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Learning lessons from the past: Legal issues arising from Ireland's child abuse inquiries

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Abstract

Inquiries have played an important role in telling the stories of children abused and neglected in Ireland in situations of family abuse, clerical abuse and institutional abuse. The inquiries – associated with the name of the chairperson (Ryan) or by their geographical remit (Dublin, Ferns, Cloyne, Kilkenny and Roscommon) – serve to vindicate the rights of the children affected and to identify the failure of the authorities to protect children from harm. They also make numerous recommendations as to how children's treatment can be improved. Although each inquiry had varying terms of reference, scope and status, together they address a wide range of issues of both specific and general significance to the issue of child protection. Focus is clearly placed on how child protection practice can be improved but many of the inquiries also comment on the legal framework and make recommendations for the reform of various aspects of child protection law and policy. This paper argues that the legal implications of these inquiries can be reduced to three overarching issues: the legislative provision for the mandatory reporting of child abuse; the need for robust and effective inspection mechanisms to ensure the protection of children, and the issue of constitutional law reform. The analysis shows that these measures are neither straightforward nor a panacea to the intractable problem of providing effective protection to children from abuse. However, taken with the other recommendations identified in the child abuse reports, they represent the beginning of a lasting legacy for the victims of abuse so tragically failed by their families, by the state and by society at large.

Keywords: Child abuse; inquiry; mandatory reporting; constitutional reform; accountability

Introduction

Ireland's modern history is littered with high profile stories about the physical, sexual and emotional abuse of children. National inquiries have played an important role in telling the stories of children abused and neglected and they represent an important vindication of the rights of individual children. The inquiries have also identified the failure of the authorities to protect children from harm and made recommendations as to how this can be improved. Although each inquiry had varying terms of reference, scope and status, together they address a wide range of issues of both specific and general significance to the issue of child protection. Focus is clearly placed on how child protection practice can be improved but many of the inquiries also comment on the legal framework and make recommendations for the reform of various aspects of child protection law and policy.

The aim of this paper, therefore, is to reflect on the legal issues that arise from these inquiries and to consider the progress made in their implementation. The first section presents a summary of several major inquiries into the treatment of children. For convenience, these are divided into inquiries dealing with abuse within the family setting (namely the Kilkenny and the Roscommon Child Abuse Inquiries), those dealing with institutional abuse (the Ryan Report) and inquiries into clerical child abuse – namely the Ferns, Dublin and Cloyne Dioceses. The second section of the paper identifies the key legal issues that emerge from these reports. Because a comprehensive analysis is beyond the scope of this paper, focus is placed on the three most pertinent issues of overarching significance to the issues raised in inquiries: First, the legislative provision for the mandatory reporting of child abuse; second, the need for robust and effective inspection mechanisms to ensure the protection of children, and third, the issue of constitutional law reform.

Part 1 – An overview of abuse inquiries

As noted above, Irish child abuse inquiries can be divided into three categories – those dealing with abuse in the family setting which explored the failure of state authorities to protect children from harm, those investigating institutional abuse – notably the Ryan Commission – and inquiries dealing with clerical child abuse. A brief account of these three categories is set out below.

1. Inquiries dealing with abuse in the family setting

There have been a number of inquiries into child abuse in the family setting in which the state's failure to identify and respond effectively to the ill-treatment of children has been examined. The two major inquiries considered here are the Kilkenny Incest Investigation and the Roscommon Child Abuse Inquiry.

The Kilkenny Incest Investigation was the first major child abuse inquiry in Ireland and in 1993 the Kilkenny Report brought the issue of child abuse directly into the public domain for the first time (McGuinness, 1993). Examining the circumstances surrounding the continued physical and sexual abuse by a father of his daughter over a 13 year period during which the family was known to a number of child protection professionals, it sent 'shockwaves throughout the entire country' (Howlin, 1993, col. 719) and is widely regarded as having provided the catalyst for an overhaul of child protection services. It made a number of strongly worded recommendations that highlighted the importance of effectively resourcing the legal framework for child protection - the Child Care Act 1991 - and that concerned the need for reform of both the Constitution and the laws around the reporting of child abuse. In relation to the former, the Inquiry held that:

the very high emphasis on the rights of the family in the Constitution may consciously or unconsciously be interpreted as giving a higher value to the rights of parents than to the rights of children. We believe that the Constitution should contain a specific and overt declaration of the rights of born children (McGuinness, 1993, p. 96).

A related recommendation was made to amend Article 41 (concerning the Family) and Article 42 (concerning education and state intervention in the family) and the

Government was pointed in the direction of the United Nations Convention on the Rights of the Child in this regard (McGuinness, 1993). The Inquiry also proposed reform of the 1987 Guidelines on Procedures for the Identification, Investigation and Management of Child Abuse and recommended that the revised instrument be placed on a statutory basis incorporating both a code of mandatory reporting for professionals and specific protocols on the handling of child abuse complaints and case management (McGuinness, 1993).

The Roscommon Child Care Inquiry, published in 2010, examined the failure of the authorities to intervene effectively in the lives of children who suffered appalling abuse and neglect at the hands of their parents (Gibbons, 2010). Like the children in the Kilkenny case, these children were known to the authorities, including the courts, but the Health Service Executive's (HSE) involvement with the family stopped short of removing the children, for several years. The Inquiry made numerous recommendations for the operation of child protection services that addressed ways to ensure the more effective handling of child abuse complaints by the HSE. Many of the recommendations mirrored those made in the Kilkenny Inquiry over 15 years before. Although it was not within its remit to recommend legislative change, the Inquiry noted that 'the Government was committed to holding a referendum on inserting children's rights into the Irish Constitution and to legislative change to ensure that the voice of the child is heard when courts are considering matters that affect them' (Gibbons, 2010, p. 84). This was welcomed in light of the fact that the 'failure to consult with, and to hear, the voice of the six children was a notable feature in this case' (Gibbons, 2010, p. 84). The Inquiry recommended that 'the HSE ensure that all appropriate policies and procedures are compliant with the requirements of the United Nations Convention on the Rights of the Child for children to be heard in all matters that concern them' (Gibbons, 2010, p. 84). It also made specific recommendations about how the court process could be improved to offer more effective protection to children most of which concerned ensuring that the necessary specialist legal advice and information is available to those taking decisions regarding the measures necessary to protect children from harm (Gibbons, 2010, p. 86). This reflects the fact that lack of familiarity with the law was a notable feature of the way this case was handled.

Although the Kilkenny and Roscommon Reports concerned different circumstances almost 15 years apart, the legal issues can be considered to be broadly similar in that they concern the legal framework governing the handling of complaints and suspicions about child protection and the role of the state vis a vis the family in protecting children from harm. These issues are discussed further below.

2. Inquiries concerning abuse in institutional settings

The Commission to Inquire into Child Abuse was established in 2000 with the function of investigating the abuse of children in institutions in the State. The Commission was largely a fact-finding inquiry that focused on: establishing the causes, nature, circumstances and extent of the abuse that occurred; determining the institutions in which such abuse occurred; the systems of management, administration, operation, supervision, inspection and regulation of such institutions, and the extent to which the persons or bodies with responsibility contributed to the occurrence or incidence of such abuse. Its primary focus was to hear the direct testimony via a Confidential Committee

of those (1090 people were heard in all) who reported being abused as children in industrial and reformatory schools, children's homes, hospitals, schools, foster care and residential institutions between 1914 and 2000. This was combined with the work of an Investigation Committee which undertook to investigate all institutions in respect of which more than 20 complaints of child abuse were made (see Chapter 5 Volume I).

The Commission published its report (known as the *Ryan Report*, after its Chairman Judge Sean Ryan) in five volumes in 2009 (Ryan, 2009). It made a number of conclusions (at Chapter 6 Volume IV), namely that physical and emotional abuse and neglect had been features of the institutions investigated, that sexual abuse had occurred in many of them and that schools were run in a severe, regimented manner that imposed oppressive discipline on children. It also concluded that the 'deferential and submissive attitude' of the Department of Education towards the Congregations who ran the institutions 'compromised its ability' to carry out its statutory duty of inspection and monitoring of the schools and indeed the system of inspection by the Department of Education was described as being 'fundamentally flawed and incapable of being effective' (Ryan, 2009, paras. 6.03 and 6.06). In particular, it criticised that the Inspector was not supported by a regulatory authority with the power to insist on changes being made.

Of the other numerous conclusions, many pointed to a failure to prioritise the best interests and rights of the children placed in the Congregations' care both by the Congregations and by the state authorities charged with their oversight. For example, the Report notes (para. 6.10) that staff of the Reformatory and Industrial Schools considered themselves to be 'custodians rather than carers', and that a climate of fear permeated most of the institutions investigated (paras. 6.09-6.17). Complaints by parents and others to the Department of Education were not properly investigated and were either dismissed or ignored (para. 6.13), and cases of sexual abuse were managed with a view to minimising the risk of public disclosure and consequent damage to the institution and the Congregation (para. 6.20). The Commission noted the level of emotional abuse that disadvantaged, neglected and abandoned children were subjected to as a 'disturbing' element of the evidence that came before it (para. 6.39). Given the nature of its conclusions and the fact that it aimed 'to prevent where possible and reduce the incidence of abuse of children in institutions and to protect children from such abuse', it is surprising that the Ryan Report made so few recommendations concerning measures aimed at raising awareness about and support for increased protection for the rights of children in Irish law. It recommended that 'childcare policy should be child-centred', 'the needs of the child should be paramount' (Ryan, 2009, para. 7.06), and that a 'review of legislation, policies and programmes relating to children in care' should be carried out at regular intervals (para. 7.07). However, the Commission did not remark on whether it considered Irish law to be 'fit for purpose' to protect children in care. Nor did it consider whether legislative or even constitutional change was necessary to advance the goal of child protection. Importantly, it did address the issue of accountability and identified the importance of independent inspection mechanisms and the need to ensure that National Guidelines for the Protection and Welfare of Children (the Children First Guidelines) were implemented consistently and uniformly (para. 7.12, 7.13). The Commission did not recommend, as others had done, the introduction

of mandatory reporting or the placement of the Children First Guidelines on a statutory basis.

3. Inquiries into clerical sexual abuse

Although The Ryan Commission was the state's largest inquiry into the abuse of children in institutional care, the issue of child sexual abuse in the community has also been the subject of several inquiries. The major inquiries concerned the handling of complaints of child abuse in the dioceses of Ferns, Dublin and Cloyne. The findings and recommendations of these reports are now outlined.

The Ferns Inquiry - 2005

The Ferns Inquiry was set up in March 2003 to investigate allegations and complaints of child sexual abuse by members of the clergy in the Diocese of Ferns and to consider the appropriateness of the response of the Church and state authorities to these complaints. The Report identified over 100 allegations of abuse made between 1962 and 2005 against 21 individual priests, and raised extremely serious concerns about the failure of the statutory authorities, including the Gardaí, to respond appropriately and effectively to the allegations (Murphy, Buckley and Joyce, 2005). Although the abuse in Ferns took place some years ago, the Report's recommendations remain directly relevant to today's circumstances, not least because many of them have yet to be implemented. The key recommendations were that:

- the Department of Health and Children (as it then was) launch and repeat periodically a nationwide publicity campaign on child sexual abuse focusing on the innocence of victims, the harm abuse causes, that abuse is perpetrated by those in all walks of life including respected men and women, that it is a serious criminal offence and that children who complain will be listened to.
- efforts be made to preserve and develop the open environment which encourages the reporting of child sexual abuse;
- every organisation whose employees or volunteers work unsupervised with children develop a code of conduct to ensure that children are kept safe from abuse, and
- measures be taken to increase public confidence in the reporting and investigating system, and that specialist child protection units be developed within the Gardaí).

In addition, three specific legal issues were highlighted. The first concerned the recommendation to introduce a criminal offence of wanton or reckless endangerment. According to s 176 of the Criminal Justice Act 2006, which implemented this recommendation, it is an offence to cause or permit any child (under 18 years) to be placed or left in a situation which creates a substantial risk to the child of being a victim of serious harm or sexual abuse, or to fail to take reasonable steps to protect a child from such a risk while knowing that the child is in such a situation. The second legal issue related to the Inquiry's concern that the HSE does not currently have explicit power to apply for a court order prohibiting or otherwise restraining a person suspected of abusing children from having unsupervised contact with them. The introduction of such a legal provision was recommended by the Report but it has not yet been implemented.

Finally, the Ferns Inquiry highlighted the fact that the HSE currently has inadequate powers to intervene to protect a child where the alleged abuse occurs outside the family. Currently, as the report notes, the Child Care Act 1991 does not protect children in this situation insofar as the HSE powers only apply to child sexual abuse within the family. Accordingly, the Inquiry recommended that an in-depth study be undertaken into the full remit of the HSE to intervene in relation to child sexual abuse perpetrated by a non-family member without the connivance of the child's parents. It is not clear what attention has been focused on this implementation.

The Dublin Report - 2009

The Dublin Inquiry (Commission of Investigation, 2009) was concerned with the institutional response to complaints, suspicions and knowledge of child sexual abuse in the Dublin Archdiocese between 1975 and 2004. In contrast to the Ryan Report, the Commission of Inquiry investigating the Dublin Archdiocese had no mandate to establish whether abuse occurred. Nor had it a specific remit to make recommendations although the Report highlights the Commission's views on relevant issues throughout. According to the Report:

The Dublin Archdiocese's pre-occupations in dealing with cases of child sexual abuse, at least until the mid 1990s, were the maintenance of secrecy, the avoidance of scandal, the protection of the reputation of the Church, and the preservation of its assets. All other considerations, including the welfare of children and justice for victims, were subordinated to these priorities. The Archdiocese did not implement its own canon law rules and did its best to avoid any application of the law of the State (para. 1.15).

In respect of the failure to apply civil (as opposed to canon) law, the Report notes that The Archbishops, bishops and other officials cannot claim that they did not know that child sexual abuse was a crime. As citizens of the State, they have the same obligations as all other citizens to uphold the law and report serious crimes to the authorities (para. 1.32).

The Dublin Report thus uncovered a failure on the part of the Church authorities to properly investigate complaints and allegations of abuse made in respect of individual clerics. Part of that response was a failure to report serious crimes to An Garda Síochána. However, the Commission was also critical of the role of the State in failing to ensure that its laws were applied equally and this, it noted, added to the culture of impunity that prevailed as a result (para. 1.113). The Report concludes that:

It is the responsibility of the State to ensure that no similar institutional immunity is ever allowed to occur again. This can be ensured only if all institutions are open to scrutiny and not accorded an exempted status by any organs of the State (para. 1.113).

In summary, then, the Dublin Report concluded that the Church authorities failed to refer serious crimes to the civil authorities and to ensure that in these matters the welfare of the child concerned was a paramount consideration. The Commission also concluded that 'the law, as it stands does not provide adequate powers to the health

authorities to promote the welfare of children who are abused, or in danger of being abused, by people outside the family and, in particular, by people who have privileged access to children (para. 6.7). In particular the Report highlights that the function of the HSE under the Child Care Act 1991 is confined to 'promoting the welfare of children in its area who are not receiving adequate care and protection'. Section 3 goes on to provide that in pursuance of this function the HSE must take such steps as are necessary to identify children who are not receiving such care and protection and, having regard to the rights and duties of parents, regard the welfare of the child as the paramount consideration and insofar as is practicable give due consideration to the wishes of the child.

Concern has thus been highlighted in both the Ferns and the Dublin Inquiries that the Child Care Act 1991 does not give adequate powers to the HSE with respect to protecting children from harm. According to the Dublin Commission, 'it would be preferable if there was a clear unambiguous listing of the statutory functions and powers of the HSE [in the Act] so that there could be no doubt about the extent of its power to intervene in child protection issues' (para. 6.26).

In agreement with the Ferns Report, the Report on the Dublin Archdiocese concluded (para 6.27) that the powers of the HSE in the 1991 Act were designed to protect a child from abuse in a family situation. It went on to express concerns about 'the lack of clear power to collate and maintain relevant information and to share that information with other relevant authorities' (para. 6.31).

The Cloyne Report - 2010

The third Report into the handling of clerical sexual abuse of children concerned the Diocese of Cloyne in East Cork (Commission of Investigation, 2011). Like the other inquiries in this category, it was not the purpose of this inquiry to establish whether abuse occurred but rather to consider whether the response of the Church and the state authorities to the complaints and allegations of clerical child sexual abuse was 'adequate or appropriate' (p. 4). In short, the Report details that in many instances the responses of those in positions of authority – both Church and state – were inadequate or inappropriate. The Report concluded that the 'greatest failure' (p. 6) was that some child sexual abuse allegations were not reported to the Gardaí (police). It criticised the failure on the part of the bishop with responsibility to implement agreed child abuse procedures and concluded that the Vatican was 'entirely unhelpful' to any bishop who wanted to implement such procedures (p. 5). From the State's point of view, the Report was largely complimentary about the role of the Gardaí, although it expressed concern about the police's approach in three cases. Moreover, although it found the response of the health authorities to be adequate, it expressed reservations that the State's laws and guidelines are 'sufficiently strong and clear' for child protection (Commission of Investigation, 2011: para 1.72). The Report acknowledged that improvements have taken place in Cloyne since 2008, but it noted deliberate refusal on the part of some Church representatives to co-operate with its own protocols regarding the reporting of allegations of child abuse and an approach which prioritised the interests of the alleged abuser over the victim. Following the publication of the Report the Minister for Justice and Equality and the Minister for Children and Youth Affairs issued a joint statement expressing sorrow for the State's part in the failures identified and committing to the

enactment of new laws to allow the sharing of 'soft' information on people wishing to work with children and making it an offence to withhold information on crimes against children and vulnerable adults (Shatter and Fitzgerald, 2011). These matters are currently under consideration.

Part 2 – The key legal issues arising from these Reports

The above summary of the Child Abuse Inquiry Reports makes clear that even though they shared a common purpose – to vindicate the rights of victims by establishing a record of their abuse and ill-treatment and identifying the failures by the authorities – they responded to that task in different ways. The recommendations range from the general (to review policy in the area of child protection) to the specific (to introduce mandatory reporting of child abuse) and from the symbolic (creation of a monument to the victims of abuse) to the practical (introducing protocols to improve communication between agencies). While it is clear from the Reports that the adoption of legal measures is not the only means by which children can be better protected from harm in Ireland, it is notable that the Inquiries refer to precise legal issues such as the need to reform the statutory basis of our child protection framework, to introduce legal mechanisms to allow information exchange about those who pose a risk to children and to impose a legal obligation on professionals to report suspicions about child abuse to the authorities. The Reports illustrate clear instances of the failure to listen to children, to actively promote their interests and rights and to take every possible measure to ensure that complaints of child abuse are investigated and followed up with the necessary rigour, care and sensitivity. There is no scientific way to ensure that children will always be heard and their rights protected in every situation. What is clear, however, is that establishing a clear legal framework informed by these core principles is an important starting point, while implementation of these goals – including via effective monitoring and oversight mechanisms – is a vital next step (UN Committee on the Rights of the Child, 2003; Council of Europe, 2009). Against this backdrop, it is notable but perhaps not surprising that many of the Inquiries have identified the inadequacy of the legal framework on child protection as a cause for concern and made precise and general recommendations for reform. Although only one Report (Kilkenny) identified explicitly the link between the state's failure to protect children and the need for Constitutional reform, the argument is made elsewhere that it is indeed pivotal to reforming the way children are treated (Constitution Review Group, 1996; Kilkelly and O'Mahony, 2007).

There are a number of precise legal issues discussed in the Reports, notably the question of the powers of the HSE to intervene in respect of children at risk of abuse other than in a family setting. In addition, three legal issues relevant across the entire area of child protection emerge from the the Inquiries. The first concerns the legal framework around the reporting of abuse to the authorities; the second is the establishment of robust and effective mechanisms to ensure the protection of children, and the third is the general question of whether Irish law in its current state provides sufficient protection for children's rights. Here, particular focus will be placed on the need to amend the Constitution to give explicit protection for children's rights.

1. Reporting abuse to the authorities

Many of the Reports summarised above highlight a failure to report child abuse to the authorities. In some instances, this failure was wilful; in others it arose on account of the nature of the relationship between the bodies concerned, where a culture of deference between Church and State prevented the necessary oversight from being effective. Some of the inquiries recommended the introduction of mandatory reporting, having drawn the arguably logical conclusion that such a measure is necessary to ensure the effective protection of children from abuse. Article 19 of the Convention on the Rights of the Child, a legally binding treaty ratified by Ireland in 1992, acknowledges the importance of ensuring that all appropriate measures are taken to prevent child maltreatment including the identification, reporting, referral, investigation, treatment and follow-up of instances of child abuse (Committee on the Rights of the Child, 2011: paras 38-41). The Committee on the Rights of the Child has strongly recommended that states introduce a range of reporting mechanisms to facilitate the making of complaints by and on behalf of children. It has also recommended that 'the reporting of instances, suspicion or risk of violence should, at a minimum, be required by professionals working directly with children' (para. 49). Other international standards, notably the 2007 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, to which Ireland is not yet a party, highlight the importance of putting systems in place to ensure the timely and effective reporting of child protection concerns. Significantly, the Council of Europe Convention stops short of requiring mandatory reporting of the abuse of children, and instead provides in Article 12 that the rules of confidentiality must not constitute an obstacle to the reporting of child abuse or exploitation. Although the Explanatory Report of the Convention notes that many states consider mandatory reporting codes critical to the protection of children (Council of Europe, para. 89), this is clearly not the prevailing view among Council of Europe states or indeed in other parts of the world. Many contest the notion of mandatory reporting as an appropriate and effective response to child protection and there is ample evidence to suggest that far from being a panacea, the introduction of mandatory reporting even among professionals (rather than imposing such a legal obligation on the public) may instead add to, rather than solve the problems associated with ineffective child protection services (Buckley, 2009; Wallace and Bunting, 2009).

In Ireland, the introduction of mandatory reporting - referring to the creation of a legal duty on professionals to report their concerns of child abuse to the authorities - was recommended by the Law Reform Commission in 1990 (LRC, 1990), and as noted above, it was recommended by the Kilkenny Incest Report in 1993 and the Roscommon Inquiry in 2010 (notwithstanding that in both instances, the inquiry involved concerns that were known to the authorities). Until recently, the Government's response was to adopt guidance rather than mandatory rules in this area and in this regard, the Children First Guidelines were adopted as national policy in 1999, and recently published in revised form (Department of Children and Youth Affairs, 2011). Technically, therefore, reporting of child abuse concerns continues to be a matter of discretion, although the exercise of that discretion is governed by the framework of national policy and inter-agency protocols developed as a result. Although many professionals do not consider the reporting of child abuse to be optional, there is ample evidence to suggest that the Children First Guidelines are not being implemented adequately or consistently. Both the Ombudsman for Children (2010a; Logan, 2010) and the Office of the Minister for

Children (as it then was) (2008) have published reports to this effect in recent years making the somewhat logical recommendation that compliance with the Guidelines will be improved by strengthening their status and by placing them on a statutory footing (but see Buckley, 2009: 2011; Bunting and Wallace, 2009). Several additional issues arise from the child abuse inquiries in this context, principally how to ensure that those not caught by professional guidance (notably the religious authorities so indicted by the numerous reports above) be compelled to report abuse to the authorities. Although the term 'mandatory reporting' is widely used to refer to a legislative requirement which imposes a duty on a person to report suspected cases of abuse and neglect (Wallace and Bunting, 2009), it does not by definition explain how widely imposed this duty is (for example, does it cover only professionals working with children, or does it extend to anyone working with children even in a voluntary capacity, or does it extend to the public at large?) and to whom the suspected abuse must be reported. Laws also vary regarding what standard of proof is required before the obligation to report kicks in, and different approaches are taken, from one jurisdiction to the next, as to whether sanctions are imposed, criminal or otherwise, on those who fail to report. Similarly, many jurisdictions provide immunity for good faith reports while some also deal differently where relationships of confidentiality (such as that between lawyer and client, and most importantly within the confessional) are relevant (Bunting and Wallace, 2009).

The only law enacted in this area in Ireland to date is legislation that protects those who report concerns. In particular, s 5 of the Protections for Persons Reporting Child Abuse Act, 1998 provides protection from civil liability for those who report such concerns reasonably and in good faith, while s 4 provides protection for employees who report child abuse concerns. Nevertheless, debate continues as to whether the current, 'discretionary' (although some professionals clearly view this as an obligation) system for the reporting of child abuse provides sufficient protection for children who have already suffered or are at risk of harm, not least given the fact that children about whom concerns are reported may receive insufficient protection (see the Kilkenny and Roscommon reports above). Under the European Convention on Human Rights (ECHR), the state is under an obligation to put in place the systems that provide children with effective legal protection from harm (Kilkelly, 2008; O'Mahony, 2008). Moreover, the enactment of the ECHR Act 2003 means that these obligations now apply to organs of the state, including the Health Service Executive (Kilkelly, 2004, pp. 135-137). Under the ECHR, the test of whether a child has enjoyed protection from inhuman treatment (under Article 3 of the ECHR) is whether the authorities 'knew or ought to have known' about the risk of harm to the child and failed, for whatever reason, to do all that was reasonable to respond (Kilkelly, 2008). Although it is unlikely that the absence of mandatory reporting would, taken in isolation, mean that this test has been failed, the existence of a legal duty to report abuse might be seen as an objective way of ensuring that concerns about child protection are brought to the authorities' attention. At the same time, in any such legal challenge, emphasis would probably be placed more on the response of the authorities, rather than whether the law itself required that abuse be reported. As Buckley (2009) argues in a different context, mandatory reporting will not of itself ensure that the state adheres to legal requirements under the ECHR if the response to those complaints is neither adequate nor effective. To complicate matters further, emphasis has recently shifted from the introduction of mandatory reporting to the placement of the Children First Guidelines on a statutory

basis. The publication of the revised Children First Guidelines in 2011, was accompanied by a commitment by the Minister for Children and Youth Affairs to introduce legislation to 'require statutory compliance' with the Guidelines (Fitzgerald, 2011). Clearly informed by the Cloyne Report, where the diocese did not comply with either Children First or the Church's own guidelines, the Minister announced that the 'days of voluntary compliance are over when it comes to child protection'. In this regard, she made clear that a statutory requirement to report abuse – as one of a number of measures – would be introduced with systems put in place to inspect and monitor compliance with this duty among the statutory sector. In respect of statutory or non-statutory organisations that do not fall under the remit of these mechanisms, the new Child and Family Service Agency is to be given powers both to carry out audits for compliance and to investigate complaints of organisational failure to comply. So attempts are clearly being made to expand the legal framework of child protection to improve compliance with Children First among all those who come into contact with children. For organisations that depend on the state for funding, auditing mechanisms may indeed serve to ensure that they have the necessary procedures in place in this area. For those unaccountable to the state (for example, the Church) and over whom the state has no leverage, imposing the duty to report on the public at large must seem the only option.

In summary then, it is clear from many child abuse inquiries that the failure to report suspicions, complaints or allegations of abuse to the authorities has been a major barrier to the protection of children from harm. But as Buckley (2011) has made clear, reporting child abuse - and the argument for making this legally mandatory - is not as straightforward as might appear. As the Inquiries show, 'the failure to report abuse' was associated with a decision (or multiple decisions) not to report an allegation of abuse to An Garda Síochána or the health authorities as a result of factors ranging from deliberate refusal to apathy or indifference. In other cases, abuse was reported, but the state's response was ineffective for reasons relating to systemic difficulties with child protection services (Kilkenny, Roscommon). Acknowledging that it is politically attractive to respond to the child abuse inquiries by introducing a legal requirement to ensure that everyone is required to report allegations of the ill-treatment of children, the reality is that a whole range of long-term measures are necessary to change behaviour and practice both among professionals and the public. Although legislation is clearly necessary, as Buckley observes (2011, p. 2), it must 'be carefully balanced to reflect the multi-dimensional and nuanced nature of the tasks involved'.

2. Accountability via inspections and complaints mechanisms

The second legal issue that arises from the child abuse inquiries highlighted above relates to the lack of accountability within those services with responsibility for the care, education and protection of children. The Ryan Report, it is remembered, specifically highlighted that the Department of Education's inspection system was 'fundamentally flawed and incapable of being effective' (para. 6.06) and recommended that more robust systems were required to protect vulnerable children in the care of state institutions. There have been improvements in the state's inspection machinery in the last decade and a number of bodies now have statutory powers to inspect residential services for children. In particular, the Social Services Inspectorate was absorbed into the Health Information and Quality Authority (HIQA) in 2007 (ss. 39-45) and HIQA

now undertakes inspections of children's residential homes, foster care services and secure settings including High Support Units, Special Care Units and most recently the Children Detention Schools. It is very important that the Social Services inspectorate's office and functions have been placed on a statutory basis and brought within a framework of quality and standards control. As part of HIQA, the Inspectorate has a statutory power to inspect services and facilities for compliance with regulations, conditions or standards and this is backed up by powers to enter premises and compel documentation to be produced (under section 73), including in the company of An Garda Síochána if necessary (section 76). This gives necessary teeth to the monitoring and inspection function which is very welcome given the extent to which the absence of robust mechanisms to monitor children's services were a significant part of the child abuse inquiries highlighted above. While the profile of HIQA has undoubtedly been improved by its approach to making publicly available, via its website, all of the reports of the inspections that it undertakes, it enjoys an additional power (under section 51 of the 2007 Act), to cancel or refuse to register a designated centre (that provides residential services for children) where the provider has committed an offence or the centre is not being run in a manner consistent with any of the standards imposed by the Act. Although the efficacy of this power is to be seen more in the threat than in the execution, it adds further to the seriousness with which the inspection regime is taken that such a sanction - ultimately an economic one - is available to those who fail to comply with national standards on the treatment of children.

These significant improvements aside, there are gaps in the inspection regime that present cause for concern. Chief among these is the fact that HIQA has no remit over St. Patrick's Institution where 16 and 17 year olds are currently detained on remand or following conviction by the criminal courts. Falling under the remit of the Irish Prison Service, St. Patrick's Institution is instead inspected by the Inspector of Prisons (established under the Prisons Act 2007). Although a statutory agency established under the Prisons Act 2007 with powers to carry out unannounced inspections of prisons, the Inspector has few of HIQA's powers as outlined above. In addition, its reports are submitted to the Minister for Justice and Equality and can be placed before the Oireachtas only at the Minister's discretion (s 31. Prisons Act 2007). Although it is very welcome that the current incumbent - Judge Michael Reilly - has been proactive in fulfilling the Inspector's mandate and in particular has adopted standards for the inspection of the detention of children (Inspector of Prisons, 2009) which are consistent with international human rights instruments like the Convention on the Rights of the Child, the weaker status of the office means that their implementation can happen by persuasion rather than force. In addition, the remit of the Ombudsman for Children - whose office can receive complaints from children in a wide variety of settings - does not currently extend to St. Patrick's Institution meaning that this vulnerable group of children are doubly disadvantaged when compared to others in residential or secure settings in Ireland (Ombudsman for Children, 2010b). In this area at least, it appears that the lessons to be learned from the inquiries outlined above - the Ryan Report in particular - have yet to be fully taken on board.

3. Constitutional reform

Several of the child abuse inquiries made recommendations to reform the legal framework and raised concern that the HSE has insufficient powers to intervene to

protect children especially from abuse outside of the family. Of more general relevance is the question of the status of the child in Irish law and under the Constitution in particular.

For over two decades, a growing body of expert opinion has called for the constitutionalisation of children's rights in Ireland (Constitution Review Group, 1996; Children's Rights Alliance, 1997; 2006; UN Committee on the Rights of the Child, 1998; 2006; All Party Oireachtas Committee on the Constitution, 2006; Barnardos, 2007; Kilkelly and O'Mahony, 2007; Carolan, 2007; Kelly, 2007; Enright, 2008; Kilkelly, 2008; Parkes, 2008). Politically, this culminated, in 2010, in the report of a Joint Oireachtas Committee which proposed relatively radical reform of Article 42 of the Constitution, which currently deals with matters of education and the family. Although the Committee's report made proposals to deal with precise issues like the placement of children for adoption, it also recommended the insertion into the Constitution of a clause to the effect that 'the State recognises and acknowledges the natural and imprescriptible rights of all children including their right to have their welfare regarded as a primary consideration and shall, as far as practicable, protect and vindicate those rights' (Joint Oireachtas Committee on the Constitutional Amendment on Children, 2010, p. 4).

Significantly, too, the proposals included the insertion of a further clause whereby the State 'guarantees in its laws to recognise and vindicate the rights of all children as individuals'(p. 4). Identified in this clause as specific rights of importance, and clearly relevant to the subject under discussion in the child abuse inquiries above, were: 'the right of the child to such protection and care as is necessary for his or her safety and welfare' (p. 4) and 'the right of the child's voice to be heard in any judicial and administrative proceedings affecting the child, having regard to the child's age and maturity' (p. 5). The status of these proposals is, as yet, unknown although the Minister for Children and Youth Affairs reiterated as recently as 16 February 2012 that a constitutional referendum will be held in 2012 and has made a commitment to a wording that stays as close as possible to the 2010 formulation (O'Brien, 2012).

In terms of which elements of the above (or any) proposals are necessary to respond in a meaningful manner to the child abuse inquiries discussed herein, two issues arise: the first concerns the need to address the current wording – notably Article 42.5 – which can be said to frustrate children being adequately protected from abuse within the home and the second concerns the absence from the Constitution of express and autonomous rights, necessary inter alia to identify the protection of children's rights as a matter of national priority.

Both the Kilkenny and the Roscommon inquiry reports expressed support for constitutional reform to give express protection to children's rights in the Irish Constitution. Perhaps surprisingly, the other child abuse reports did not reiterate this recommendation although they made the more general point that child protection laws are in need of review and reform. One explanation for the latter position is that the Kilkenny and Roscommon inquiries concerned state intervention in the family and it is in this area (notably the high emphasis placed on the rights of the family to the detriment of the child, as it was expressed in the Kilkenny Report) that the Constitution

has been deemed particularly deficient (Enright, 2008). At the same time, the argument can be made that the absence from the Constitution of express autonomous rights for children (that is, independent of the rights children enjoy within the family) allowed (even facilitated) the rights of children to be underplayed vis à vis the rights of the alleged adult abuser in the other contexts described in the Ryan, Cloyne, Dublin and Ferns reports. It is hardly necessary to point out that establishing a causal relationship between constitutional protection of rights and their realisation in practice is a near impossible task. At the same time, it is clear that giving rights legal and indeed constitutional protection is not a rhetorical or an empty exercise. This is particularly important if the rights of 'others' – including those whose rights may come into conflict with the rights of children – are given constitutional protection (Bennett Woodhouse, 1999). In the circumstances covered by all of the reports above – where the rights of parents and members of the religious orders were placed above those of children – this would appear an entirely legitimate and indeed vital step towards ensuring the future protection of children.

As the Kilkenny and Roscommon reports highlight, the current constitutional framework presents a hierarchy of rights that can operate against children, to their clear detriment, and it is essential that children's rights are inserted into the Constitution in response. The point is illustrated with reference to the Child Care Act 1991, s 3 of which provides that in the identification of children in need of care and protection the HSE must regard the welfare of the child as the first and paramount consideration, but with due regard to the rights of the parents under the Constitution. The origins for this test go back to the decision of the Supreme Court in the case of *Re JH* in 1985 (Taskforce on Childcare Services, 1980). Here, in considering the situation of a child who had been placed for adoption whose parents sought her return to their care, the Supreme Court held that in all but the most extreme cases the welfare of a child was best found in his/her family (Kelly, 2007). One of the effects of this test is to dilute the requirement to treat the child's interests as paramount in cases of dispute between parents and the state. As the Kilkenny Report opined, this test

'render(s) it constitutionally impermissible to regard the welfare of the child as the first and paramount consideration in any dispute as to its upbringing or custody between parents and third parties such as health boards without first bringing into consideration the constitutional rights of the family' (McGuinness, 1993, p. 30).

The constitutional hierarchy of rights is clear, therefore, and regard for the rights of the family (with parents cast in the role as the defender of the rights of the child) makes it impossible to treat the child's rights as paramount, even where the threat the child faces is within the family itself (Carolan, 2007). Even if one assumes that the vast majority of parents are loving and caring towards their children, translating that fact into a constitutional principle arguably goes too far. Although an extreme case, the Roscommon Child Care inquiry supports this conclusion, and the fact that Article 42.5 (which provides that the state can only intervene in the family in exceptional cases) of the Constitution is the subject of current reform proposals reflects this also (Kilkelly & O'Mahony, 2007).

Of course most of the child abuse inquiries discussed above did not concern the state-family paradigm and a question arises as to what relevance constitutional reform has to the treatment of children more generally. This brings us to the second issue, that is, the need to ensure that what reform is proposed includes a self-standing (that is, independent of the family context) obligation on the state to vindicate the rights of the child. The amendment proposed by the Oireachtas Committee in 2010 sought to make a number of key changes to the existing constitutional position. First, it provides for equal treatment and rights for all children, regardless of the marital status of their parents, on which there was previously some doubt and confusion. Second, by referring to the rights of all children 'as individuals', it makes it clear that children have rights as autonomous beings and not just as members of the family unit (Joint Oireachtas Committee, 2010, p. 113). This provision genuinely breaks new ground by placing a duty on the State to recognize and vindicate the rights of children as rights-holders. While retaining the phrase 'natural and imprescriptible rights' from the existing Article 42.5, the proposal specifically enumerates some of these rights, while making it clear that this list is not exhaustive (pp. 112-113). As noted above, the rights enumerated include the child's right to protection and care, and the right to be heard in proceedings affecting the child. Together, these provisions would bring about 'real change and explicit recognition of the rights of children under the Constitution' (Joint Oireachtas Committee, 2010, p. 61). They would also respond in a real way to two significant failures highlighted in the child abuse inquiries above, namely the failure to protect children from abuse and to listen to children's voices.

The fate of these – and any other proposals – that are put to the people is clearly unknown. What is evident, however, is that apart from the other legitimate reasons to support constitutional reform, the child abuse inquiries provide an undeniable imperative to take concrete action - with powerful symbolic effect - to strengthen the legal framework that supports child protection by giving constitutional expression to the core values of children's rights.

Conclusion

This paper sought to examine the Irish child abuse inquiries of recent years from a legal perspective. It began by summarising the findings of three types of inquiry – involving abuse within the family, within residential institutions of the state and in the care of Catholic clergy – and noted the wide variety of recommendations for reform, including proposals to improve the legal framework of child protection. Taking the reports together, three issues emerge as worthy of special attention as ways to ensure that the inquiries' impact is felt by children both today and tomorrow – they are: mandatory reporting, robust systems to inspect and monitor the care of children and undertaking constitutional reform. As the above analysis tries to show, none of these measures is straightforward; nor do they provide a panacea, in isolation, to the intractable problem of providing effective protection to children from abuse. However, taken together – with each other and with the many other recommendations identified in the child abuse reports and elsewhere – they represent the beginning of a lasting legacy for the victims of abuse so tragically failed by their families, by the state and by society at large.

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