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## INTRODUCTION

### Social Work and Social Care

The first thing that will be apparent in this book is its treatment of both social care law and social work law as a single corpus of law. There are arguments for and against such an approach. While social care and social work may be described as cognate professions, there are also significant differences concerning the education of both sets of professionals (one in institutes of technology, the other in universities) and, most importantly, their work orientation (Share and McElwee 2005). Social care practitioners typically work directly with service users, with an emphasis on therapeutic work. The role of the social worker, on the other hand, is usually to manage the 'case' through arranging placements and their termination and through the coordination of case review meetings (*ibid.*). As such, the social worker is 'more closely identified with statutory tasks' than the social care worker, who is less directly impacted (O'Doherty 2005: 238). These differences aside, it remains true that social work and social care work have more areas in common than areas of division; and various factors such as improvements in pay and training opportunities have meant that the 'gaps' between the professions have narrowed in recent years (Farrelly and O'Doherty 2005). Indeed, the enactment of the Health and Social Care Professionals Act 2005, providing for the registration of the social care sector, has led to calls for further integration of the professions. Farrelly and O'Doherty (2005), for example, draw attention to the fact that child care, social work and social care practitioners all operate under the aegis of state-run organisations and are responsible for the welfare outcomes of the same children. It is also clear that while social care practitioners operate at some remove from the statutory framework, legal requirements cannot be ignored, particularly in the prevailing risk climate where front line social care work has become increasingly legalised and proceduralised (Share and McElwee 2005; Conneely 2005). All of these features point to a shared body of knowledge (including *legal* knowledge) between the two professional areas; and indeed to the timeliness of a suitable legal text.

### Context

Since 1997, social work in Ireland has undergone a significant transformation, developing its own qualification board, national professional qualifications and systems for accrediting. Such changes have been built on recently with the establishment of the Health and Social Care Professionals Council (CORU) in 2007 to regulate the health and social care professions. Despite advances on many fronts, it is questionable to what degree it is meaningful in Ireland to speak of a

discrete discipline known as ‘social work law’, as argued for some years ago by Preston-Shoot *et al.* (1998). These writers view the effective teaching and learning of social work law as the achievement of the fusion of substantive and administrative law governing social work practice with social work values and ethics. Unlike England and Wales, however, this jurisdiction is not possessed of a significant body of literature and research on this aspect of social work. Additionally, many of the criticisms levelled by White (2004) at this argument for a discrete discipline in a Northern Ireland context have equal or greater applicability to the Republic of Ireland.

The first relates to the ability of social care professionals to actually engage with lawyers on their own terms. Much of social workers’ engagement with the law is indirect in the sense that contact with lawyers is usually via their employer and therefore ‘circumscribed by the policies, guidelines or instructions issued by their employer’ (White 2004: 4). Indeed, in Ireland, most social workers are either directly employed by the HSE (59 per cent, NSWQB 2006) or the organisation they work for is funded by the Department of Health (Christie 2005; O’Doherty 2005). Secondly, while it is undeniable that the ‘discovery’ of child abuse as a social problem in the 1990s saw the public profile of social work grow, the role played by the social worker is rarely articulated in legislation (White 2004). The same can be said (probably with even greater force) of social care workers, despite the rapid advances towards professionalisation now taking place. Share and McElwee (2005: 57) describe social care work as a ‘very much hidden’ profession without its own distinct body of systematic knowledge. While the move away from a system of accreditation (social workers) or certification (social care workers) to a system of registration (discussed later in Part I of this book) may well see the emergence of such a discipline in the future, it is not accurate to speak at this time of Irish ‘social work law’ or ‘social care law’ as a body of law with its own distinct identity. For the moment, suffice it to say that law plays a significant role in social care work and this role is probably set to increase given the increasing volume of social care legislation appearing on the statute book.

### **What Areas of Law are Involved?**

Law is a vital component of social work practice in Ireland. It is clear that social workers are heavily involved in issues that impact on people’s rights, through providing appropriate services or intervening in some cases to protect people from themselves or others. The law clarifies the relationship between the state and the individual or family, and informs social workers and agencies what they can and cannot do. As noted, the majority of social workers in Ireland today are employed by public bodies whose every action has to be based on some kind of legal power. Even for those social workers employed in the voluntary or non-governmental sector, the law provides the framework within which services are provided. For example, guardian *ad litem* services often operate within the context of child protection or family breakdown proceedings and they will require a working knowledge of both the court system and substantive law concerning these areas.

Further guidance as to the legal knowledge social work students should have before award of their degree can be derived from *Criteria and Standards of Proficiency for Social Work Education and Training Programmes*, recently published by the Social Workers Registration Board (2011). Standards of proficiency are the standards required of graduates for the safe and effective practice of social work. These standards provide a framework for the elaboration of programme learning outcomes and they are grouped under six categories:

- Professional autonomy and accountability.
- Interpersonal and professional relationships.
- Effective communication.
- Personal and professional development.
- Provision of quality services.
- Knowledge, understanding and skills.

Legal issues are most relevant for the first and last categories. Specific indicators that relate to both of these categories and that require knowledge of the law and/or legal issues are as follows:

- Professional autonomy and accountability.

On completion of the programme, graduates will be able to:

- Practise within the legal and ethical boundaries of their profession to the highest possible standard. Specifically, they will be able to: respect the rights, dignity and autonomy of every service user; practise in accordance with current legislation applicable to the work of their profession; and understand the implications of duty of care for service users and professionals.
- Practise in a non-discriminatory way. This will include demonstration of a commitment to human rights and social justice and recognition of the moral and legal rights of individuals to the promotion of wellbeing and protection, if at risk of abuse, exploitation and violence from others or themselves.
- Understand the importance of, and be able to maintain, confidentiality, including awareness of its limits and of data protection and freedom of information legislation.
- Understand the importance of, and be able to obtain, informed consent.
- Exercise a professional duty of care/service.
- Understand the obligation to maintain fitness to practise.
- Knowledge, understanding and skills.

On completion of the programme, graduates will be able to:

- Know and understand the essential knowledge areas relevant to social work, including a critical understanding of law and the legal system.

- Know and understand how professional principles are expressed and translated into action through a number of different approaches to practice, and how to select or modify approaches to meet the needs of individuals, groups or communities. This will require knowledge of relevant legislation, regulations, national guidelines and standards, findings of inquiries, investigations, and associated reports influencing social work practice with the full range of social work clients.
- Know and understand the skills and elements required to maintain service user, self and staff safety, including applicable legislation such as health and safety legislation, employment legislation and relevant national guidelines.

Law also features in the recent Awards Standards for Social Care Work published by the Higher Education and Training Awards Council (HETAC) (2010) which may ultimately play a role in the area of social care registration. Social care graduates are expected to demonstrate knowledge, skills and competence across a variety of areas in their professional role. In relation to the specialised knowledge which they are required to attain, it is notable that students at diploma/degree level must attain 'specialised knowledge of the systems and regulations relevant to social care' including 'legislation and regulations relevant to social care ... professional obligations under child protection and welfare guidelines and professional obligations for the protection, care and welfare of vulnerable people'. Students must also possess 'knowledge of the principles governing professional regulation and oversight' and 'knowledge of human rights and social justice discourses and their application for social care'.

It can be seen from examination of both sets of standards that requirements include critical awareness of the institutions and structures within which social care professionals practise, of the human rights of service users and accountability mechanisms, as well as specialised knowledge of the legal framework surrounding areas such as child protection, domestic violence or work with vulnerable adults. Brammer (2006: 7) suggests three elements of the study of law as part of a social work programme and these are summarised below:

1. Law as a structure within which social workers must practise. In light of a social worker's role as a witness in court, knowledge will be required of court procedures, the roles of others within the court system, etc.
2. Law as an instrument that gives social workers licence to practise. Legislation and case law bestows on them powers and duties and also governs accountability mechanisms.
3. Discrete legal issues that service users may face, such as domestic violence.

### **What's in this Book?**

This book aims to provide student social workers and social care workers with an introduction to Irish law in the areas that are most relevant to practice. In many ways the diverse range of legal issues in which social care professionals may be

involved renders it difficult to exclude given areas as unrelated. While this may be particularly true of the various roles performed by social care workers, it is becoming increasingly true of the social work role as well. As noted in the former NQSW Accreditation Standards (2010: iv), social workers in Ireland contribute to services ranging from ‘substance misuse to infertility, from offending to parental support, from mental health to homelessness, disability to life stages issues’ and this may take place in a variety of settings (community hospital, probation) and sectors (public, private, community, voluntary). However, certain issues can be identified as more relevant to social work and social care work practice than others.

The book begins with an overview of the Irish legal system, discussing the various sources of law, and the role of the courts and the law officers involved within it. Also included in Part I is a chapter on court procedures, including a discussion on giving evidence in court and writing reports. In Part II, the focus moves to what is in many ways seen as the ‘irreducible core of the profession’ (White 2004: 5), namely, the range of services available to support children and families and the measures provided for in law in order to promote children’s safety. A more specialist chapter on youth justice is also provided by Mairéad Seymour. Part III examines the legal framework surrounding vulnerable adults who may be in need of community or residential care or, in extreme cases, protection from themselves or other people.

### **A Note on Terminology Used in this Book**

One of the barriers to fuller understanding of the law by social care professionals is the use of legal jargon, language and terminology. While every effort has been made to keep this to a minimum in this book, some technical legal terms are unavoidable and some of these may still be expressed in Latin. A glossary is included at the back of the book to assist students in this regard but certain terms will appear frequently and it is worthwhile highlighting these. One such term is ‘jurisdiction’ which means ‘power to act’ in a legal sense. For example, ‘the judge did not have jurisdiction to hear the case’ means that the judge did not have the legal power under legislation or other sources of law to decide the matter. Another term is ‘statute’ (or ‘statutory law’), which is simply a reference to a piece of legislation or written law passed by the Oireachtas. Finally, ‘case law’ refers to the principles of law which can be extracted from decisions of the superior courts, namely, the Supreme Court, High Court and Court of Criminal Appeal. It is sometimes used interchangeably with the term ‘common law’.

Throughout the text ‘s/he’ is used, rather than male gender only. In line with best practice in social work and social care, the term ‘service user’ is also preferred to ‘client’. For reasons of convenience (and in line with the collective term used by CORU), the terms ‘social care practitioner’ and ‘social care professional’ are used to denote social workers and social care workers taken together.

## THE LAW ON SPECIAL CARE

There is an additional care order that was not dealt with in the previous chapter. It is known as the ‘special care order’ and it is examined in detail in this chapter. The essence of the distinction between a special care order and a mainstream care order under the 1991 Act is that it is the *behaviour of the child* him/herself that poses the threat to his/her welfare. In practice, a child may be considered for special care where his/her needs are such that they cannot be adequately catered for in the general residential care system. These young people may suffer from severe behavioural problems or personality disorders and may have a history of absconding from residential care facilities. As Nestor (2009: 193) writes:

[T]he reported cases paint a picture of adolescents with disturbed personalities who are beyond control and who have proved stubbornly unresponsive to the protective or educational measures provided by mainstream placements.

In order to address this problem, Part 3 of the Children Act 2001 amended the Child Care Act 1991 through the introduction of a ‘special care order’ authorising the detention of a child in a special care unit in circumstances where a child’s own behaviour poses risks to his/her safety or welfare. It is important to distinguish between a high support unit and a special care unit in this regard, as a special care unit is a fully secure, locked facility. There are only three special care units in Ireland: Ballydowd Special Care Unit in Dublin, Coovagh House in Limerick, and a unit for young girls in Gleann Alainn in Cork. Together, they account for approximately 25 beds or 1 per cent of residential provision in the HSE.

This chapter will first of all discuss the background to the introduction of special care orders in Irish law, before proceeding to examine the legal framework surrounding the making of such orders. As will become clear, the law in this area is currently in a state of some flux: the relevant provisions of the 2001 Act were not implemented and an important Act reforming this area has recently been passed by the government but is not yet fully operational. The law as stated below is therefore the law as it currently stands at the time of writing. Where appropriate, however, changes introduced by the Child Care (Amendment) Act 2011 will be highlighted.

### **The Context of the Special Care Order**

As discussed in Chapter 7, section 3 of the 1991 Child Care Act obliged health boards (as they then were) to promote the welfare of children in their area, but did not provide for any kind of legislative mechanism whereby children whose welfare

necessitated some form of civil containment or detention could be detained in a residential centre to receive appropriate treatment. While the making of a care order confers parental responsibility on the HSE, thus enabling it to place certain restrictions on a child's movement, the placing of a child in secure accommodation does not represent the normal exercise of parental control. Thus, those children whose acute behavioural problems necessitated detention could only be detained by being 'criminalised', i.e. by being charged with an offence so the courts could have jurisdiction over them (Shannon 2010).

Over time, the High Court came to fill the gap, developing a jurisdiction whereby it authorised the detention of children in residential centres in order to provide secure welfare. This jurisdiction (known as the court's 'inherent jurisdiction') derived from the power of the High Court to make orders under Article 40.3.2 of the Constitution to protect the life, person and property rights of every citizen. This came about as a result of young people and their advocates starting judicial review proceedings in the High Court claiming that the state had failed in its constitutional duty towards them under Articles 40.3 and Article 42.5 of the Constitution. It will be recalled that Article 40.3 is the personal rights provision of the Constitution and includes a child's right to welfare, while Article 42.5 provides for state intervention when parents have failed in their duty towards their children.

The efforts of these advocates did not initially meet with success. In the case of *PS v. Eastern Health Board* (1994),<sup>1</sup> the High Court held that the health board could not detain a young person for their own care and protection in the absence of a specific statutory provision authorising same. It is worth noting that the UK Children Act 1989, after which the Child Care Act 1991 was in a large part fashioned, contained a section allowing for the secure detention of young people, a point made by Geoghegan J. in the *PS* judgment (Carr 2008). However, in the later case of *FN v. Minister for Education* (1995),<sup>2</sup> the High Court had moved to a position where children could be lawfully detained in order to vindicate their constitutional rights under Articles 40.3 and 42.5. Geoghegan J. held that where neither the parents nor the health board could deal with the special needs of a child who was in need of special treatment, attention or education, with an element of detention necessary for the treatment to be effective, then there is a constitutional obligation on the state under Articles 42.5 and 40.3 to cater for those needs.

The effect of *FN* was twofold: first, to recognise that children with severe behavioural problems could be constitutionally detained for treatment; and second, to place the onus on the state to make suitable arrangements for such children. Carr (2008: 84) observes that the 'the court's movement in this direction was most likely as a result of the seriousness and frequency of cases that came before it, including cases where young people had experienced extreme deprivation and were suicidal or at other risk of serious harm'. The decision in *FN* was endorsed some years later by the Supreme Court in the case of *DG v. Eastern Health Board* (1998),<sup>3</sup> discussed in greater detail below. In that case,

Hamilton C.J. described the nature of the inherent power to detain a child as follows:

The jurisdiction, which I have held, is vested in the High Court is a jurisdiction which should be exercised only in extreme and rare occasions, when the Court is satisfied that it is required, for a short period in the interests of the welfare of the child and there is, at that time, no other suitable facility.

Cases involving children in similar predicaments continued to appear before the High Court throughout the mid to late 1990s. Many were heard by the Hon. Mr Justice Peter Kelly who, in growing frustration at the lack of adequate placements for children, started making mandatory orders or injunctions compelling the state to carry out its function of providing secure accommodation in high support units. In *DB v. Minister for Justice* (1999),<sup>4</sup> he ordered the Minister for Justice to make available to the Eastern Health Board sufficient funding to allow the board to build and maintain a high support unit in Portrane, later to become Crannog Nua High Support Unit. In another case in October 2000, Kelly J. threatened to hold the Ministers for Health, Education and Justice in contempt of court if a suitable place wasn't found for a troubled teenager. However, this practice was stopped by the Supreme Court in *TD v. Minister for Education* (2001),<sup>5</sup> where Kelly J. had directed the Minister for Health to take all steps necessary to complete the plans he had set out for building ten high support and special care units. On appeal, it was held that the issuing of such an injunction was contrary to the constitutional principle of the separation of powers. This principle (contained in Article 6.2 of the Constitution) requires each branch of government to respect the boundaries imposed on them by the Constitution. The Supreme Court found that the issuing of mandatory orders obliging the state to make heavy expenditure on targeted projects within specific time frames involved the judiciary straying into the executive or policy arena.

It should be noted that the power of the High Court to place children in secure detention does not extend to detention in a penal institution, in the absence of any other suitable facility. In *DG v. Eastern Health Board* (1998),<sup>6</sup> the Supreme Court sanctioned the detention (for four weeks) of a 16-year-old boy in St Patrick's Institution, which is a penal institution, on the basis that this was justified by the requirement that the child's welfare be regarded as a paramount consideration. It held that where the child's welfare required that s/he be placed in secure detention, such detention was permissible. The Supreme Court's decision was appealed to the European Court of Human Rights which issued its judgment on 16 May 2002. The case, now known as *DG v. Ireland* (2002),<sup>7</sup> involved a challenge to the child's detention in St Patrick's on the basis that it was contrary to Article 5 of the European Convention on Human Rights (the right to liberty). The Irish government relied on the exception contained in 5(1)(d) of the Article, which permits the detention of a minor by lawful order for the purpose

of ‘educational supervision’ as well as detention for a short-term period quickly followed by the application of an educational regime. The EC+HR, however, applied its previous decision in *Bouamar v. Belgium* (1989)<sup>8</sup> that placement in a prison did not further any educational aim, nor did it constitute an ‘interim custody measure for the purpose of an educational supervisory regime which was followed speedily by the application of such a regime’ as the health board did not secure a proper placement for the applicant until six months after his initial detention. It therefore found Ireland to be in breach of Article 5(1)(d) of the ECHR.

### Special Care Orders: A ‘False Dawn’

The legal lacuna in Irish law highlighted by these cases has been addressed in the Children Act 2001, although, given that the relevant provisions have not been implemented, it may be described more accurately as a ‘false dawn’ in the history of secure care in this jurisdiction (Carr 2008). The legislation intended that applications for special care orders would be made through the District Court, as with other orders under the Child Care Act 1991. It was further intended that the introduction of special care orders in the 2001 Act would not deprive the High Court of its constitutional jurisdiction, which it has developed since *FN*, and that the two jurisdictions would run concurrently. This has not transpired, however, and the HSE has continued to apply to the High Court for orders to detain children in special care units. The reasons for this are unclear. Carr (2008) surmises that issues relating to emergency powers and the legal designation of special care units by the Minister for Health remained obstacles to the implementation of Part 3. In any event, there appeared to be clear policy decision that the High Court, rather than the District Court, was the most appropriate forum for such applications, perhaps due to the considerable expertise that this court has gained in this area over the past 15 years.

The continued use of the inherent jurisdiction of the High Court, however, has led to concerns being expressed by the High Court about the absence of a proper regulatory framework in respect of such applications. In *HSE v. SS* (2008),<sup>9</sup> MacMenamin J. observed:

[E]xperience has demonstrated that, perhaps for many reasons, there has been a legislative reluctance to implement all provisions of Part 3 of the Act of 2001 or to abandon the (perhaps more flexible) approach derived from the exercise of inherent jurisdiction. Indeed the number of such cases in the High Court lists has regrettably grown to approximately twenty per week.

The frequent invocation and exercise of ‘exceptional’ constitutional powers, absent principles of application or, any statutory or regulatory framework is undesirable. The fact that those provisions of the Children Act, 2001 vesting analogous statutory powers in the District Court have not been brought into force might, at least for the

moment, be seen as itself a policy decision by the legislature itself that this inherent power continue to be operated in these cases. It should not continue indefinitely in the present form. The court again notes that this is a matter under review by the Executive.

Subsequently, the Child Care (Amendment) Act 2011 has been passed, which, *inter alia*, vests jurisdiction for special care orders in the High Court. This development, together with a number of other changes to the original scheme, is discussed below.

### Special Care: The Legal Framework

Part 3 of the Children Act 2001 inserted a new Part 4A into the Child Care Act 1991 providing for special care orders. Section 23A of the 1991 Act, as inserted, imposed a duty on the HSE to apply for a special care order or an interim special care order where a child who is found in its area requires special care and protection which s/he is not likely to receive unless the court makes the order. The decision as to whether to apply for a special care order is made by the HSE alone, although the 2001 Act also contains a provision under section 23A(3) whereby the parents of a child could request the HSE to make an application for a special care order. Similar provisions are contained under the new Part 4A inserted by the 2011 Act. However, in the redrafted legislation the HSE must consult with the child, the parent/guardian and the guardian *ad litem* regarding the proposal to provide special care to the child unless it is satisfied that this would not be in the best interests of the child.<sup>10</sup> This requirement (together with the facility for a parent of a child to request an appraisal of the child in special care)<sup>11</sup> perhaps reflects the renewed emphasis placed on the rights of parents, including their ECHR rights, by the High Court in the *SS* decision (Kilkelly 2008). In *SS*, MacMenamin J. held that the rights of parents are 'substantive' and should, where practicable, 'extend to all stages of the decision-making process in child protection cases where either, or both, parent evinces a willingness to play a role and to the extent that it is in the best interests of the child'.

In line with the principle of detention as a last resort, contained in Article 37 of the UNCRC, the original legislation contains certain safeguards. Safeguards are particularly important given the gravity of the judgment under the Act: a child will be deprived of his/her liberty in the absence of a criminal charge or conviction. One of the most important of these safeguards is that the HSE is required to arrange for the convening of a family welfare conference under Part 2 of the Children Act 2001. A family welfare conference (FWC) is designed to ensure that the important people in the child's life (family members, guardian *ad litem*, relatives, HSE professionals, etc.) have explored other methods of meeting the child's particular needs, such as assisting the child within his/her own family or placing the child within the mainstream residential system. The specific provisions relating to this safeguard are discussed below. The second safeguard concerns the duty to consult a specialist body called the Special Residential

Services Board (SRSB) established under Part 11 of the 2001 Act for their views on the application for special care. The SRSB was renamed the Children Acts Advisory Board (CAAB) in 2007 and its role was somewhat altered.<sup>12</sup> The 2011 Act abolishes the CAAB in recognition of the fact that it has now been subsumed into the Department of Children and Youth Affairs,<sup>13</sup> a move which should provoke some concern given the absence of an independent oversight body in this area. Indeed, the effectiveness of this safeguard in filtering out unsuitable applications for special care may be seen in the not insignificant number of applications where a recommendation was not issued. Statistics produced for the CAAB 2008 Annual Report show that, in 2007, 48 out of 64 applications were recommended as suitable by the SRSB/CAAB, and 30 out of 48 were recommended in 2008 (CAAB, 2009a). Carr (2010: 67) puts it well when she writes:

The question remains as to why an organisation established in relatively recent legislation (Children Act 2001) was subsequently reformulated in additional legislation (Child Care (Amendment) Act 2007) and is now being disbanded in further legislation a mere three years later.

### **The Role of the Family Welfare Conference (FWC)**

A FWC is convened by the HSE and deals mostly with non-offending young people whose behaviour presents a serious risk to themselves or others. It can be triggered in two ways. First, where it appears to the HSE that a child may be in need of special care and protection, a FWC must be convened before it can apply for a special care order. An exception to this requirement is created in the 2011 Act,<sup>14</sup> where the HSE is satisfied that it is not in the best interests of the child. If the HSE decides to invoke this exception, under section 23F(10) it must satisfy the High Court as to the grounds for its decision. Second, a FWC may be held on the direction of the Children Court<sup>15</sup> where it considers that a child before it on a criminal charge may be in need of special care or protection. The function of a FWC is to decide if a child in respect of whom the conference is being convened is in need of special care and protection so that a special care order is to be advised or other action taken regarding the child. Where a FWC is to be convened, the HSE must appoint a person called a 'convenor' to arrange on its behalf a FWC in respect of the child.<sup>16</sup>

The list of persons entitled to attend the conference is contained in section 9 of the 2001 Act. They include the child, the parents or guardian of the child, any guardian *ad litem* appointed for the child, other relatives of the child, HSE officers and any other person who, in the opinion of the co-ordinator (after consultation with the child's parents) would make a positive contribution to the conference. As the conference is specifically intended to be a non-judicial process for children in need of care and protection, the right to legal representation under the Constitution and the ECHR does not apply. However, prior to convening a

conference, the convenor will discuss with all parties the persons it would be most appropriate to invite to participate. If the child or family insist that their legal representative be present, it is open to the co-ordinator to invite that representative under section 9(1)(f) on the basis that they would make a positive contribution because of their expertise.<sup>17</sup>

Under section 10 of the 2001 Act, a FWC may regulate its own procedures. However, section 30 of the 2011 Act requires that the procedure to regulate a FWC be consistent with fairness and natural justice, including procedure for consulting with and ascertaining the wishes of the child in respect of whom the conference is convened. In this regard, the Act also states that the HSE shall prepare and publish procedural guidelines for carrying out consultations and convening FWCs.<sup>18</sup> Additionally, under Article 7(3) of the Children (Family Welfare Conference) Regulations 2004,<sup>19</sup> there is a requirement that the family are allocated their own 'private time' (during which all professionals are excluded) to reach a decision. In any matter relating to a FWC, all participants should treat the welfare of the child as the primary and paramount consideration. It is important to note that the proceedings of a FWC are privileged and no evidence shall be admissible in any court of any information, statement or admission disclosed or made in the course of the conference.<sup>20</sup> This is to enable a full and frank discussion to take place.

Section 13 of the 2001 Act provides that on receipt of the recommendation of a FWC, the HSE may apply for a special care order or supervision order or provide any service or assistance to the child or his/her family as it considers appropriate *having regard to the recommendations of the conference*. It would therefore appear that a FWC could, in discussing the overall needs of a child, go outside the strict confines of recommending a special care order (or not) and consider the appropriateness of other services to be provided. This is put beyond doubt by section 29(e) of the 2011 Act, which provides that a FWC should consider whether a child requires special care and make recommendations to the HSE in relation to the care of the child as the conference considers necessary, including (where appropriate) care other than special care, under the Act of 1991.

Section 8(2) of the 2001 Act specifies that any recommendation made by the conference shall be agreed unanimously by those present at the conference unless the disagreement of any person present is deemed by the co-ordinator as unreasonable, in which case the co-ordinator may dispense with that person's agreement. It further provides that where a recommendation is not unanimous (disregarding any disagreement deemed unreasonable) the matter shall be referred to the HSE for determination. Therefore, while the co-ordinator must strive for unanimity in agreeing upon recommendations, if a person (including a parent) is unreasonable in their opposition to a particular way forward, then the conference can continue and make a recommendation nevertheless.

The problem is obviously particularly acute when the child objects. It is clear that renewed emphasis has been placed on the need to ascertain the child's views under the 2011 Act, not least through the provisions concerning the role of the

guardian *ad litem* in communicating the child's views to the court (see Chapter 5). In *SS, MacMenamin J.* held that adequate opportunity should be provided to minors to make their views known, in the fulfilment of his/her 'natural and imprescriptible rights'. However, it must be remembered that under Irish law the child's wishes are restricted to the extent that the HSE has made a determination that the child is in need of care and protection. Previous case law on this matter, such as *DG v. Eastern Health Board* (1998)<sup>21</sup> (discussed above), has decided that the child's right to have his/her welfare considered 'paramount' trumps the child's right to liberty. This illustrates the need for a balanced approach when it comes to objections by children to recommendations considered by the FWC.

### Grounds for Making a Special Care Order

Under section 23B of the 1991 Act (as inserted by the 2001 Act), the court can make a special care order if satisfied, on the application of the HSE, that:

- The behaviour of the child is such that it poses a real and substantial risk to his/her health, safety, development or welfare.
- The child requires special care and protection which s/he is unlikely to receive unless the court makes such an order.

Some criticism had been voiced about the failure of the 2001 Act to define the terms 'health, safety, development or welfare' in light of the serious implications that a special care order may have for a child (Shannon 2004, 2005). The criteria as stated in the new Act are somewhat more robust. In addition to the requirements noted above regarding consultation with parents/guardians and the holding of a FWC, the legislation requires the High Court to be satisfied of the following:

- The child is aged 11 or over.
- The behaviour of the child poses a real and substantial risk of harm to the child's life,<sup>22</sup> health, safety, development or welfare.
- Alternative care, including mental health care, would not meet the child's needs.
- Special care is required to address this risk of harm.
- The child requires special care to protect his/her life, health, safety, development or welfare.
- Detention in a special care unit is in the best interests of the child.<sup>23</sup>

In particular, Shannon (2010) observes that the insertion of a requirement that the court have specific regard to the best interests of the child will serve to ensure that children are not detained in special care units unnecessarily.

In practice the types of children who may be the subject of such orders are those children who, for example, have a considerable history of absconding from care facilities or residential units, or who have a history of self-harm or harm to

others. The aim of the order for most children will be the provision of a short-term period of stabilising care, although the possibility of longer-term intervention remains in some cases (Carr 2010).<sup>24</sup> The child may reside at home with his/her parents or guardians, or may already be within the care system. Some further indication of the circumstances in which a special care order may be properly considered can be derived from the Revised Criteria for the Appropriate Use of Special Care Units (2008) as agreed between CAAB and the HSE. These criteria must generally be met in determining the appropriateness of placement in a special care unit and any exceptions must meet the overriding majority of criteria. All applications will be reviewed by the National Special Care Admissions and Discharge Committee of the HSE (NSCADC), which centrally manages and co-ordinates the admission and discharge process into special care. The criteria state that a special care order is appropriate where:

- The young person is aged 11–17 at admission.
- The behaviour of the young person poses a real and substantial risk to his/her health, safety, development or welfare, unless placed in a special care unit and ‘on an objective basis’ is likely to endanger the safety of others.
- The young person has a history of impaired socialisation and impaired impulse control and may also have a history of absconding that places them at serious risk.
- If placed in any other form of care the young person is likely to cause self-injury or injury to others.
- Consideration has been given to placement history and all other non-special care options have been eliminated, based on the child’s needs.
- A less secure structured environment would not meet the young person’s needs at this particular time.
- A comprehensive needs assessment, including a care plan and discharge plan, has been carried out.
- Consideration has been given by the HSE to arrangements for family and community contact. Where it is not possible to place a young person in a regional area more local to the family, the care plan must specify arrangements for family and community contact and integration.

Useful guidance is also provided as to when a special care order is *not* appropriate, i.e. where the primary reason for seeking placement is that:

- The young person has a moderate, severe or profound general learning disability.
- The young person requires medically supervised detoxification for drug use.
- The young person has an acute psychiatric or medical illness requiring intensive medical intervention.

The criteria also state that:

- A previous criminal conviction does not of itself preclude an application for special care.
- A special care order cannot be made in situations where the child or young person is subject to criminal charges (and is before the courts), and where these charges have not been dealt with or decided by the courts.

It is worth dwelling for a moment on the latter point, given its importance for practice and also its recent treatment in the case law. The position outlined by the CAAB guidelines in relation to the interaction of special care orders with the criminal justice system reflects the decision of the High Court in *DT v. National Special Care Admissions and Discharge Committee and the HSE* (2008).<sup>25</sup> In that case, Sheehan J. adopted an approach whereby the criminal jurisdiction effectively trumps that of the civil courts. The 2011 Act changes this position quite significantly, so that the HSE can still apply for a special care order or continue to provide special care in circumstances where:

- A criminal charge is pending.
- A child has served a custodial sentence/detention order.
- A child has received a suspended sentence or a deferred/suspended detention order.<sup>26</sup>

On the other hand, the HSE is required to apply for the discharge of a special care order (and withdraw an application for an order) where a custodial sentence or children detention order is imposed.<sup>27</sup> This change means that only orders imposing a custodial sentence will trump a child's special care needs, thus extending special care to children previously denied it. Carr (2010) speculates that it will also affect the ratio of admissions to special care in terms of gender (currently 3:2 in favour of females) given the greater likelihood of males entering the criminal justice system.

### Effects of a Special Care Order

Once made, a special care order has the effect of committing the child to the care of the HSE. Under the original legislation, the child was to be accommodated in a special care unit for a specified period between three and six months although the duration of the order could be continually extended under section 23B(4)(b) of the 1991 Act (as inserted by the 2001 Act) to the point when the child reaches 18. Under the new Act, the duration of the order is three months<sup>28</sup> and this can only be extended twice for the purpose of continuing the provision of special care to that child.<sup>29</sup> This important change is to be welcomed, given the absence of any indication in the 2001 Act as to the optimum length of time a child should be detained in a special care unit.

The new length of the order also reflects the *dicta* of the High Court in *HSE v. SS* to the effect that the Constitution only permits civil detention of a minor for a short period. While MacMenamin J. declined to fix a limit to the length of

time for which a child could be constitutionally detained, he held that 'the capacity and age of the minor, the nature of the place of detention, the extent, quality and suitability of the educational and welfare activities must have a direct bearing on the duration for which a court may order a minor to be detained'. His comments in *SS* regarding the need for 'regular failsafe' review of the child's detention are also reflected in the provisions of the new Act, which provides that the High Court shall carry out a review in each four-week period for which a special care order has effect.<sup>30</sup> While a monthly review of the child's progress in care is currently required to be undertaken by the HSE under the Child Care (Special Care) Regulations 2004,<sup>31</sup> a High Court review provides an important means of ensuring that continued detention of the child is appropriate and in line with the Constitution and ECHR.

Under section 23B(2) of the Child Care Act (as amended by the 2001 Act), the HSE is required to provide appropriate care, education and treatment for the child. The HSE is also given the power to take such steps as are reasonable to prevent the child from causing injury to him/herself or other persons in the unit or absconding from the unit. These powers are considerably expanded by the provisions of the 2011 Act to grant the HSE full parental authority. Powers accorded the HSE on the grant of a special care order or interim special care order include the right to give consent to any medical or psychiatric examination or treatment for the child, and the right to consent to an application for a passport for the child.<sup>32</sup> The HSE is obliged to notify as soon as possible a parent having custody of the child (or a person acting *in loco parentis*) of the placement of the child in a special care unit.<sup>33</sup>

The HSE must apply for a variation or discharge of the order if it appears to it that the circumstances that led to the order no longer exist.<sup>34</sup> Further, the court itself on the application of any person (including the child or the child's parents/guardians) can vary or discharge the order.<sup>35</sup> The order may be varied to authorise the release of the child to a residential unit or on placement with relatives, for medical/psychiatric treatment or on compassionate grounds.<sup>36</sup> Under sections 8 and 9 of the 2011 Act, the HSE is empowered to apply for a care order or supervision order in respect of a child who is the subject of a special care order, which will take effect on the expiration of the special care order.

### Interim Special Care Orders

In the 1991 Act (as amended by the 2001 Act), the District Court may make an interim special care order where there is reasonable cause to believe that grounds exist for the making of a special care order and that it is necessary in the interests of the child that s/he be detained in a special care unit.<sup>37</sup> As with the mainstream interim care order, the standard is lower than the full order: it merely requires the court to be satisfied as to the HSE's reasonable belief rather than as to the facts themselves. Similar provisions are contained in the new Act, although a reasonable belief must be established with regard to each of the new, expanded criteria discussed above.<sup>38</sup> The effect of the original interim special care order is to

authorise the detention of the child in a special care unit for up to 28 days or, where the HSE and parent consent, for a period exceeding 28 days.<sup>39</sup> Under the new Act, the process for applications for interim orders is tightened. The duration of an interim special care order is halved to a maximum period of 14 days (or 8 days if made *ex parte*)<sup>40</sup> and only one application for an extension (maximum 21 days) is permitted.<sup>41</sup> In the 1991 Act as amended, parents must be put on notice of the application except where, having regard to the welfare of the child, the judge directs otherwise.<sup>42</sup> In the new Act, notice must be served, save where the High Court is satisfied that it be withheld in the interests of justice or for the protection of the life, health, safety, development or welfare of the child.<sup>43</sup>

The provisions of the 1991 Act in relation to emergency care orders also apply to interim special care orders, in that a court may issue a warrant authorising the Gardaí to deliver the child into the custody of the HSE. Further, the effect of the orders is similar in that it is the District Court that holds decision-making power in relation to the child concerning issues such as parental access, medical treatment, etc.<sup>44</sup> Under the 2011 Act, the High Court's powers are more extensive. For the purposes of executing an interim special care order, the High Court may, in addition to issuing a warrant authorising entry, make an order requiring persons having custody of the child to deliver him/her to the HSE, as well as an order directing the Gardaí to search for and find the child and to deliver the child to the custody of the HSE.<sup>45</sup> Further, as noted above, once a special care order or interim special care order is made, the 2011 Act effectively places the HSE in the role of parent towards the child and allows it to consent to medical or psychiatric assessment or treatment and the issuing of a passport<sup>46</sup> (subject to the power of the High Court to make such provision and give such directions as it considers necessary in the best interests of the child).<sup>47</sup> Given the extensive nature of the powers afforded the HSE and the High Court under the new Act to ensure the smooth operation of the orders, and given the problems with emergency arrangements for children outlined by Carr (2008), it may perhaps be considered an omission that specific powers of detention were not awarded to members of An Garda Síochána in order to facilitate transfer into the custody of the HSE.

### Other Provisions

Under section 23J of the 1991 Act (as inserted by the 2001 Act), certain provisions of the 1991 Act are extended to special care orders as indicated below:

- The HSE must facilitate reasonable access to the child by the child's parents (section 37).
- There will be a case review of each child in the HSE's care (section 42).
- The HSE *may* provide aftercare for children up to the age of 21 (section 45).
- The District Court may give directions on any question affecting the welfare of a child in the care of the HSE under section 47. Therefore, as with care orders under section 18, it is the District Court that retains ultimate control over a child in respect of whom a special care order has been made.<sup>48</sup>

Similarly, under the 2011 Act, the provisions in relation to facilitating access and aftercare are extended to children who are the subject of special care orders.<sup>49</sup> It should be noted that the fact that the provision of aftercare is not mandatory for children leaving special care has been the subject of some negative comment, given the particular vulnerabilities of this group of children (Barnardos *et al.* 2010). The provisions in sections 24–26 of the Act concerning the appointment of a guardian *ad litem* and/or legal representative for the child are also extended to applications for special care orders.<sup>50</sup> As already noted, the High Court retains the power to issue general directions on any question affecting the welfare of the child under the new Act.<sup>51</sup> Special care orders are expressly excluded from the case review provisions under section 42, given the specific provisions for review by the High Court which apply to these children.<sup>52</sup>

### Special Care Units

Under the 2001 Act, no provision was made in relation to the inspection of special care units. Section 23K of the 1991 Act (as inserted by the 2001 Act) merely refers to a periodic inspection of special care units by ‘authorised persons’. This can be contrasted with section 186(1) of the Children Act 2001 in relation to children detention schools, which provides that an Inspector of Children Detention Schools shall carry out regular inspections of each detention school every six months. Under Part 5 of the 2011 Act, special care units are to be inspected by HIQA (Social Services Inspectorate) under the Health Act 2007. Although, in practice, HIQA has carried out inspections of special care units since its establishment in 2007 (and the SSI has inspected these units since 1999), Part 5 will formally transfer legal responsibility to that body. Inspections will be conducted against the Child Care (Special Care) Regulations 2004<sup>53</sup> and the National Standards for Special Care (2001). These documents contain details on matters such as: visiting arrangements; healthcare; education; the use of restraint and single separation; care record; care plan, etc; and are considered in more detail in Chapter 9. Significantly, HIQA will also assume responsibility for registration of special care units.<sup>54</sup>

### Compatibility of Special Care Orders with the ECHR

It is likely that the legislative scheme outlined (though not implemented) in the 2001 Act is compatible with the ECHR, which, as noted, is now part of our domestic law. Support for this view can be derived from the case of *Koniarska v. UK* (2000),<sup>55</sup> which concerned the placement by a local authority in England of a young girl in a secure unit for protective purposes. The applicant challenged her placement in the unit on the basis that it did not constitute ‘educational supervision’ within the terms of Article 5(1)(d) of the ECHR (see above discussion concerning *DG v. Ireland*). In rejecting her application, the ECtHR placed a very broad interpretation on the term ‘educational supervision’ in Article 5. The court held that educational supervision should not be considered in a strict scholastic sense but could ‘embrace many aspects of the exercise, by the local

authority, of parental rights for the benefit and protection of the person concerned', including placing restrictions on the child's liberty for the purpose of addressing the underlying causes of his/her behaviour.

On the other hand, serious concerns may be expressed about the continued operation of a non-statutory scheme authorising the civil detention of minors and its implications for the liberty rights of children under the ECHR (Hamilton 2009). Kilkelly (2008: 313) welcomes the criteria agreed by the CAAB and the HSE for admission to special care units as bringing 'the likelihood of full compliance of secure care placements closer to the requirements of the ECHR'. The placement of special care orders on a fully statutory basis by virtue of the 2011 Act will also enhance the prospects of compliance, especially in light of the new definition of special care in the 2011 Act as care that includes medical and psychiatric assessment, examination and treatment as well as educational supervision.<sup>56</sup> Shannon (2010) is also correct to point to the significant increases in resources allocated to special care in recent years as a significant factor.

### Summary

Social care professionals should be aware of the continued use of the inherent powers of the High Court in this area to place children with severe behavioural problems in secure care. The introduction of a proper statutory framework for special care orders some 16 years after the seminal judgment in *F/N* is therefore much to be welcomed. The implementation of the new Act, despite the removal of the CAAB and important criticisms in relation to aftercare, will go some way towards securing the rights of children subject to these orders. Provisions such as the more detailed definition of special care, the expanded criteria for the grant of an order, the limits placed on the duration of the orders, and the significant powers granted to the High Court in the legislation, all serve to better protect children who are being deprived of their liberty for their own welfare.

### Further Reading

- Barnardos *et al.* (2010), *Initial Observations on the Child Care (Amendment) Bill 2009*.
- Carr, N. (2008), 'Exceptions to the Rule? The Role of the High Court in Secure Care in Ireland', *Irish Journal of Family Law*, 11(4): 84–91.
- Carr, N. (2010), 'Child Care (Amendment) Bill 2009: An Attempt to Arbitrate on a System's Logic?', *Irish Journal of Family Law*, 13(3): 63–69.
- Children Acts Advisory Board/Health Service Executive (2008), *Criteria for the Appropriate Use of Special Care Units*. Dublin: CAAB.
- Kilkelly, U. (2008), *Children's Rights in Ireland: Law, Policy and Practice*. Dublin: Tottel Publishing, pp.304–314.