts to the establishment of a pool of appropriately trained mental health professionals who could be appointed by the court as independent expert witnesses.

In general, we adhere to our provisional recommendation that expert evidence be admissible as to competence and as to children's typical behaviourial and emotional reactions to sexual abuse.

CHAPTER 7: MAKING IT EASIER FOR CHILDREN TO GIVE EVIDENCE

General

7.01 There is universal agreement that it is traumatic for children to give evidence of unpleasant experiences and that it is particularly disturbing when they have been victims of parental abuse and are required to confront the abusing parent in Court. This leads, understandably, to a desire to shield them from this experience and to a failure to report and/or prosecute the crime. This in turn encourages further abuse.

7.02 As we have seen already, a deep-seated assumption is embedded in society and reflected in our law that young children are unreliable and incompetent witnesses. This assumption, we are satisfied, is erroneous, and inimical to the constitutional rights of young citizens who, although they may not be endowed with an adult's capacity better to withstand the ordeal of giving evidence, have the same right, under Article 40 of the Constitution, to the defence and vindication of their personal rights. Accordingly, in order to defend and vindicate the rights of all young citizens, the State must ensure that there is no removable obstacle barring their access to the Courts. In order properly to vindicate the right of a child to bodily integrity, our laws should ensure that where it is possible for the child to give evidence for the People in a prosecution of his or her alleged abuser, such evidence should be made available.

In order to ensure this availability it will be necessary to modify some of the usual attributes of a criminal trial. Such modification must not, however, constitute a denial of the right to trial in due course of law given to an accused by Article 38 of the Constitution.

7.03 In Chapter 7 of the Consultation Paper we reviewed in brief the law restricting admissibility of out of court statements, including hearsay. We noted that the law already provided for exceptions to the rule, pointing out,

for example, that as long ago as 1908 the law permitted a child's evidence to be given on deposition, if attendance at court would involve serious damage to its life or health. Proof by certificate is now a familiar part of blood alcohol and drug prosecutions. It can safely be said that confrontation and unrestricted cross-examination are not a *sine qua non* of trial in due course of law.

We examined in detail the constitutional law on confrontation and cross-examination in Ireland and in the USA where the jurisprudence on confrontation had developed more rapidly than here.[78] We were satisfied that in Ireland while, as a general rule and despite the existence of exceptions to the rule against hearsay, the right to cross-examine was an essential feature of trial in due course of law, a right to confront one's accuser did not enjoy the same status. No submission we received dissented from this conclusion.

7.04 Since we published the Consultation Paper, in addition to the submissions received and the opinions expressed at our Seminar, we have also had the advantage of reading the Reports of the Scottish Law Commission on the *Evidence of Children and Other Potentially Vulnerable Witnesses*[79] and of the Report to the Home Office of the Advisory Group on *Video Evidence*, chaired by Judge Pigot. Our relevant provisional recommendations were (in a different order):-

1. "An exception to the Rule against Hearsay on the lines of the Washington or Florida child sexual abuse exceptions could be made on grounds of reliability where the child is available to give evidence and testifies. Where the child is not available to give evidence, it would be necessary to provide for corroboration such as the court would deem sufficient."

2. "A residual exception to the hearsay rule, such as is found in the Federal Rules of Evidence, could be provided."

3. "The presentation of evidence through a surrogate witness would represent so radical a departure from the norms of our system of criminal justice that the Commission does not think it either practical or desirable to recommend it."

4. "The child complainant should be able to give her evidence from behind a screen at the trial."

5. "The child complainant should be able to give evidence by means of closed circuit television at the trial."

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78 Law Reform Commission Consultation Paper on Child Sexual Abuse, paras 7.026 to 7.035.
79 Scottish Law Commission, Report No. 125.

6. "The Commission provisionally recommends, as its preferred option for trials on indictment, that the Criminal Procedure Act, 1967 should be amended to provide for the video-recording of District Court depositions in cases going forward for trial by jury, at the election of the DPP. The video-recording would be presented as the child's evidence at all trials on indictment, as the normal procedure, unless the Court decided after application by the accused that, in the interests of justice and fair procedures, the child should give evidence at the trial. In that event, the evidence could be given from behind a screen or on closed circuit television."

7. "Provision could be made for admitting a video-recording of the child's evidence provided the child was made available for cross-examination at the trial. A video-recording could be admissible in total substitution for the child's participation at the trial, provided a general reliability or trustworthiness requirement such as is built into the child abuse or residual hearsay exceptions in the United States was also built into this exception, or a requirement of sufficient corroboration."

8. "During the prosecution and, if possible, the investigation of these offences, the child should be questioned by disinterested but skilled child examiners who are experienced in child language and psychology, and are appointed by the court. The examiner would act as the conduit for all questions from the lawyers in the case, from the court or from the accused if he or she is representing himself or herself. The examiner's role would be to establish and maintain rapport and ease of communication with the child witness while remaining detached from the issues in the case."

9. "No special reform is necessary to enable anatomical dolls and other demonstrative aids to testimony to be used in court."

10. "Similarly no special law reform would be necessary to enable the trial judge at his or her discretion to allow witnesses whose age or physical condition may so require to give evidence in a particular location in the court and to permit a so-called 'support person' to sit in close proximity or, in the case of very young children, to take the child on his or her lap, provided there was no communication of any sort between the witnesses and the 'support person'."

11. "The Commission would not recommend the appointment of a guardian *ad litem* in civil or criminal proceedings to protect the interests of a child who is not a party to such proceedings. Such a proposal would be of dubious constitutionality, as it might tilt the balance of the trial unfairly against the accused and might also introduce serious and unjustifiable complications in the trial procedure."

12. "Apart from provisionally recommending the video-recording of evidence as above as a means of guarding against lapses of memory on the part of the child, the Commission makes no particular recommendation relating to delay in procedure. The desirability of ensuring that trials are speedy in all cases, and not merely where children appear as witnesses, is obvious."

American Exceptions

7.05 In our Consultation Paper, we recommended the provision of exceptions to the Rule Against Hearsay such as the child abuse exceptions in Washington and Florida and the residual exception found in the Federal Rules of Evidence.[80] These American exceptions to the Rule Against Hearsay were included in the Consultation Paper for the sake of completeness. *They were not our preferred options and are more appropriate to a report on evidence in general. We do not recommend their adoption in this Report.*

Surrogate Witnesses

7.06 *Nothing we have heard or read since publication of the Consultation Paper has modified our original strong view against the use of surrogate witnesses.*[81]

Use of Closed Circuit Television and/or Screens

7.07 While we considered the use of closed circuit television and of screens as separate options in our Consultation Paper, the legal arguments for and against their use are exactly the same in each case and, as the use of closed circuit television is greatly to be preferred as affording much greater flexibility of approach, we will consider both under the one heading. It would clearly be more expensive to install closed circuit television but, at least as a preliminary measure, we envisage its being installed in courthouses where both the Circuit and District Courts sit. It would, accordingly, be useful to provide for the use of screens (preferably one-way, preventing the child witness seeing the accused) as a back-up, interim facility. Rules of Court can, if necessary, provide for the transfer of cases to Courthouses with the closed circuit television facility.

7.08 The use of a live TV link enables one to locate the child outside the courtroom in a comfortable and congenial environment while everyone in the courtroom will be able to observe the child giving her evidence. The Criminal Justice Act 1988 provides for its use in England, as does legislation in New South Wales. The Scottish Law Commission and Victorian Law Commission also recommended that its use be authorised. The Scottish Law Commission describes the system as follows:-

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80 *Op cit*, paras 7.009 to 7.022.
81 *Id*, paras 7.042-7.044, 7.091.

> "From the technical point of view the important features of the systems which we have seen are, first, that they are entirely automatic and do not require the attendance of camera operators and technicians, and second, that they provide both the judge and counsel with an opportunity to watch not only the child but also others as well. So far as the child is concerned, he or she is placed in a room near to the court room. That room is carpeted and simply but agreeably decorated and finished. The child sits at a table, accompanied by a parent or other supporting adult, and facing the child is what appears to be an ordinary domestic television set. In fact the set will have either a concealed camera built in to it, or a small camera clipped on top of it. On the screen will appear the face of whoever is speaking to the child at the time. In the court room there are three different kinds of television monitor. For the jury, the accused and the general public there are large screens which simply show the face of the child at all times. Counsel have small monitors, with built-in or clipped on cameras, the screens of which simultaneously show, by a split screen technique, the face of the child and the face of whoever is at the time speaking to the child. Finally, the judge has a monitor which, in addition to showing what can be seen by counsel, also shows a view of the whole room where the child is. This is transmitted from a fixed camera fitted near the ceiling of the room, and enables the judge to ensure that the child is not being influenced or coached by any other person in the room. All of the cameras are voice-activated, and so switch on automatically as soon as a person begins to speak to the child.
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> Our impression - and this is confirmed by what we have been told by English judges and counsel - is that a closed circuit arrangement along the lines which we have described appears likely to be helpful in some cases both in terms of reducing distress for the child and also in terms of ensuring that the child will in fact be able to give evidence."[82]

Of course, there can be many variations on the arrangement just described.

7.09 It has been represented to us that a camera does not capture the true 'body language' of a witness. Given a properly positioned camera and a clear picture, we fail to see why not and this deficiency does not seem to have arisen in practice to date. It will always be preferable to conduct trials in the usual way, but if use of a live link enables more cases to be presented without distress for the complainant while securing fair procedures for the accused, some lack of physical immediacy can be tolerated.

7.10 In our Consultation Paper, we saw no legal difficulty in introducing this reform[83] and have received no submission which would oppose its introduction.

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82 *Op cit*, paras 4.30, 4.31.
83 *Op cit*, paras 7.047 to 7.052.

Indeed one Circuit Judge informed us that a screen had already been used on his Circuit. The Scottish Law Commission, which originally opposed the use of screens in its Discussion Paper, fearing that they might be ineffective or prejudicial, now recommends that provision be made for their use in the light of actual experience in England and Wales and in Scotland itself. They recommend their use where the witness is under the age of 16 and, despite any objection from the accused, to conceal the accused *from* the witness, provided the accused can see the witness, e.g. by using one-way glass.

7.11 We have had some difficulty in reaching a conclusion at to whether the use of closed circuit television should be mandatory. While an argument can be made for mandatory use, the fact remains that there may be cases in which the interests of justice will not be served by its use. The legal and psychological advice available to the D.P.P. could indicate that the presentation of the case would be enhanced by dispensing with it, without any risk of trauma to the witness. It would be undesirable that, in such cases, the court should not even have a discretion to dispense with its use. The Scottish Law Commission recommends that leave be obtained from the court for the use of a screen[84] and, while we initially favoured leaving it to the D.P.P. to decide whether closed circuit television or a screen or either should be employed, we are satisfied on further consideration *and recommend that use of closed circuit television (or, if unavailable, a screen) should be the rule where a witness in these cases is under 17 years of age unless the Court, for special reason, decides otherwise. Rules of Court should provide for the transfer of proceedings to Courthouses where the relevant facilities were available.*

Video Recording Depositions

7.12 Among the provisional recommendations in this area in the Consultation Paper, the Commission's preferred option was to provide for the video-recording of depositions in the District Court.[85] The essential features of the provisional recommendation were as follows.

Under present law any witness in a case proceeding to trial can be called either by the prosecution or by the defence to give his evidence on deposition in the District Court and as the deposition can already (in admittedly restricted circumstances) be read as his evidence at the trial, this procedure could be adapted so that a child complainant could give evidence (including direct examination, cross-examination, re-examination and any examination by the District Justice) in the District Court. This evidence could then be video recorded and the recording played at the trial. The child would give evidence in a separate room, appropriately furnished, on closed circuit television and would be video recorded while so doing. Instead of calling the child to give evidence at the trial, the video-tape of the deposition, including cross-

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84 *Op cit*, para 4.33.

85 *Op cit*, paras 7.078 to 7.084.

examination, would be shown to the judge and jury as the child's evidence. The child would not be called to give evidence at the trial unless the Court was satisfied that it was necessary to do so in the interests of justice. In that event, it is envisaged that he or she would give evidence on closed circuit TV in the same appropriate room or in a room similarly appointed. Thus when a witness under 17 is called to give evidence on deposition in these cases, the rule would be that it would be video recorded for use at the trial and, assuming the witness is called by the prosecution, the defendant should conduct a full cross-examination at this stage rather than reserve it for the trial as is frequently the practice at present. As with the use of closed circuit television in general, the Court would retain a discretion to order, for special reason, that the deposition be taken in open court in the usual way.

7.13 Taken in isolation and on the assumption that, in taking the deposition, examination and cross-examination would be conducted in the usual way by barristers or solicitors or the accused in person, there was general support for this provisional recommendation.

The Scottish Law Commission have made a similar recommendation except that in their scheme the deposition would, where possible, be taken before the judge who is to preside at the trial and as near as possible to the date of the trial itself. The deposition could only be taken with the leave of the Court.[86] The Pigot Advisory Group (having recommended the admissibility, in principle, of pre-trial videos) recommended that once a case comes within the jurisdiction of the Crown Court, the prosecution should be able as of right to apply for the child witness to be examined and cross-examined at an out-of-court hearing which would be recorded and shown later at the trial. However, under the Pigot proposals, the child must always be available for cross-examination at the trial itself.[87] In contrast, under the Scottish system it appears that the child will not have to be available for the trial at all.[88]

7.14 *We recommend that the Criminal Procedure Act, 1967 should be amended to provide for the video-recording of any District Court deposition taken from a witness aged under 17 years in these cases, unless the Court, for special reason, rules that the deposition be taken in the ordinary way. The video-recording would be presented as the child's evidence at all trials on indictment, as the normal procedure, unless the court decides, on an application by the accused that, in the interests of justice and fair procedures, the child should give evidence at the trial. In that event, the evidence could be given on closed circuit television or from behind a screen.*

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86 *Op cit*, paras 4.38 to 4.44.

87 Report of the Advisory Group on Video Evidence, (Chairman, His Honour Judge Pigot QC). Home Office, London. December 1989, paras 2.25 to 2.35.

88 *Op cit*, para 4.16.

Video-recording Out of Court Statements

7.15 There were two variants of this option in the Consultation Paper. In the first, the child was available for cross-examination (at the trial). In the second, the child was not available but the child's evidence had to attain a certain standard of reliability or required corroboration to be admissible.[89]

The first variant of the proposal envisages that, assuming legislation for recording depositions would be provided, provision would be made in addition for admitting in evidence the video recording of an interview conducted by a doctor, a psychologist, a member of the Gardai, a social worker, a solicitor, or a child examiner, or by any combination of such persons. It is assumed that such an interview would be conducted at an early stage before anyone was charged with an offence. Whereas a lawyer representing a suspect might also be present at that stage and could participate, we consider it preferable to examine the proposal on the assumption that there would be no representation of the suspect. The court of trial would decide whether or not such a record should be admissible in the interests of justice. It would always be made available to the defence in advance of any hearing, if it was not exhibited (or a transcript of it set out) in the book of evidence.

7.16 Once the child is available to give evidence and be cross-examined preferably at the deposition stage, or with the leave of the Court at the trial (albeit behind a screen or on a live link) we can see no objection to such a provision. Indeed, it would operate in ease of an accused where it disclosed inconsistencies with a deposition recorded later.

The Pigot Report[90] and the Scottish Law Commission[91] also recommend such a provision. Indeed, the Scottish Law Commission recommends that such evidence be admissible, where the court sees fit, even when obtained after leading questions.[92] We have recommended that, when a child gives evidence on deposition and is recorded, the child would not have to give evidence at the trial.

Where a deposition is taken and the prosecution or defence wish in addition to have a preliminary video admitted, that video should be shown at the same time the deposition is taken and any cross-examination in respect of it should be conducted at that time. (If it is sought to admit it at the trial for the first time, cross-examination could be conducted, but only with the leave of the court).

7.17 We do not propose to confirm the second variant of our provisional recommendation, i.e., that out-of-court videos be admissible where the child

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89 *Op cit*, paras 7.053 to 7.073.
90 *Op cit*, chapter 4.
91 *Op cit*, paras 4.45 to 4.70.
92 *Id*, at paras 4.69, 4.70.

is not available to give evidence. We refrain from doing so, not because we consider it impractical or legally improper, but because we consider that it might best be addressed in a report on evidence in general. We do not rule it out for the future. We are satisfied that our other proposals for reform, together with the provisions of s29 of the Children's Act, 1908, adapted to provide for video recording, will secure adequate access to the Courts for young complainants.

As we said in our Consultation Paper, the provision of live closed circuit TV links (or screens) should suffice to make it easier for children to give evidence, as it would spare them confrontation with the alleged abuser in the court room atmosphere. Thus if a case of child abuse is disposed of in the normal way in the District Court, where there is no jury and no provision for depositions, all that should be needed is the TV link (or screen).[93]

7.18 Where cases go forward for trial by jury some delay is inevitable and for this reason it is valuable to have a video-record of the child's account of events taken, at the latest, at the deposition stage. In addition, any preliminary video would be potentially admissible. In this context, timing is all important: if a video is taken too early, the investigation may well be incomplete and an interviewer without any clear line to follow might have to resort to 'fishing' or leading questions.

When the recording of evidence is left to a late stage e.g. after the return for trial, we consider it might be as well to defer it to the trial itself, since the less interviews the child is subjected to, the better. In this context, we query the Scottish Law Commission's emphasis in recommending that the evidence be recorded "as short a time before the date of the trial as possible".[94] The trial should take place as soon as possible after the evidence is recorded.

The Commission envisages that as the quality of the preliminary interview improves with experience and in the light of what the Court will and will not admit in evidence, the DPP will rely less on the video recorded deposition and will take whatever risks are involved in relying on the earlier record being admitted in evidence. Under the latter procedure, the child would be available to give evidence in any event.

7.19 Neither the Pigot Report nor the Scottish Law Commission suggested any particular criteria to be included in legislation providing for the admissibility of preliminary videos. However, the Pigot Group recommended that there should be a Code of Practice for the conduct of video recorded interviews to which the court should have regard in making the decision on admissibility. The court would not be bound by the code but where it

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93 *op cit*, para 7.082.
94 *Op cit*, recommendation 10(d).

rejected an interview which complied with the Code, it would have to give specific reasons for so doing.[95]

The relevant paragraphs of the Pigot Report containing a list of the matters to which the code should apply are to be found in Appendix A.

7.20 *We recommend that provision be made for the admission in evidence of a video-recorded interview with a child, recorded out of court and conducted by an appropriate person e.g. an appropriately qualified child examiner, a doctor, a psychologist, a Ban Garda, or a social worker, provided the child is made available for cross-examination. In cases going forward for trial on indictment, the video recorded testimony should be first shown in the District Court on notice to the defence. The child could then be cross-examined and the cross-examination recorded so that it could be played at the trial. The child would not have to give evidence at the trial itself unless the court deemed it necessary in the interests of justice for the child to do so. The Court of Trial would decide whether any such video recorded evidence would be admissible. This procedure could be followed in addition to or in substitution for the recording of the child's deposition in the District Court as provided for in the previous recommendation. Provision could be made, in addition, for the admission of a preliminary video in evidence for the first time at the trial itself, with or without additional cross-examination as the Court may direct. In any case where the Court required the child to be cross-examined at the trial, the child could give evidence on closed circuit television.*

The Child Examiner

7.21 In our Consultation Paper we recommended that all the questioning of the child, both on recorded deposition and if possible where a preliminary interview was being recorded, should be conducted through a skilled and impartial child examiner.[96] Apart from the provisional proposal to admit hearsay without cross-examination but with corroboration, this was perhaps the most controversial proposal in our Consultation Paper. Certainly lawyers attending our Seminar appeared to be quite exercised about it.

In fact, the proposal emerged at an advanced stage of our deliberations. The reason it was made initially was quite simple. Despite every effort to shield the complainant by screens or the use of closed-circuit television, where an accused represented himself, as happened, for example in the case of *DPP v T*,[97] the complainant would hear his voice and would have to answer his questions which would undoubtedly be couched in intimate and upsettingly familiar terminology. Since we did not consider it practicable or desirable to compel accused persons to avail of legal representation, we recommended the use of an intermediary in such circumstances.

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95 *Op cit*, para 4.8 et seq.
96 *Op cit*, paras 7.078, 7.092.
97 Unreported. Court of Criminal Appeal, 27th July 1988.

7.22 Contrary to what some may have thought, we had not suggested doing away with cross-examination. We originally contemplated no more than a modification of existing practice: the questions a defending counsel or solicitor would have asked would now be asked in another voice. As a result, timing and intonation, which is so much part of the skilled cross-examiner's art, would be lost. This, however, is the price one would have to pay to ensure, in cases where the accused was representing himself, that the child witness was not placed at so serious a disadvantage as to create the possibility of real injustice.

Our final proposal went further than this. We contemplated the questioning of the child by skilled child examiners, appointed by the court, during the prosecution and, if possible, the investigation of these offences, not merely where the accused was representing himself or herself, but also where he or she was defended by lawyers. We envisaged that the examiner would act as a conduit for all questions from the lawyers and that his or her role would be to establish and maintain rapport and ease of communication with the child witness while remaining detached from the issues in the case.

7.23 We were influenced by two factors in making this more radical proposal. First, under our adversarial legal system, it is the duty of a defending lawyer to use every legitimate means to secure the acquittal of his client. While he must not mislead the court of trial in any way, it is not his duty to ensure that the enquiry in which he is participating arrives at the truth. Hence, he is perfectly entitled to conduct a cross-examination which is designed to unsettle a child witness alleged to have been the victim of an offence by his client and reduce his or her credibility as a witness to the lowest possible level. Secondly, in an imperfect world, there will always be defending advocates who will seek to harass or bully a child witness in a way which is not only psychologically harmful to the child but may also be damaging to their own client's case.

7.24 This had led us inexorably to the conclusion, not disturbed by our consultations, that too high a price is being paid for the right to conduct a wholly uninhibited and "direct" cross-examination of a child witness. While we have naturally had regard to the constitutional dimensions of such a proposal, we are satisfied that the guarantees of a trial "in due course of law" do not necessarily preclude a restriction of some nature on an accused person's general right to cross-examine his accuser without an intermediary. The right in practice is inevitably restricted: thus, persons who cannot speak English, who are non-speaking or have a speech defect are allowed at present to give evidence through interpreters. We have also noted that, since we made our provisional recommendations, a majority of those subscribing to the Pigot Report recommended that the trial judge should have a discretion at all times to appoint an examiner where a witness was very young or very

disturbed.[98]

7.25 We have, however, had more difficulty in arriving at a conclusion as to whether the accused should be deprived of the right of cross-examination in the trial of every such offence, without regard to the circumstances of the particular case with which the court is concerned. While we are satisfied, as with the "American exceptions" to the Rule Against Hearsay, and the proposal to admit "out of court" videos without the child being available, that the proposal to use an examiner in all cases where use of closed circuit television facilities was authorised would not necessarily be unconstitutional, nevertheless, after further consideration, we are not disposed to recommend the universal use of examiners at this time.

7.26 It will take time to train examiners, whether they be lawyers acquiring psychological skills or vice versa. However, the law should provide at once that, although cross-examination by one's own lawyer would continue to be the norm for the time being, *the court should have power to appoint an examiner, for special reason, on the application of the DPP. We recommend that the accused should continue to be entitled to cross-examine the alleged victim himself or through his counsel or solicitor at the depositions stage and (when the presence of the child is required) at the trial, except where the court is satisfied that, having regard to the age and/or mental condition of the alleged victim, the interests of justice require that the cross-examination be conducted through a child examiner, in which event the examiner would be required to put to the alleged victim any question permissible under the rules of evidence requested by the defence.*

Child examiners should be experienced in interviewing children and specially trained in child language, psychology and the relevant law with particular emphasis on the law of evidence.

Delay

7.27 The Commission expressed itself satisfied in its Consultation Paper that the ability to record evidence on video tape was a sufficient safeguard against the lapse of witnesses' memories which is caused by delay and made no further recommendation in that regard save, perhaps rather complacently, to express the hope that delay could be avoided in all cases. However, we must now examine a further recommendation in the Pigot Report. It suggests that where a prosecution for child abuse is going to be tried on indictment in the Crown Court, committal proceedings in the Magistrates' Court should be dispensed with and replaced by a preliminary investigation by the Crown Court.[99]

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98 *Op cit*, para 2.32.
99 *Id*, para 6.8.

Such committal proceedings correspond to the preliminary examination which, under our law, takes place in the District Court. In both procedures, the Magistrate or District Justice, having read the statements of evidence to be given in the case and heard the evidence of any witness required to give oral evidence, decides whether the accused has a case to meet. If the Magistrate or District Justice decides there is no case to meet, the accused must be discharged.

7.28 Where a person is charged with an indictable offence and there is an election for trial by jury, the holding of a preliminary investigation by a court in order to determine whether there is sufficient evidence against the accused to justify his or her being put on trial is a valuable protection for the citizen and, as such, should not be lightly discarded even in the limited range of cases now under consideration. We think, however, that there would be general agreement that in its present form it contributes significantly to the delays being experienced in criminal proceedings.

As we pointed out in our Consultation Paper, delay in cases of child sexual abuse can seriously affect the child's memory and ability to give an accurate account of events. It is, of course, the case that, if our recommendation as to the video recording of depositions is implemented, this difficulty would be significantly ameliorated.

7.29 We do not suggest that, even in the limited range of cases now under consideration, the accused person should be deprived of the right to have a preliminary investigation as to whether there is a *prima facie* case against him. Unless the accused waives preliminary examination, which he is unlikely to do as delay and lapse of memory can only work in his favour, a preliminary examination has to be conducted in every case, even in the clearest of cases where the accused would not normally seek a refusal of informations. This inevitably causes delay which is absolutely unnecessary.

It would save much time to abolish the mandatory preliminary examination in the District Court. Instead, after the return for trial the accused should have the right to apply to the Circuit Court for a preliminary examination of the evidence. He would be highly unlikely to do so in a clear case. At the very least, it would be bad tactics for the accused to waste the time of the Court with a preliminary application when a *prima facie* case is clearly made out on the book of evidence, particularly when he retains the right to apply for a direction at the end of the prosecution case. There is much to be said for enabling a preliminary examination of the case against the accused to be conducted by the court of trial, which in the cases now under consideration would almost invariably be the Circuit Court. At the same time, the valuable right of both the prosecution and the accused to require the evidence of any witness to be taken on deposition in the District Court should be retained and, as we have already recommended, provision made for its being video-recorded at the District Court stage.

7.30 We accordingly *recommend that, where it is determined that cases covered by this Report are to be tried by jury, the preliminary examination should be dispensed with and the District Justice should return the accused for trial, as if the preliminary examination had been waived under s12 of the Criminal Procedure Act 1967, having first taken and recorded any deposition sought from the complainant and any cross-examination of the complainant in respect of any preliminary video-recording of an interview then shown in court and having taken any other deposition sought by the prosecution or the accused. The accused should be entitled in every such case to apply to the court of trial before he is arraigned for an order directing that he be discharged on the ground that there is no prima facie case against him.*

Identification

7.31 We would adopt a recommendation of the Scottish Law Commission[100] that, *where the case against the accused contains evidence of an identification parade or other recognised identification procedure and adequate notice is given to the accused, it should be presumed that the person identified is one and the same as the accused. The accused may in turn, challenge the presumption on giving appropriate notice to the prosecution. This procedure would dispense with the confrontation necessarily involved in unnecessary formal dock identifications.*

> "There is no doubt that in some cases identification will be a crucial and contested issue. While - given the approach taken with regard to identification in England and Wales - some of us doubt that in-court identification is necessarily the *best* evidence to resolve such an issue, we nonetheless have to accept that in some instances such a means of identification may have to be resorted to. Accordingly, we do not seek to prohibit its use. However, in many instances identification is not in dispute in the sense that the accused does not seek to challenge that he is the person referred to in a witness's evidence (though he may wish to challenge the evidence about what he is alleged to have done). In such cases, therefore, identification of the accused is normally no more than a formality, albeit a formality which must be observed if the prosecution is to prove its case. We believe that in cases of this sort it should not be necessary for a child to make an in-court identification."[101]

Use of a Guardian Ad Litem

7.32 In our Consultation paper we were not in favour of the appointment of a guardian *ad litem* for criminal proceedings. In other legal systems, the guardian *ad litem* is responsible for advising the court and safeguarding the child's interests throughout the whole process of bringing the case to trial, and not just during the court proceedings. In the US, it is common practice in

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100 *Op cit*, paras 3.7 to 3.20.
101 *Id*, para 3.12.

civil cases involving children, but recently they have been appointed in criminal cases too. Their role is to protect the child from the stress of courtroom proceedings and to ensure greater co-ordination between the civil and criminal proceedings involving the same child. The exact dimensions of the guardian *ad litem's* role are still at an experimental stage in the US and are generally determined by the presiding judge, who can in some cases refuse to allow the guardian *ad litem* to be party to the proceedings. The role of a guardian *ad litem* is particularly important for children who are isolated, for example in cases where the child has been sexually abused by a family member and has been removed from the family.

7.33 There was considerable support for the provision of a guardian *ad litem* or for a "child advocate" who would protect the child from improper cross-examination. Similar issues arose in our Consultation Paper and Report on *Rape* when we considered separate representation for complainants. Any additional representation would be perceived as tilting the constitutional balance in favour of the prosecution. It is the function of the judge to ensure that cross-examination is conducted properly. The use of a child examiner, the presence of a support person and the use of screens or live TV links should provide sufficient relief from the distress occasioned by an appearance in Court. *Accordingly, we do not recommend the appointment of a guardian ad litem for the complainant.*

Providing a Support Person

7.34 *Although no special legislation would be necessary, the Commission recommends that the trial judge at his or her discretion should allow witnesses whose age or physical condition may so require to give evidence in a particular location in the court and to permit a so-called "support person" to sit in close proximity or, in the case of very young children, to take the child on his or her lap, provided there is no communication of any sort between the witnesses and the "support person".*

General

7.35 (a) *The Court should permit the use of anatomical dolls and other demonstrative aids to testimony.*

(b) *Where possible, courts should sit in the smallest and brightest courtroom available and dispense with the wearing of wigs and gowns in these cases. If possible, judge, counsel and child witness should sit at the same table while the child gives evidence.*

(c) *Special waiting room facilities should be provided with toys, books and games available for children. While it may not be possible in all our courthouses to have witness rooms solely for use by children, we strongly share the view of the Scottish Law Commission that, whenever possible, children should not have to*

share a waiting room with other adult witnesses (apart from any accompanying adults) and should never have to share a waiting room with the accused or any of the witnesses called on his behalf.

(d) *Similar provisions should be made for excluding from the court persons not involved in the case as are made in our Report on* Rape.

PART IV OTHER LEGAL ASPECTS OF CHILD SEXUAL ABUSE

CHAPTER 8: INVESTIGATION TECHNIQUES AND THE PERSONNEL OF THE LAW

Leading Questions

8.01 In the Consultation Paper, we considered the controversy and debate that has arisen in relation to the reliability and status of testimony elucidated by professionals from children suspected of being sexually abused. We pointed out that many workers in the area of child sexual abuse had modified their clinical techniques using the assistance and advice of the courts and legal experts so that the interviewing in many cases was more acceptable to the courts. We also set out a summary of the stages of interviewing and the modified structured interview now in use in Great Ormond Street Hospital in London. We provisionally recommended that:

(1) *at no stage in the investigative process in relation to child sexual abuse prosecutions should the child be subjected to leading questions.*

(2) *This exclusion of leading questions should apply also in non-criminal cases where an issue of child sexual abuse arose.*

There was no dissent from these provisional recommendations, which we accordingly confirm.

The Use of Anatomical Dolls and Other Demonstrative Aids

8.02 We also referred to the use of anatomical dolls by medical and police personnel in the investigation of child sexual abuse cases. We provisionally *recommended that since, under the existing law, the courts will exclude statements which are obtained in circumstances unfair to the accused and convictions will in any event be unlikely without corroboration, the use of such techniques, which are clearly of assistance to many of those professionally concerned with the investigation of possible child sexual abuse, should not be outlawed. There was*

little dissent from this provisional conclusion which we accordingly confirm. We would endorse the view of the Pigot Advisory Group (see Appendix A) that they should only be used to help the child establish details with which he or she may have verbal difficulties once the general substance of a complaint is clear.

The Personnel of the Law

8.03 We pointed out in the Consultation Paper that:

> "Essential to the proper operation of the system whose purpose is the protection of children is that the persons working within it should be well trained in their own professional spheres, sensitive to the objective of the system and capable of working effectively within an inter-disciplinary framework."

While these were not strictly matters of law reform, we considered it important to make some observations. Of these, the most important were proposals that

(1) *Special care should be exercised by the Director of Public Prosecutions in selecting prosecuting counsel in child sexual abuse cases. As in the case of the appointment of independent representatives for children in such cases (see para 1.56 above), the introduction of a panel system might be considered.*

(2) *The legal professions should give serious consideration to adopting special codes of practice relating to representation in, and the conduct of, cases involving children. The professions should also consider ways, including the possibility of a certification system, of ensuring that lawyers involved in such cases have appropriate training or experience.*

(3) *Opportunities should be provided for judges and justices who may be dealing with child sexual abuse cases to acquire information by means of training courses, seminars etc as to the special problems posed by such cases.*[102]

There was no dissent from these proposals, which we accordingly confirm.

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102 Since the publication of the Consultation Paper, the Commission has arranged, through the courtesy of the Judicial Studies Board for England and Wales, to send an observer to Seminars of this nature organised by that body.

CHAPTER 9: SUMMARY OF RECOMMENDATIONS

(References in brackets are to relevant paragraphs in Consultation Paper)

Mandatory Reporting

1. For the purpose of a mandatory reporting law we recommend the definition of child sexual abuse proposed by the Western Australia Task Force in its 1987 Report, viz:

> "(i) intentional touching of the body of a child for the purpose of the sexual arousal or sexual gratification of the child or the person;
>
> (ii) intentional masturbation in the presence of the child;
>
> (iii) intentional exposure of the sexual organs of a person or any other sexual act intentionally performed in the presence of the child for the purpose of sexual arousal or gratification of the older person or as an expression of aggression, threat or intimidation towards the child; and
>
> (iv) sexual exploitation, which includes permitting, encouraging or requiring a child to solicit for or to engage in prostitution or other sexual act as referred to above with the accused or any other person, persons, animal or thing or engaging in the recording (on video-tape, film, audio tape, or other temporary or permanent material), posing, modelling or performing of any act involving the exhibition of a child's body for the purpose of sexual gratification of an audience or for the purpose of any other

sexual act (referred to in sub-paragraphs (i) and (iii) above)." Para 1.10 (para 2.11).

2. Doctors, psychiatrists, psychologists, health workers, social workers, probation officers and teachers should be placed under a legal obligation to report cases of suspected child sexual abuse as so defined. Para 1.14 (para 2.06).

3. The obligation to report should arise when the mandated reporter knows or has good reason to believe that child sexual abuse has occurred. The test of knowledge or belief should be objective rather than subjective, the question being whether the individual ought reasonably to be aware that sexual abuse has occurred. Paras 1.15, 1.16 (para 2.10).

4. A mandated reporter should be required to make an initial oral report followed by a written back-up report identifying the child and the nature and basis of the suspicion that he or she has been subjected to sexual abuse. Para 1.17 (para 2.09).

5. The person to whom all reports should be made should be the Director of Community Care and Medical Officer of Health within each health board. It should also be open to a mandated reporter to submit his or her report to the Gardai. Para 1.18 (para 2.09).

6. Failure without good reason to report should constitute a summary offence with a maximum penalty of six months imprisonment and/or a fine of £1,000. Prosecutions for failure to report should be subject to the consent of the Director of Public Prosecutions. Para 1.19 (para 2.07).

7. Express statutory immunity from civil and criminal proceedings should be given to any person who *bona fide* and with due care reports a suspicion of child sexual abuse to the appropriate authority. Para 1.20 (para 2.08).

Investigation

8. Health boards should be under an express statutory duty to take certain minimal steps in response to a report of alleged child sexual abuse. The obligation to investigate should not be absolute but, where a decision is made not to investigate following a report of alleged abuse, the onus should be on the health board to give reasons. Matters to be investigated should be detailed in guidelines issued. Para 2.02 (paras 2.13-2.15).

Case Conference

9. The Director of Community Care/Medical Officer of Health should be under a general legal duty to hold a case conference in cases of suspected child sexual abuse which have not been rejected as unfounded. When he or she decides not to hold a case conference, he or she should be obliged to record the reasons for the decision. We also believe that there is a need for standard procedures to be adopted governing the conduct of case conferences, regulating in detail such matters as membership, minute taking and circulation of minutes, interviewing and other procedural matters. These matters would best be spelt out in Department of Health Guidelines. Para 2.10 (para 2.17).

10. Where a criminal offence is suspected, the case conference should consider the question of whether criminal proceedings are appropriate. In all cases where an offence is suspected the Gardai should be notified and, where possible, should attend the case conference. The advice or observations given by the case conference relating to prosecution should primarily concern matters relevant to the welfare of the child. Para 2.11 (para 2.17).

11. Parents should be informed of case conferences. They should, if available and as a general rule, be invited to attend for at least part of the conference and should be given an opportunity to comment on any action proposed by the conference. The conference should have the power to exclude parents altogether only in exceptional circumstances. Para 2.12 (para 2.17).

12. Professional legal advice should be available to the case conference. Para 2.13 (para 2.17).

Child Abuse Lists

13. Any system of maintaining lists of suspected and confirmed cases of child abuse should be uniformly adhered to. The circumstances in which a case is listed as confirmed should be carefully defined and a refined system of classification should be used. Parents should have a legal right to be informed of any entry or change of entry on any health board child abuse list which relates to them or their child. There should be an obligation on health boards to review regularly entries in child abuse lists and a procedure whereby a parent may apply to have his or her child's name removed from a list. Para 2.14 (para 2.18).

Care and Emergency Care Proceedings

14. The present procedure whereby all applications for place of safety orders are on the basis of a sworn information should be retained. Para 3.05 (para 2.19).

15. Section 15 of the Child Care Bill 1988 should be amended to restrict the making of an interim care order on an *ex parte* basis to one period of eight days. Para 3.07 (para 2.20).

16. The District Justice should be required, before making an interim care order, to satisfy himself that preparations for full care proceedings are advancing with all possible speed and that an interim care order, particularly when it is applied for *ex parte*, is not only necessary but also the only appropriate means of protecting the child. Para 3.08 (paras 2.24, 2.25).

17. An application for an interim care order (without consent) should be made on the basis of a sworn information. Para 3.08 (paras 2.24, 2.25).

18. The right to apply for an interim care order (without consent) should be confined to the Director of Community Care/Medical Officer of Health or a senior official of the health board acting on his/her behalf. Para 3.08 (paras 2.24, 2.25).

19. Section 15(2)(b) of the Child Care Bill 1988 should be amended to make it clear that an interim care order may not be granted for a period exceeding eight days without the consent of *both* parents where both have custody rights prior to the order. Para 3.09 (paras 2.24, 2.25).

20. Where a District Justice has made an emergency care order, the relevant health board should be obliged to inform the parents of the location at which the child is being kept. However, in exceptional circumstances the District Justice may order that such information be withheld from the parents. Para 3.17 (para 2.23).

21. The appropriate definition of "sexual abuse" for the purposes of a care order under section 15 of the Child Care Bill 1988 should be that recommended in para 1 of this chapter. Para 3.19 (para 2.25).

22. Where a District Justice makes a supervision order under s15(5) of the Child Care Bill 1988 in lieu of a care order, legislation should place a positive obligation on him to be satisfied that the supervision order will adequately protect the child. Para 3.20 (para 2.26).

23. The general principle that care proceedings should be otherwise than in public should be subject to exceptions in the case of the press and *bona fide* researchers. Para 3.21 (para 2.27).

24. A child should have the right to be heard in care proceedings relating to him or her, except where it appears to the Court that this would not be in the child's interest. Para 3.22 (para 2.27).

25. Provision should be made for the appointment by a District Justice of an independent representative for the child where in the opinion of the Justice this appears to be necessary in the interests of the child. The person providing representation should be legally qualified. He or she should be appointed by the Court from among lawyers who by reason of training and experience are competent to represent children. A panel of such lawyers should be established. Para 3.22 (para 2.27).

26. A health board should not be entitled, without seeking the sanction of the court, to restore a child who is in compulsory care to the custody of a parent where abuse or neglect by that parent was the reason for the care order. Para 3.24 (para 2.28).

Medical Examination

27. The District Court should be given power to authorise a health board to arrange for the medical examination and other assessment of a child where the level of suspicion of abuse is sufficiently high. Where such an authorisation is granted, the parent should be under an obligation to present the child for examination at a given place and at a certain time or times. It should be open to the health board to apply for the order on an *ex parte* basis. The order should not involve the child being separated from his parents for more than eight hours in respect of each occasion on which an examination or assessment is ordered. A child who is of sufficient understanding to make an informed decision may refuse to submit to assessment. Para 3.10 to 3.12 (para 2.22).

Barring Orders

28. A barring order should be available in respect of any person who is or has been a member of the abused child's household or who, while not a member of the child's household, comes into regular contact with the child. Where a barring order is made in relation to a person who is not a parent or a sibling of the child, it should, save in exceptional circumstances, be made only in respect of the child's family home. Paras 3.27, 3.28 (para 2.31).

29. A health board should be given power to seek a barring order as an alternative to a care order, and the District Court should be given power to grant a barring order as an alternative to a care order where the Justice is satisfied that this is the most appropriate method of securing the protection of the child. Before making a barring order, the Justice should be satisfied (a) that the conditions have been met for the making of a barring order, and (b) that grounds exist for the making of a care order. Para 3.31 (para 2.29).

30. The right to seek the barring order should be extended to the child. Para 3.33 (para 2.30).

Exclusion Order

31. The District Court should, when dealing with an emergency situation, have at its disposal the option of removing the alleged abuser on an *ex parte* basis, as an alternative to an emergency care order. The grounds for such exclusion should be the same as the grounds for an emergency care order. Application for such an order should be restricted to a health board or a parent of the child. The order should be available against any member of the child's household, including siblings and perhaps against any other persons, such as babysitters, who are likely to be regularly in contact with the child.

    The mechanism for the enforcement of an exclusion order should be the same as that applicable to a barring order under the Family Law (Protection of Spouses and Children) Act, 1981. The District Justice should be entitled to make an exclusion order as an alternative in proceedings for an emergency care order and vice versa. However, the Justice should not make an exclusion order unless he is of the opinion that it would, having regard to the circumstances, secure the safety of the child. The order should last for the same maximum period as an emergency care order (eight days), and should be renewable for a further period of eight days. It should be made in contemplation of a full hearing involving care and/or barring order applications. Para 3.37 (para 2.24).

Protection Order

32. A health board should be entitled to seek a protection order in respect of a child on an *ex parte* basis on the same grounds as those which at present apply where a spouse makes the application. The class of persons against whom protection orders may be sought should be expanded. Any person who is a member of the household of the child against whom abuse is alleged, and any other person who is likely to have regular contact with the child, should be capable of being made subject to a protection order. Para 3.38 (para 2.24).

33. Courts hearing criminal cases should have power to make barring or protection orders, as appropriate, against persons found guilty of offences involving child sexual abuse. Para 3.39 (para 2.32).

The Criminal Law

34. The expression "carnal knowledge" used in the Criminal Law (Amendment) Act, 1935 should be replaced by the expression "sexual intercourse", as defined in section 1(2) of the Criminal Law (Rape) Act, 1981. Para 4.05 (para 4.06).

Unlawful Sexual Intercourse

35. It should continue to be an offence, save in certain circumstances, for any male to have sexual intercourse with a girl under the age of 17 years. Para 4.07 (paras 4.05, 4.06).

36. In the case of a girl between the ages of 15 and 17, sexual intercourse should be a criminal offence only where the male participant is "a person in authority" as defined in para 46 below or at least five years older than the girl in question. Para 4.12 (paras 4.19 to 4.22).

37. The maximum penalty for an offence of unlawful sexual intercourse with a girl between the ages of 13 and 17 should be seven years imprisonment. This represents an increase from five years penal servitude where the girl is aged between 15 and 17 and a reduction from penal servitude for life where the girl is aged between 13 and 15. Para 4.10 (para 4.13).

38. A person who has sexual intercourse with a girl under the age of 13 years should be liable to penal servitude for life. Accordingly, the relevant age of the girl in this context should be lowered from 15 to 13. Para 4.09 (para 4.12).

Offence of Child Sexual Abuse

39. A new offence of "child sexual abuse" or "sexual exploitation" should be created to replace the present offence of "indecent assault with consent". The definition should be based on the Western Australian definition of child sexual abuse which we have recommended for adoption in civil proceedings in para 1 above. Only sexual activity engaged in for the sexual gratification of the accused or another, or as an expression of aggression, threat or intimidation should constitute an offence. In any prosecution for the offence, the onus should be on the accused to establish that he had no improper motive. The offence should be prosecutable summarily or on indictment at the election of the DPP. Depending on the nature of the offence, the maximum penalty should be between 5 and 7 years imprisonment. Para 4.19 (para 4.07).

40. It should only be possible to commit the offence referred to in the previous paragraph with a child under 15 years of age. However the conduct in question should also be a criminal offence when committed with a boy or girl of 15 or 16 years of age where the perpetrator is a 'person in authority' as defined in para 46 below. Para 4.20 (para 4.22).

Mistake

41. In a prosecution for a consensual sexual offence, there should be a defence available to the accused that he genuinely believed at the time of the act, on reasonable grounds, that the girl had attained the age of consent or an age attracting a less serious penalty. In arriving at a conclusion as to whether he did so believe, the Court should be entitled to take into account whether there were reasonable grounds on which he could hold such a belief. Paras 4.14 to 4.15 (paras 4.15 to 4.17).

Liability of Girl or Boy

42. There should be no change in the present law that where a person is charged with having sexual intercourse or sexual activity falling short of intercourse with a girl under a specified age, the girl is not subject to any criminal liability. The same should apply to any offence of anal penetration committed by a person in authority or by a person five years older than the boy in question or other sexual activity with boys under a specified age. Para 4.23 (para 4.21).

Homosexual Offences

43. Sections 61 and 62 of the Offences Against the Person Act, 1861 and s11 of the Criminal Law (Amendment) Act, 1885 which render criminal acts of buggery and gross indecency between male persons should be repealed and there should be the same protection against both homosexual and heterosexual exploitation of the young. It follows from this recommendation that the "child sexual abuse" offence which we have recommended should be created to replace the present offence of "indecent assault with consent", should apply equally in the case of homosexual activity. Para 4.29 (paras 4.23 to 4.33).

44. Anal penile penetration of boys and girls between the ages of 15 and 17 should continue to be an offence. Para 4.31 (para 4.33).

45. The new offence of 'child sexual abuse' should continue to be an offence in the case of boys between the ages of 15 and 17 when the perpetrator is a 'person in authority' as defined in para 46 below. Para 4.32 (para 4.33).

'Person in Authority'

46. A "person in authority" should be defined as a parent, stepparent, grandparent, uncle or aunt, any guardian or person *in loco parentis* or any person responsible, even temporarily, for the education, supervision or welfare of a person below the age of 17. Para 4.11 (paras 4.10, 4.20).

Incest

47. There should be no change in the law relating to incest. Para 4.33 (para 4.22).

THE LAW OF EVIDENCE

Competence to Give Evidence

48. The Court should continue to make the ultimate decision as to the competence of children to give evidence. The test of competency of children should be the capacity of the child to give an intelligible account of events which he or she has observed. Para 5.18 (paras 5.01 to 5.35).

Corroboration

49. The requirement to warn a jury before they can convict on the sworn evidence of a child and the requirement of corroboration of the unsworn evidence of a child should be abolished. Para 5.28 (paras 5.36 to 5.39).

The Oath

50. Section 30 of the Children Act 1908 should be repealed and replaced by a provision enabling the court to hear the evidence of children under the age of 14 without requiring them to give evidence on oath or affirm where the court is satisfied that the children are competent to give evidence in accordance with the criteria as to competency already proposed. In the case of young persons between the ages of 14 and 17 the same regime as to the giving of sworn evidence should apply as is proposed for adults and jurors generally in our forthcoming Report to the Taoiseach on that topic. Para 5.36 (para 5.44).

Expert Evidence

51. Experienced, multi-disciplinary, sexual abuse assessment teams, together with the professional associations representing those from whose ranks expert witnesses are normally drawn, should consider establishing and agreeing on a Code of Practice for the assessment of child sexual abuse cases and, in particular, for the quality and form of court reports.

    Consideration should also be given by the Presidents of the various courts to the establishment of a pool of appropriately trained mental health professionals who could be appointed by the court as independent expert witnesses.

In general, expert evidence should be admissible as to competence and as to children's typical behaviourial and emotional reactions to sexual abuse. Para 6.04 (paras 6.01 to 6.16).

Making it Easier for Children to give Evidence

52. We do not recommend the introduction of the various American exceptions to the Rule Against Hearsay recommended by us in our Consultation Paper. Para 7.05 (paras 7.001 to 7.022).

53. We do not recommend the use of surrogate witnesses. Para 7.06 (paras 7.042 to 7.044).

Closed Circuit Television

54. The use of closed circuit television (or, if unavailable, a screen) should be the rule where a witness in a case of child sexual abuse is under 17 years of age unless the Court, for special reason, decides otherwise. Rules of Court should provide for the transfer of proceedings to courthouses where the relevant facilities are available. Para 7.11 (paras 7.026 to 7.038, 7.045 to 7.052).

Depositions

55. The Criminal Procedure Act, 1967 should be amended to provide for the video-recording of any District Court deposition taken from a witness aged under 17 years in these cases, unless the Court, for special reason, rules that the deposition be taken in the ordinary way. The video-recording should be presented as the child's evidence at all trials on indictment, as the normal procedure, unless the Court decides, on an application by the accused, that, in the interests of justice and fair procedures, the child should give evidence at the trial. In that event, the evidence should be given on closed circuit television or from behind a screen. Para 7.14 (paras 7.074 to 7.084).

Out of Court Video

56. Provision should be made for the admission in evidence of a video-recorded interview with a child recorded out of court and conducted by an appropriate person, e.g. an appropriately qualified child examiner, a doctor, a psychologist, a Ban Garda, or a social worker, provided the child is made available for cross-examination. In cases going forward for trial on indictment, the video-recorded testimony should be first shown in the District Court on notice to the defence. The child could then be cross-examined and the cross-examination recorded so that it could be played at the trial. The child would not have to give evidence at the trial itself unless the Court deemed it necessary in the interests of justice for the child to do so. The Court of trial would decide

whether any such video-recorded evidence would be admissible. This procedure could be followed in addition to or in substitution for the recording of the child's deposition in the District Court as provided for in the previous recommendation. Provision should be made, in addition, for the admission of a preliminary video in evidence for the first time at the trial itself, with or without additional cross-examination as the Court may direct. In any case where the Court requires the child to be cross-examined at the trial, the child could give evidence on closed circuit television. Para 7.20 (paras 7.053 to 7.073).

The Child Examiner

57. In a prosecution for child sexual abuse, the court should have power to appoint an examiner, for special reason, on the application of the DPP. The accused, however, should continue to be entitled to cross-examine the alleged victim himself or through his counsel or solicitor at the deposition stage and (when the presence of the child is required) at the trial, except where the court is satisfied that, having regard to the age and/or mental condition of the alleged victim, the interests of justice required that the cross-examination be conducted through a child examiner, in which event the examiner should be required to put to the alleged victim any question permissible under the rules of evidence requested by the defence.

Child examiners should be experienced at interviewing children and specially trained in child language, psychology and the relevant law with particular emphasis on the law of evidence. Para 7.26 (paras 7.078, 7.092).

Preliminary Examination

58. Where an offence of child sexual abuse is to be tried by a jury, the preliminary examination should be dispensed with and the District Justice should return the accused for trial as if the preliminary examination had been waived under section 12 of the Criminal Procedure Act, 1967, having first taken and recorded any depositions sought from the complainant or any cross-examination of the complainant in respect of any preliminary video-recording of an interview then shown in court and having taken any other deposition sought by the prosecution or the accused. The accused should be entitled in every such case to apply to the court of trial before he is arraigned for an order directing that he be discharged on the ground that there is no *prima facie*. case against him. Para 7.30 (paras 7.087, 7.100).

Guardian Ad Litem

59. The appointment of a *guardian ad litem* for the complainant is not recommended. Para 7.33 (paras 7.086, 7.099).

Support Person

60. Although no special legislation would be necessary, the trial judge, at his or her discretion, should allow witnesses whose age or physical condition may so require to give evidence in a particular location in the Court and permit a so-called "support person" to sit in close proximity or, in the case of very young children, to take the child on his or her lap, provided there is no communication of any sort between the witnesses and the "support person". Para 7.34 (paras 7.085, 7.098).

Identification

61. Where the case against the accused contains evidence of an identification parade or other recognised identification procedure and adequate notice is given to the accused, it should be presumed that the person identified is one and the same as the accused. The accused may, in turn, challenge the presumption on giving appropriate notice to the prosecution. Para 7.31.

General

62. (a) The Court should permit the use of anatomical dolls and other demonstrative aids to testimony.

(b) Where possible, courts should sit in the smallest and brightest courtroom available and dispense with the wearing of wigs and gowns in these cases. If possible, judge, counsel and child witness should sit at the same table while the child gives evidence.

(c) Special waiting room facilities should be provided with toys, books and games available for children. Wherever possible, children should not have to share a waiting room with other adults (apart from any accompanying adult) and should never have to share a waiting room with the accused or witnesses called on his behalf.

(d) Similar provisions should be made for excluding from the Court persons not involved in the case as are made in the Commission's Report on *Rape*.

(e) At no stage in the investigative process in relation to child sexual abuse prosecutions should the child be subjected to leading questions in relation to any matters of significance.

(f) This exclusion of leading questions should apply also in civil cases where an issue of child sexual abuse arises.

(g) The use of anatomical dolls and other demonstrative aids in the investigation of child sexual abuse cases should not be outlawed.

(h) Special care should be exercised by the Director of Public Prosecutions in selecting prosecuting counsel in child sexual abuse cases. The introduction of a panel system might be considered.

(i) The legal professions should give serious consideration to adopting special codes of practice relating to representation in, and the conduct of, cases involving children. The professions should also consider ways, including the possibility of a certification system, of ensuring that lawyers involved in such cases have appropriate training or experience.

(j) Opportunities should be provided for judges and justices who may be dealing with child sexual abuse cases to acquire information by way of training courses and otherwise as to the special problems posed by such cases.

APPENDIX A

The Pigot Advisory Group suggest that the following be covered in a Code of Practice.

(1) Timing

The video taped interview should be conducted as soon as practicable after an offence has been reported - no more than several days - but allowing for sufficient time for inter agency consultation, consideration of the circumstances surrounding the case and prior medical examination where appropriate. The video taped interview should broadly equate with a witness statement in which the first detailed account of a complaint is given to the police. A supplementary interview can be done in those cases where the prosecutor having viewed the video and considered the papers in the case, needs to elicit further information.

(2) Location

Video taped interviews can take place in purpose built suites in hospitals or in police stations where suitable facilities are available.

(3) Equipment

The video equipment used should be of very high quality, capable of recording the words, gestures and facial expressions of all the parties present in the room. Two cameras should be used: a static camera giving a general view of the room and a moving camera, together with

film.

(4) Participants

Ideally, the child should be interviewed by a single interviewer, nominated by the different agencies of child welfare and police department. With very small children, parents can be present. The interviewer will normally be a social worker or police officer especially trained in the handling of child abuse cases. Because it is envisaged that recorded interviews will substantially replace examination-in-chief at the trial, interviewers must receive training in the law of evidence, especially as it relates to rules and procedures for the examination of witnesses in court.

(5) Consent

Consent of child witnesses and their parents to the making of a video recording should only be sought where consent would be necessary if the interview were not recorded. However, the fullest possible information should always be given to interested parties. Where serious offences have been committed against children, video recording should be the standard and accepted way in which the evidence is given to the police and the courts. If a tape is to be used subsequently for training purposes, specific consent should be sought.

(6) Conducting the Interview

The Committee endorsed the "stepwise" approach to the interview which requires the interviewer to proceed from the most general open aspects of the interview to the more specific.

(7) Leading Questions

Video taped interviews should be conducted as far as possible in accordance with the rules of evidence which govern the examination-in-chief of witnesses in court, which it is designed to replace. Thus, leading questions should be avoided. "Where children are concerned the courts already allow some latitude in this area depending upon the child's age and understanding. We think the important point is that interviewers should never be the first to suggest that a particular offence was committed or that a particular person was the perpretator. We do not believe that the courts would exclude fairly conducted interviews for purely technical reasons or because of the inclusion of occasional insignificant leading questions. Nevertheless, it should be remembered

that crucial leading questions which relate to the central facts of a case must be avoided wherever possible. This may well result in the exclusion of the interview at court."[1]

(8) Anatomically Correct Dolls

A code of practice should make clear that such aids should only be used to help the child to establish details with which he or she may have verbal difficulties once the general substance of a complaint is clear.

(9) Showing the Recording to the Accused

The video taped interview should be shown to the accused as soon as practicably possible, though he may choose to reserve his comments until his solicitor is present.

(10) Ownership, Copies and Storage

Ownership of the recording should be vested in the responsible police force and copies should be sent to the prosecuting authority and to the social services only, which copies should be returned to the police when they are no longer required. An accused person or his legal adviser should be allowed reasonable facilities to view the video recording at a police station or prison establishment but should not be allowed to borrow the tape.

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1 Report of the Advisory Group on Video Evidence, Home Office, London, December 1989, p42.

APPENDIX B

PART I

List of registered participants at Seminar November 1989
Ms Monica Barnes, T.D.

Dr Aileen Beirne
Director
Community Care
Kilkenny

Mr John Bergin
National Gay Federation

Ms Niamh Bhreathnach
The Labour Party

Ms Paula Birmingham
Barnardos

Mr Frank Boughton
Principal Officer
Department of Justice

Ms Julie Brennan
South Eastern Health Board
Kilkenny

Mr Brendan Broderick
President
Psychological Society of Ireland

Ms Dervla Brown
Free Legal Advice Centres
Dublin

His Honour Judge J G Buchanan

Mr Raymond Byrne
Irish Council for Civil Liberties

Dr Patricia Callan
Midland Health Board

Ms Mary Canavan
Council for the Status of Women

Mr John Carr
Education Officer,
Irish National Teachers Organisation

Ms Mary Casey
Southern Health Board
Mallow

Mr Peter Charleton, B.L.

Dr Anne Clancy
Mid Eastern Health Board,
County Clinic,
Navan

Sgt. Catherine Clancy
Garda Siochana
Ballyshannon

Ms Brid Clarke
Senior Social Worker,
Eastern Health Board

Ms Anna Comerford
Health Centre
Wicklow

Dr Alpha Connelly, B.L.
Faculty of Law
University College Dublin

Ms Siobhan Connolly
Social Work Team Area 7
Eastern Health Board

Mr Colin Conroy
Parents with Children in Care

Mr Tom Cooney
Irish Council for Civil Liberties

Ms Clodagh Corcoran

Dr Margaret Cosgrove
Midland Health Board

Mr Joe Costello
Association of Secondary Teachers in Ireland

Ms Mary Cox
CARI Foundation

Ms Breeda T Coyle
President,
Institute of Guidance Counsellors

Ms Mary Crilly
Cork Rape Crisis Centre

Ms Gina Curtis
Women's Aid

Ms Nicola Darling
St Francis Clinic
Temple Street Hospital

District Justice Sean Delap

Mr Don Donnelly
Gay & Lesbian Equality Network

Mr G P Donnelly
Senior Social Worker
North Eastern Health Board
Cavan

Mr Barry Donoghue
Office of the Chief State Solicitor

Ms Joan Doran
Irish Parents Together

Mr Colman Duggan
St Louise's Unit
Our Lady's Hospital
Crumlin

Mr Robert Eagar
Solicitor

Ms Caroline Fennell, B.L.
Faculty of Law
University College Cork

Ms Nuala Fennell, T.D.

Ms Elaine Fitzgerald
St Clare's Unit
Temple Street Hospital

Dr Carol Fitzpatrick
St Clare's Unit
Temple Street Hospital

Dr Thomas Fitzpatrick
Mid Western Health Board,
County Clinic, Ennis

Ms Patricia Fleming
AIM Group

Brother Terence Flynn O.H.
St John of God
Child and Family Centre
Rathgar

Mr Robbie Gilligan
Department of Social Studies
Trinity College Dublin

Mr Brendan Grogan, Barrister-at-Law

Mr Adrian Hardiman, S.C.

Ms Mary Horkan
Department of Social Administration/Social Work
University College Dublin

District Justice Gillian M Hussey

Mr Brian Ingoldsby
Department of Justice

Dr T M R Jackson
Director of Community Care
Southern Health Board

Ms Siobhan Jennings
Health Centre
Coolock

Ms Marie Keenan
The Rutland Centre
Dublin 6

Mr Fran Kelleher
Social Worker
Eastern Health Board

Ms Siobhan Keogh
Senior Social Worker
County Clinic, Mullingar

Dr Diana Kiely
Senior Area Medical Officer
Westmeath/Longford

Ms Maire Kirrane
Barrister-at-Law

Ms Gloria Kirwan
Social Work Team Area 7
Eastern Health Board

District Justice Mary Kotsonouris

Mr John Larkin
Law School
Trinity College Dublin

Mr Charlie Lennon
Association of Secondary Teachers in Ireland

Mr Andrew Logue
Director
Barnardos

Ms Christina Loughlin
Chief State Solicitor's Office

District Justice Sean Magee

Mr Paddy Mahony
Irish Association of Care Workers

Mr Finbarr Malone
Social Work Department
Raheny

Ms Sharon Malone
Irish Parents Together

Mr Patrick Marrinan, B.L.

Mr Joseph G Mathews, B.L.

His Honour Judge Michael Moriarty

Ms Dorothy Morrissey
Limerick Rape Crisis Centre

Mr Patrick MacEntee
Senior Counsel
Queen's Counsel

Ms Colette McAndrew
Senior Social Worker
Cherry Orchard Hospital

Dr Aldona McBride
Community Care
Roscommon

Dr Joe McCarroll
Family solidarity

Ms Imelda McCarthy
Department of Social Administration & Social Work
University College Dublin

The Hon Mr Justice Niall McCarthy

Mr Terry McCauley
South Eastern Health Board
Clonmel

Mr Hugh McDaid
Senior Social worker
Galway

Mr Des McDonald
Family solidarity

District Justice James Paul McDonnell

Mr Michael McGinley
Programme Manager
Community Care
Manorhamilton

Ms Helen McGovern
Solicitor

Mr Kieran McGrath
St Claire's Unit
Temple Street Hospital

Ms Catherine McGuinness
Senior Counsel

Ms Helen McLoughlin
Social Workers and Community Workers Vocational Group
L.G.P.S.U.

Dr Paul McQuaid
Mater Hospital
Dublin

Mr Derek Nally
Chairman
Irish Association for Victim Support

Dr G Nolan
Regional Director
South Eastern Health Board

Supt Phyllis Nolan
Garda Community Relations

Ms Olive Nugent
Irish Country Women's Association

Dr M O'Boyle
South Eastern Health Board

Mr Brendan O'Connor
CARI Foundation

Ms Monica O'Connor
Women's Aid

Mr Pat O'Dwyer
Senior Social Worker
Southern Health Board
Cork

His Honour Judge Kevin O'Higgins

Dr Winifred O'Neill
Community Care Office
Rathdown
Dublin 7

Mr Cian O'Tighearnaigh
Irish Society for the Protection of Cruelty to Children

Ms Deirdre Pemberton
Irish Association of Social Workers

Dr Patricia Prendiville
County Clinic
Clonmel

Ms Anne Punch
Limerick Rape Crisis Centre

Ms Bernie Purcell
Director
Dublin Rape Crisis Centre

Ms Geraldine Quigley
Social Worker
South Eastern Health Board
New Ross

Dr Ailis Quinlan
Director of Community Care
Eastern Health Board
Ballyfermot

Mr John Quinn
Senior Social Worker
Eastern Health Board

Mr Jim Richardson, B.L.

Ms Marilyn Roantree
Senior Social Worker
Eastern Health Board

Mr Ruth Robinson
Social Workers & Community Workers Vocational Group

Mr Kieran Rose
Gay & Lesbian Equality Network

Ms Bride Rosney
Teachers Union of Ireland

Ms Frances Ruane
Guidance Counsellor
Blakestown Community School

Dr Imelda Ryan
Our Lady's Hospital
Crumlin

Ms Dorothy Staunton
St Frances Clinic
Temple Street Hospital

Mr Patrick Terry
Special Legal Advisor
Department of Justice

Ms Ruth Torode
Department of Social Studies
Trinity College Dublin

Ms Mary Trainor
Social Worker
St Francis Day Hospital

Ms Rosemary Troy
Childline/Irish Society for the Protection of Cruelty to Children

Mr P J Tweedale
Office of Law Reform
Northern Ireland

Dr Mary Twomey
Southern Health Board
Cork

Ms Eilis Walsh
Irish Association of Social Workers

Dr Cyril F Warde
Director of Community Care
Eastern Health Board

Dr Rosalea Watters
Director of Community Care

Dr Moira Woods
Rotunda Hospital

PART II

List of Persons and Bodies from whom Submissions in writing were received

Barnardos

Angela and Chris Carey
Dublin 24

Clonmel Rape Crisis Centre

Eastern Health Board
Social Work Department
Community Care Area 7

Family Solidarity

Gay and Lesbian Equality Network

Gay Health Action

Mr Robbie Gilligan
Lecturer in Social Work
Trinity College Dublin

District Justice Mary Kotsonouris

Mr Brian Ingoldsby*
Department of Justice

Institute of Guidance Counsellors
Limerick

Irish Association of Social Workers

Irish Council for Civil Liberties

Irish National Teachers Organisation

District Justice James Paul McDonnell

Mr Kieran McGrath,
Senior Social Worker
Temple Street Hospital
Dublin

Ms Doris Manly
Killiney
Co Dublin

Mr James Martin*
Department of Justice

National Gay Federation

St Clare's Unit
Children's Hospital
Temple Street

St Louise's Child Sexual Abuse Assessment Unit
Our Lady's Hospital for Sick Children
Crumlin
Dublin

Social Workers and Community Workers Vocational Group
Local Government and Public Services Union

South Eastern Health Board
Clonmel Sexual Abuse Study Group

Ms Dorothy Staunton, B.Soc., Sc., Dip.Appl.Soc.St.

Threshold: National Campaign for the Homeless

Ms Ruth Torode
Lecturer in Social Work
Trinity College Dublin

Western Health Board
Community Care
Merlin Park Regional Hospital
Galway

*Denotes personal submission