Advice of the Ombudsman for Children

on the Courts Bill 2013

June 2013

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1. Introduction

1.1. The Minister for Justice, Equality and Defence published the Courts Bill 2013 ("the Bill") on 19 March 2013. The Bill has two main purposes: to modify the operation of the *in camera* rule and to increase the monetary jurisdiction limits of the Circuit and District Courts in civil proceedings.

1.2. Section 7(4) of the Ombudsman for Children Act 2002 provides that the Ombudsman for Children may advise Ministers of the Government on any matter relating to the rights and welfare of children, including the probable effect on children of the implementation of any proposals for legislation. In accordance with this function, the Ombudsman for Children's Office has prepared advice on Part 2 of the Bill, which allows for *in camera* restrictions to be lifted in family and child care proceedings in order for "bona fide representatives of the Press" to attend.

1.3. Children and families would benefit from there being a greater understanding of such proceedings. The purpose of Part 2 of the Bill is to enhance the transparency of family and child care proceedings in order to address the deficit that exists at present by adding to our knowledge of the operation of the law in these areas. The Ombudsman for Children's Office supports these objectives fully, as it supports the more general programme of reform aimed at making court processes more child-focused and less adversarial.[1]

1.4. In striking the balance between respecting the privacy of parties to such proceedings – particularly children – and administering justice in public, the questions framing reform must be:

- What benefits are there for children and how will such reform affect the enjoyment of their rights?
- What information is it useful and necessary to put into the public domain to enable proper monitoring of the operation of the relevant legislation?
- What is the best method by which to obtain that information?

1.5. In light of these considerations, the Ombudsman for Children's Office believes that a system of reporting on family and child care proceedings should exhibit a number of characteristics, including:

- **Human rights compliance**: the State's obligations – particularly those arising from the UN Convention on the Rights of the Child and the European Convention on Human Rights – must be satisfied. The right to privacy is a fundamental consideration in this regard and non-identification must be guaranteed.

[1] See Ombudsman for Children's Office, *Advice of the Ombudsman for Children on the Child Care (Amendment) Bill 2009*, (OCO, 2010), p. 6

- **Non-deterring**: the system of reporting should not operate as a deterrent to entering the court process, nor should it operate as an encouragement to children to retract child abuse disclosures.
- **Systemic overview**: this Office does not believe that reporting of individual cases is sufficient. Systemic information must be obtained so that, for example, differences in child care practice in different parts of the State can be identified.
- **Sustainable**: this Office believes that a sustainable, ongoing system of reporting is in the interests of children as well as the public interest.
- **Independent**: this Office believes that public confidence would be best assured by an independent reporting mechanism.

1.6. This Office has concerns that the system envisaged in Part 2 of the Bill will not meet the stated objectives of the legislation and will not have the characteristics outlined above. A consultation paper published by the UK Ministry of Justice in 2007 on access by the media to family courts in England and Wales noted that when reflecting on how to improve the openness of the courts, the focus should not be on the numbers or types of people going in to the courts, but on the amount and quality of information coming out of the courts.[2] The Ombudsman for Children's Office concurs and, for the reasons set out later in this advice, does not believe that the Bill as it currently stands has struck the best balance.

1.7. It should be noted that there is already legislative provision for reporting on family law and child care cases by barristers, solicitors or other persons approved by regulations. This has been introduced by s.40 of the Civil Liability and Courts Act 2004 ("the 2004 Act") and s.3 of the Child Care (Amendment) Act 2007 ("the 2007 Act") and has led to the Family Law Reporting Project, which has concluded, and the Child Care Law Reporting Project, which is currently underway but which is time limited. Significantly, the Child Care Law Reporting Project involves the presence of a single reporter in each case. It is also not contemporaneous; instead, it aims to publish reports bimonthly.

1.8. Another important aspect of the *in camera* rule is its impact on the capacity of statutory bodies with powers to conduct inquiries to access *in camera* information. Ss.40(6) and 40(7) of the 2004 Act are meant to ensure that statutory bodies with powers to conduct inquiries, investigations and hearings have the power to access *in camera* material. This has been very important for the Ombudsman for Children in particular since this Office deals with a large volume of complaints relating to the child care system. However, this Office has encountered difficulties in accessing such information and the passage of the Bill through the Houses of the Oireachtas provides an opportunity to resolve those difficulties. This is a matter that the Ombudsman for Children's Office has in the past raised with the Government and the Oireachtas, particularly in its advices on the Health (Amendment) Bill 2010.

[2] Ministry of Justice, *Confidence and Confidentiality: Openness in family courts – a new approach*, (Cm 7131, 2007), p. 3

1.9. The media in Ireland have played a great role in advancing children's rights and indeed the work of this Office; this will no doubt continue to be the case in future. However, we must bear in mind that children are less able to resist infringements of their privacy than adults, even though such infringements are no less keenly felt. When it comes to family law or child care proceedings, children are part of the process only reluctantly and through circumstances not of their making. In light of this, we must ensure that their privacy is respected to the greatest extent possible.

2. International human rights standards and *in camera* restrictions

2.1. Ireland has a range of international human rights obligations relevant to the operation of the *in camera* rule.

2.2. The United Nations Convention on the Rights of the Child ("the UNCRC") recognises the right of the child to privacy. Article 16 states:

> "1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
>
> 2. The child has the right to the protection of the law against such interference or attacks."

2.3. Although the UNCRC does not address the application of the right to privacy in the context of family and child care proceedings explicitly, the UN Committee on the Rights of the Child has been critical of States parties that have provided insufficient protection to the privacy of children in such proceedings. Specifically, the Committee has found that the disclosure of the identity of victims of child abuse amounts to a violation of Article 16[3] and it has supported both legislative measures and codes of ethics for the media as methods of protecting the right to privacy.[4]

2.4. Article 40(2)(b)(vii) of the CRC refers to the specific need for States to respect the privacy of a child accused or found guilty of a criminal offence at all stages of the proceedings. Similarly, Article 8 of the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* provides:

> "8.1 The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling.
>
> 8.2 In principle, no information that may lead to the identification of a juvenile offender shall be published."[5]

2.5. Although these provisions do not deal with family law or child care proceedings,[6] the UN Committee on the Rights of the Child has suggested that these protections should be afforded to children in the context of other legal proceedings as well.[7]

2.6. Proceedings that are heard otherwise than in public have also been the subject of examination by the European Court of Human Rights ("ECtHR") in light of

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[3] UN Doc, CRC/C/15/Add.261, para. 45 and 46
[4] UN Doc CRC/C/MUS/CO/2, paras. 35 and 36
[5] UN Doc A/RES/40/33 (1985).
[6] See also *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty*, UN Doc A/RES/45/113 (1990), at rule 19.
[7] Hodgkin, R. and Newell, P., *Implementation Handbook for the Convention on the Rights of the Child,* (UNICEF, 2007) pp. 208-209

obligations arising from Articles 6 and 8 of the European Convention on Human Rights ("ECHR"). Article 6(1) of the ECHR provides that:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

2.7. The rationale for this has been explained by the ECtHR:

> "[T]he public character of proceedings protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 § 1, a fair hearing, the guarantee of which is one of the foundations of a democratic society."[8]

2.8. However, Article 6(1) ECHR also goes on to recognise that restrictions may be placed on the right to a public hearing:

> "Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, *where the interests of juveniles or the protection of the private life of the parties so require*, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice." [Emphasis added

2.9. Article 8 ECHR also recognises that "everyone has the right to respect for his private and family life, his home and his correspondence."

2.10. The ECtHR has considered the balance to be struck between the right to a hearing in public and the interests of children in two cases: *B and P v United Kingdom* and *Moser v Austria*.

2.11. *B and P v United Kingdom* concerned *in camera* restrictions under the Children Act 1989 in England and Wales as they applied to private law custody or residence proceedings regarding children.[9] It was argued in that case that the presumption in the 1989 Act that such proceedings involving children should be heard in private was contrary to Article 6(1) ECHR and that there should, instead, be a presumption that proceedings be heard in public. The ECtHR rejected this argument. It stated:

> "The proceedings which the present applicants wished to take place in public concerned the residence of each man's son following the parents' divorce or separation. The Court considers that such proceedings are prime examples of cases where the exclusion of the press and public may be justified in order to protect the

[8] Application no. 12643/02, Judgment of 21 September 2006 at para 93.
[9] Applications nos. 36337/97 and 35974/97, judgment of 24 April 2001. The term in England and Wales used for custody is residence.

privacy of the child and parties and to avoid prejudicing the interests of justice. To enable the deciding judge to gain as full and accurate a picture as possible of the advantages and disadvantages of the various residence and contact options open to the child, it is essential that the parents and other witnesses feel able to express themselves candidly on highly personal issues without fear of public curiosity or comment.

The applicants submit that the presumption in favour of a private hearing in cases under the Children Act should be reversed. However, while the Court agrees that Article 6 § 1 states a general rule that civil proceedings, inter alia, should take place in public, *it does not find it inconsistent with this provision for a State to designate an entire class of case as an exception to the general rule where considered necessary ... where required by the interests of juveniles or the protection of the private life of the parties ..., although the need for such a measure must always be subject to the Court's control* ..."[10] [Emphasis added]

2.12. It is therefore compatible with the ECHR to have a presumption that private law child care proceedings are heard in private, provided that the court has discretion in a particular case to decide otherwise.

2.13. The ECtHR considered the matter again in *Moser v Austria*. In that case, there were two important differences with *B and P v United Kingdom*. *Moser* concerned public law child care proceedings. Also, under Austrian law at the time it was understood that the Court had no power to lift *in camera* restrictions. The ECtHR held that Article 6(1) ECHR had been violated. It pointed out that unlike in *B and P v United Kingdom*, there was no power to lift *in camera* restrictions under Austrian law. It then went on to state:

"Moreover, the case of *B. and P. v. the United Kingdom* concerned the parents' dispute over a child's residence, thus, a dispute between family members, i.e. individual parties. The present case concerns the transfer of custody of the first applicant's son to a public institution, namely the Youth Welfare Office, thus, opposing an individual to the State. *The Court considers that in this sphere, the reasons for excluding a case from public scrutiny must be subject to careful examination*. This was not the position in the present case, since the law was silent on the issue and the courts simply followed a long-established practice to hold hearings *in camera* without considering the special features of the case."[11] [*Emphasis added*]

In short therefore, it is contrary to Article 6(1) ECHR for there to be no power to lift *in camera* restrictions. Also, the reasons for excluding a childcare case from public scrutiny must be subject to careful examination in order to satisfy Article 6(1) ECHR.

[10] At para 38.
[11] Application No. 12643/02, judgment of the 21st September, 2006.

3. International experience

3.1. It is instructive to consider the international experience of opening up *in camera* court proceedings to the media.

3.2. Research undertaken in the context of the 2009 reform of guidelines on admitting the media to family courts in England and Wales examined the experience of a number of countries that had initiated similar reforms, including Canada, Australia, and New Zealand.[12]Similar motivations led to debates on the need to open up court processes in the jurisdictions examined: concern that public confidence in the courts system was undermined by the lack of information emanating from family courts; a related concern regarding the legitimacy of decisions made by those courts; and the desire to increase the public's understanding of court processes and decisions. While noting that the jurisdictions examined in the report differed in important respects[13], the research nonetheless identified three common features of legislation in jurisdictions that had allowed wider press or public access:

- Wide discretionary powers to judges to determine press/public admission on a case-by-case basis, and in some instances provision to allow parties to request a closed hearing;
- Where the press may attend, there are extensive publication restrictions in place to protect the privacy rights of children, parents and others involved in proceedings; and
- Reporting restrictions are accompanied by criminal sanctions for breach of the restrictions.[14]

3.3. A study carried out in New Zealand following the opening up of the family courts in 2005 made a number of findings relevant to the current debate in Ireland:

- The media's level of interest in reporting on family law cases appeared to be low;
- An overwhelming majority of Family Court judges were in favour of the new regime of openness in the Family Court and welcomed media attendance;
- Judges were disappointed with the limited and unbalanced reporting of the Family Court in the first year of the new regime; and
- The media faces significant practical impediments to fully reporting about the Family Court, including lack of personnel and time to cover cases.[15]

The study concluded that the "door to the Family Court is open, but the media has not gone through" and suggested that the reasons for this included practical

[12] Brophy, J. and Roberts, C., '*Openness and transparency' in family courts: what the experience of other countries tells us about reform in England and Wales*, (University of Oxford, 2009)
[13] Ibid., pp. 6-7
[14] Ibid., p. 9
[15] Cheer, U., Caldwell, J. and Tully, J., *The Family Court, Families and the Public Gaze,* (New Zealand Families Commission, 2007), p. 62

limits imposed within the highly competitive media sector, lost opportunities and failure to capitalise on or adapt to new sources of information.[16]

3.4. The conclusion of the survey of different jurisdictions mentioned above was that the international experience does not support the contention that opening up the courts to the media necessarily enhances transparency, legitimacy and public knowledge.[17]This is because press coverage has been of uneven quality, allegations of "secrecy" in the courts persist and the public does not generally get its information about how courts work from newspapers.[18] The authors of the research argue that:

> "…press access is no substitute for good information about family courts and the way decisions are reached. This is needed both to help the parties and the general public to understand the legal processes and decision making and also to provide research based evidence. What was often acknowledged as missing in jurisdictions was independent research able to answer contemporary questions about trends and practices in a way press reporting of individual cases simply cannot provide."[19]

3.5. Another striking feature of the international experience of reforming family law and child care proceedings to allow greater access to the media is the absence of any consultation with children and young people. Given that the rationale for placing restrictions on the administration to justice in public in such proceedings derives mostly from concern regarding their impact on children, this is a serious omission. An exception to this was the consultation undertaken by the UK Government in 2007 on the reform of family courts in England and Wales; it incorporated the views of some 200 young people, most of whom were opposed to the presence of reporters in the courtroom.[20]

3.6. This position was consistent with the findings of a subsequent consultation carried out by the Office of the Children's Commissioner for England.[21] The major reason for young people's opposition to allowing greater access to the media was that court hearings address issues that are private; the young people consulted felt that those proceedings concern events that are painful, embarrassing and humiliating for children and an overwhelming majority said this detail was not the business of newspapers or the general public.[22] The specific findings of the consultation included the following:

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[16] Ibid.
[17] Brophy and Roberts, p. 14
[18] Ibid.
[19] Ibid., p. 15
[20] Department of Constitutional Affairs, *Confidence and confidentiality Improving transparency and privacy in family courts* (Cm 7036, 2007), p. 73
[21] Brophy, J., *The views of children and young people regarding media access to family courts* (Children's Commissioner for England, 2010)
[22] Ibid., section 2

- Almost all of the children and young people (79% in the public law sample, 91% in the private law group) were opposed to the decision to permit reporters into family court hearings;
- Almost all the children and young people interviewed (96%) said once children are told a reporter might be in court they will be unwilling or less willing to talk to a clinician about ill-treatment or disputes about their care, or about their wishes and feelings;
- Young people said judges and magistrates should seek the views of relevant children before deciding whether to admit the press to a hearing; and
- Children fear 'exposure'; they are afraid that personal, painful and humiliating information will 'get out' and they will be embarrassed, ashamed and bullied at school, in neighbourhoods and communities. This expectation is not limited to children in rural communities and is particularly relevant for those from ethnic minority communities. They also appeared unconvinced about the capacity of laws and adults to protect them.[23]

3.7. Article 12 of the UN Convention on the Rights of the Child places a clear obligation on States parties to ensure that children and young people have the opportunity to express their views on matters that affect them, and for those views to be given due weight having regard to their age and maturity. This applies both to individual children and groups of children. The failure to seek the views of young people in relation to a matter such as the reform of family law and child care proceedings represents a serious deficiency in the consultations undertaken in other jurisdictions; similarly, the omission of a requirement on the court to seek the views of children when exercising their discretion in allowing access to sensitive proceedings or publication of information is also a major weakness. This Office hopes that the same mistakes will not be repeated in Ireland.

[23] Ibid.

4. Recent developments in Ireland regarding *in camera* restrictions

4.1. Before commenting on the changes proposed by the Bill, it is worth noting that there have been a number of recent developments regarding *in camera* restrictions. These provide an important background context to the Bill and are therefore briefly outlined below.

Family Law Reporting and Child Care Law Reporting: Section 40 of the Civil Liability and Courts Act 2004 and s.3 of the Child Care Act 2007

4.2. S.40 of the 2004 Act[24] made a number of changes to *in camera* restrictions. In particular, it allowed for the preparation and publication of reports of proceedings under "relevant enactments" by a barrister, solicitor and certain other persons designated by regulation and access to documentation - such as orders, court reports and pleadings – by such persons.[25] The term relevant enactment was defined to mean certain specific *in camera* restrictions. These were *in camera* restrictions found in family law statutes.[26] *In camera* restrictions in the 1991 Act were not included.[27]

4.3. As a result of this change, the Family Law Reporting Project was established under the auspices of the Courts Service in 2007 to report on family law cases. It published a series called "Family Law Matters" which reported on District Court, Circuit Court and High Court cases.[28] The Project concluded its work in 2009. At that point, the Committee overseeing the work decided that it would be undertaken more appropriately by an external and independent expert or organisation, ideally involving personnel with legal qualifications and some research experience.[29] However, since 2009 there has been no reporting of family law like that undertaken by Family Law Reporting Project.

4.4. As already stated, the reporting provisions of s.40 of the 2004 Act were restricted to "relevant enactments" only, a term which did not include *in camera* restrictions under the 1991 Act. However, s.3 of the 2007 Act subsequently amended the 1991 Act to insert provisions allowing for reporting that were broadly similar to the reporting provisions of s.40 of the 2004 Act.

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[24] S.40 has been amended by s.31 of the Civil Law (Miscellaneous Provisions) Act 2008.
[25] Ss.40(3) and (11) of the 2004 Act.
[26] S.40(2) of the 2004 Act.
[27] By contrast, all *in camera* restrictions appear to be covered by the separate provisions of ss.40(6) and (7) of the 2004 Act which allow statutory bodies conducting hearings, inquiries and investigations to access *in camera* material.
[28] Available at http://www.courts.ie/courts.ie/library3.nsf/pagecurrent/DBF7DEC660A62D3880256DA60052BC9D?opendocument&l=en.
[29] See Report of the Family Law Reporting Project Committee to the Board of the Courts Service, (2009), available at http://www.courts.ie/Courts.ie/library3.nsf/(WebFiles)/491532ED22EBA9A4802575CB004E5ABA/$FILE/Report%20of%20the%20Family%20Law%20Reporting%20Project%20Committee%20to%20the%20Board%20of%20the%20Courts%20Service.pdf.

4.5. As a result of this development, in 2012 the Child Care Law Reporting Project was established.[30] Unlike the Family Law Reporting Project, the Child Care Law Reporting Project was not established under the auspices of the Courts Service. Rather it is a project funded by – but independent of – Atlantic Philanthropies, the Department of Children and Youth Affairs and the One Foundation.

4.6. Both s.40 of the 2004 Act and s.3 of the 2007 Act require that any report shall not contain information which would enable any party to the proceedings or any child to whom the proceedings relate to be identified.

4.7. In an attempt to ensure this, the Child Care Law Reporting Project has published a protocol with guidance for its reporters on avoiding identification of the parties and the child. For example, initials of the parties are not to be used. There is to be no reference to the city or town where the family lives or to the trade or profession of the parents or the school of the child.[31]

4.8. It is important to note that the Child Care Law Reporting Project, like the Family Law Reporting Project, involves the attendance of one reporter at a case. Also, reports are not contemporaneous. In the case of the Child Care Law Reporting Project, they are published bimonthly.

The power to lift *in camera* restrictions and to permit media attendance

4.9. S.40(8) of the 2004 Act also provides that a court hearing proceedings under a "relevant enactment" (that is to say family law legislation, but not child care legislation) may on its own motion or on the application of one of the parties to the proceedings order disclosure of *in camera* documents, information or evidence to third parties if such disclosure is required to protect the legitimate interests of a party or other person affected by the proceedings.

4.10. Prior to the 2004 Act, it was unclear whether such a power existed. In the leading case, *Eastern Health Board v Fitness to Practise Committee* [32] it was held that there was a common law power to lift *in camera* restrictions on such terms as the judge thought proper, that it would require specific statutory authority to override this and that no such statutory authority existed in Irish law. However, a later case, *RM v DM*, took a different view and held that in family law proceedings *in camera* restrictions could not be lifted.[33]

4.11. S.40(8) of the 2004 Act effectively overruled the decision in *RM v DM* and meant that *in camera* restrictions under "relevant enactments" (i.e. family law proceedings)

[30] For further details see www.childlawproject.ie.
[31] See http://www.childlawproject.ie/protocol/, accessed on 7 May 2012.
[32] [1998] 3 IR 399.
[33] [2000] 3 IR 373.

could be lifted. However, more recently in *HSE v McAnaspie*[34], the High Court followed *Eastern Health Board v Fitness to Practise Committee, B and P v United Kingdom* and *Moser v Austria* and found that there was a general power to lift *in camera* restrictions. It was also held that there was a power to permit the media to attend child care proceedings but that restrictions could be imposed on this.

4.12. As a result of *HSE v McAnaspie*, it is clear that there is a power to lift *in camera* restrictions. This can ensure Ireland's compliance with Article 6 (1) ECHR. However, it was clear in *HSE v McAnaspie* that it was envisaged that the media would attend in child care cases on an exceptional basis only.[35]

Access to *in camera* information by certain statutory and other bodies

4.13. S.40 of the 2004 Act also allows bodies conducting statutory hearings, inquiries or investigations, as well as other bodies designated by regulation conducting hearings, inquiries or investigations, to access *in camera* material. The provisions allowing this are found at ss.40(6) and (7) of the 2004 Act.

4.14. The Ombudsman for Children is, of course, a statutory office with a power to conduct investigations.[36] It therefore falls within ss.40(6) and (7) of the 2004 Act. Ss.40(6) and (7) are important to this Office since it regularly receives complaints regarding the child care system and many of the children concerned have been the subject of child care proceedings.

4.15. Unlike the provisions on reporting in s.40, the provisions on allowing access to information by statutory and other bodies do not override *in camera* restrictions only in "relevant enactments", a term defined by s.40(2) to include family law *in camera* restrictions only. Therefore, it should be possible to acquire *in camera* information not only in family law proceedings but also in child care proceedings. However, this Office has been concerned that the Health Service Executive has, at times, refused to accept this position and has argued that child care proceedings are not included.

4.16. This Bill provides an opportunity to address this difficulty.

4.17. ***It is therefore recommended – for the avoidance of any doubt – that it be made explicit that ss.40(6) and (7) are not confined to relevant enactments as defined by s.40(2). An amendment to this effect is provided at Annex A.***

4.18. S.40(9) of the 2004 Act also regulates the subsequent use of *in camera* information provided to a body conducting a hearing, inquiry or investigation. It provides that any hearing, inquiry or investigation when dealing with *in camera* material obtained

[34] [2011] IEHC 477.
[35] At para 42.
[36] See s.8 of the Ombudsman for Children Act 2002.

under ss.40(6) and (7), must be conducted otherwise than in public and the *in camera* material must not be published.[37]

4.19. This is problematic. To begin with, it is not clear whether the court which heard the proceedings can lift the *in camera* restriction - notwithstanding s.40(9) - to allow information to be published. The better view is that it can – since, as set out above, it has been held that *in camera* restrictions can be lifted by the court which heard the proceedings and, in the absence of clear words, that power should not be interpreted as having been overridden. But the matter is not as clear as it should be.

4.20. More fundamentally, in the same way as there is a power to report on family law and childcare proceedings, provided nothing is done that would enable the parties or the child to whom the proceedings relate to be identified, a body falling within ss.40(6) and (7) should be afforded the discretion to publish *in camera* information provided that nothing is done that would enable the identification of the parties or the child to whom the proceedings relate. A prior court application should not be necessary.

4.21. ***It is recommended that the Bill include amendments to address these difficulties so that the Ombudsman for Children and other statutory bodies are able to deal with in camera information appropriately, provided that nothing is done that would enable the identification of the parties or a child to whom proceedings relate. Draft amendments are provided in this regard at Annex A.***

4.22. A further difficulty has arisen due to two judgments: *Martin v Legal Aid Board*[38] and *HSE v McAnaspie*.[39]

4.23. *Martin v Legal Aid Board* concerned supervision of the files of Legal Aid Board solicitors by persons authorised by the Legal Aid Board as part of their internal auditing/quality assurance processes. Two solicitors refused to show family law and child care files to the authorised persons on the basis that it would violate *in camera* restrictions. Laffoy J noted that s.40 of the 2004 Act had relaxed the rigours of *in camera* restrictions, including by permitting production of *in camera* material to certain investigative bodies and persons. However, she noted that the authorised persons did not fall within any of these categories. But she found that showing the documentation to authorised persons of the Legal Aid Board did not violate *in camera* restrictions, having regard to the intention of the Civil Legal Aid Act 1995. However, she went on to state that the situation was different in respect of expert reports produced for the court further to s.47 of the Family Law Act 1995. She stated:

> "Such a report differs from ordinary *in camera* documentation. The report is the court's report. The solicitor on record in the proceedings is an officer of the court. It seems to me that it is a matter for the court which directed the

[37] S.40(9).
[38] [2007] 2 IR 759.
[39] [2011] IEHC 477.

> procurement of the report to determine whether in a particular case it is proper that disclosure of the copy be made to the authorised person. It is not a matter which this court can determine in the abstract in these proceedings."[40]

This approach was endorsed by Birmingham J in *HSE v McAnaspie*. He found that Guardian ad Litem reports were also created for the Court's benefit.[41]

4.24. While there has been no definitive ruling on this point, *Martin v Legal Aid Board* and *HSE v McAnaspie* raise doubts about the power of a statutory body conducting an hearing, inquiry or investigation to obtain without prior court application expert reports under s.47 of the Family Law Act 1995, expert reports directed under s.27 of the 1991 Act and reports created by Guardians ad Litem appointed under s.26 of the 1991 Act. This has complicated and caused unnecessary delays in some investigations by the Ombudsman for Children; it has also at times impeded the pursuit of timely, local redress.

4.25. ***In view of the above, it is recommended for the avoidance of doubt that the Bill clarify that the powers in ss.40(6) and (7) extend to reports under s.47 of the Family Law Act 1995, s.27 of the Child Care Act 1991 and to reports of Guardians ad Litem appointed under s.26 of the Child Care Act 1991 and other reports created for the court's benefit.***

[40] At para 57.
[41] At para 38.

5. The proposals of the Courts Bill 2013

5.1. The main innovation of Part 2 of the Bill is that it inserts into s.40 of the 2004 Act and into s.29 of the 1991 Act a provision making clear that *in camera* restrictions in family law and child care legislation shall not operate "to prohibit bona fide representatives of the Press from attending" proceedings under such legislation. However, it is made an offence to publish or broadcast any matter which would lead members of the public to identify the parties to family law or child care proceedings. Penalties for breach range up to a fine of €50,000 and imprisonment for a term not exceeding 3 years, or both.

5.2. No definition is provided of "bona fide representatives of the Press." It is therefore unclear what categories of commentator or journalist would be able to attend and under what conditions. In other jurisdictions, a system of accreditation has been introduced to provide clarity on this matter.[42] ***Should the Bill proceed in its current form, it is recommended that a definition of bona fide members of the Press be provided or other measures be included to clarify who can attend proceedings included in the Bill.***

5.3. A court hearing family law or child care proceedings is given the power to "exclude or otherwise restrict the attendance of bona fide representatives of the Press or prohibit or restrict the publication or broadcasting of any evidence." In determining whether or not to exercise this power, the court may have regard to a wide range of factors including:

- the best interests of the child,
- whether information given or likely to be given in evidence is sensitive personal information,
- the extent to which undue distress could be caused to a party to the proceedings or a child to whom the proceedings relate,
- the need to protect a party to the proceedings or a child against coercion, intimidation or harassment
- whether information given or likely to be given in evidence might be prejudicial to a criminal investigation or criminal proceedings.

5.4. It is not specifically clarified that the best interests of the child must be the paramount consideration in determining such matters. While the paramountcy of a child's welfare is already required by other statutory provisions - such as s.24 of the 1991 Act and s.3 of the Guardianship of Infants Act 1964 – the fact that the best interests of the child is listed as one consideration among many in the Bill puts the matter in some doubt. ***Should the Bill proceed in its current form, it is recommended that it be made clear that the best interests of the child be the***

[42] In Nova Scotia, for example, the Media Liaison Committee (2006) set out an accreditation system covering qualifications, application processes, guidelines for breaches of conduct and a Breaches Advisory Committee.

paramount consideration in determining whether to exclude a member of the Press or to restrict Press coverage.

5.5. It is also useful to consider the relationship between the best interests of children and respect for their views in this context. The UN Committee on the Rights of the Child has clarified that an assessment of a child's best interests must include respect for the child's right to express his or her views freely, with due weight given to those views in all matters affecting the child.[43] This suggests that the Bill should also include a requirement for the court to have regard to the views of child in accordance with Article 12 of the UNCRC.

5.6. The Ombudsman for Children sympathises with the policy objectives which Part 2 of the Bill seeks to promote. The administration of justice in public is an important constitutional value. Transparency about family law and child care proceedings can help to ensure public confidence in the child care and family law systems.

5.7. However, this Office has a number of serious concerns about the potential impact of this reform.

5.8. The Family Law Reporting Project and the Child Care Law Reporting Project involve a single reporter attending proceedings. As soon as that number is increased, the chances of identification are necessarily increased, notwithstanding the very serious penalties for identification.

5.9. A recent case illustrates the difficulties that may arise. A number of newspapers published details regarding a case of suspected non-accidental injuries including –

- where the children were in hospital;
- the kind of injuries that were sustained;
- the general area where the parents were living;
- the ages of the parents;
- their backgrounds; and
- their home circumstances.

While individually some of the coverage might not have identified the children, when a number of reports were read together the parents and children could have been identified to a significant section of the public.

5.10. This risk could be reduced by adherence to the protocol adopted by the Child Care Law Reporting Project.[44] Indeed, ***if it is decided to allow the media into child care and family law proceedings, it is recommended that provision be made***

[43] UN Committee on the Rights of the Child, *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration,* (UN Doc CRC/C/GC/14, 2013), para. 43
[44] Available at http://www.childlawproject.ie/protocol/.

for that protocol in the Bill. However, such a protocol has its limits. For example, if a local newspaper is reporting on child care cases, readers may reasonably conclude that the cases reported on are from the locality, even if this is not stated. Detail which may not identify a child in a national newspaper may more easily identify a child when in a local newspaper.

5.11. Also, in some cases the particular details of the case may lead to identification. For example, details of any unusual features of the child or the parents may lead to their identification in their local communities.

5.12. While the penalties for identification are severe, this may in reality be ineffective to prevent identification. If multiple journalists are present in court, each journalist may not, him or herself, identify the child but taken together their reports may do so. In such a case, it is not clear which journalist, if any, could be fairly prosecuted.

5.13. In response, it could be argued that the Court may give directions on the details that can and cannot be published in order to prevent identification. However, this would leave the court in the difficult situation of determining – in detail – what may and may not be reported in specific cases and effectively determining a journalist's coverage.

5.14. A further difficulty may arise, particularly in child care cases. Typically, such cases will involve an emergency care order, several interim care orders and a full care order hearing. Often, at least one interim care order will be contested necessitating a hearing in which extensive evidence may be given. This may be many months before the hearing of the full care order occurs. A child who is the subject of the interim care order will normally be aware of the court dates through his or her Guardian ad Litem, parents or social worker. If – unlike the current Child Care Law Reporting Project – the reporting is contemporaneous, then the chances of the child identifying him or herself from reportage is likely to be increased.

5.15. This may have fundamental consequences for the child care case. In many cases, children's disclosures will be of central importance. This is particularly likely to be true in cases of sexual abuse where there will often be no witnesses to the abuse and no independent medical evidence to corroborate it.

5.16. If a child becomes aware from contemporaneous media reportage of what is occurring in the case, this may cause the child distress – particularly if the child learns of denials by the parents of the abuse. Further, it may increase pressure on the child to retract his or her account of the abuse.

5.17. If a child identified his or her case from a contested interim care order hearing, he or she may thereafter feel under increased pressure to retract his or her allegations in the months leading to the full care order hearing.

5.18. Also, if parties or children are identified in family law or childcare proceedings, this may have a deterrent effect leading to parties being more reluctant to go to court in family law proceedings and children being more reluctant to make child abuse

allegations. It could also lead to greater stress for parties and children who are involved in family law and child care cases.

5.19. This Office believes that any system for reporting should be rights-compliant, systemic, sustainable, non-deterring and independent This Office does not believe that the proposals of the Bill meet many of these criteria for the reasons set out above. They will not provide systemic information. They may lead to identification. They may cause children to retract child abuse disclosures and deter parties from going to court. ***This Office therefore recommends that the provisions of the Courts Bill on media presence be reconsidered so that the concerns outlined in this submission can be addressed.***

5.20. This Office also believes that this matter would be better addressed upon the completion of the Child Care Law Reporting Project. This project may provide useful learning on how best to ensure greater transparency in the court system while also protecting the privacy of the parties and any children to whom the proceedings relate.

ANNEX A

Suggested amendments to the Courts Bill 2013 addressing difficulties encountered by the Ombudsman for Children with *in camera* restrictions in the course of her investigations

Section 40 of the Civil Liability and Courts Act 2004 is amended -

(a) by replacing subsection (9) with-

"(9) A hearing, inquiry or investigation referred to in *subsection (6)* or *(7)* shall, in so far as it relates to a document referred to in *subsection (6)* or information or evidence referred to in *subsection (7)* -

(a) be conducted otherwise than in public, and

(b) such a document, information or evidence may only be published provided that it does not contain any information which would enable the parties to the proceedings or any child to which the proceedings relate to be identified."; and

(b) by adding the following subsections after subsection (11) -

"(12) For the avoidance of doubt it is hereby declared that the enactments to which subsections (6) and (7) relate are not limited to relevant enactments within the meaning of subsection (2).

(13) For the avoidance of doubt, it is hereby declared that this section applies -

(a) to a document prepared for the benefit of a court, including by a person appointed under sections 26 or section 27 of the Child Care Act 1991 or section 47 of the Act of 1995;

(b) information or evidence given by an author of such a document, including by a person appointed under section 26 or section 27 of the Child Care Act 1991 or section 47 of the Act of 1995 in the performance of his or her functions under those sections.

(14) Nothing contained in section 40(9) removes the discretion of a court which is hearing, has heard or will be hearing proceedings otherwise than in public under any enactment from authorising a hearing, inquiry or investigation referred to in subsection (6) or (7) insofar as it relates to a document referred to in subsection (6) or information or evidence referred to in subsection (7) from being conducted publicly to such extent and subject to such conditions as it may determine."