



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**Preventing Children going missing
from Care:
Reconciling Liberty and Best
Interests**

February 2022

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Foreword

I am delighted to be able to share this significant work which was undertaken from a human rights perspective, respecting the principle that best interests of the child must always come first.

Not only does this report contain a comprehensive analysis of the relevant legal standards, it will assist in the practical application of those standards for the better protection of children.

This report has been long awaited. It reflects increasing concern raised with the Commission over recent years both by the public during our engagements with them and by practitioners who work with and care for children. This is a societal issue but also a justice issue.

The Commission, to build a database for the research, held roundtables with young people who had been through the care system, organisations who enable the voices of children and young people in care to be heard and staff working with children in care. This was designed to ensure we took into account the experiences and realities of life for children in the care system.

We also heard from police, for example, about their fears for children in care settings who are at risk of child sexual and other exploitation and abuse. To put that in context, they tell us that half of all missing persons cases are either children in care or individuals in mental health stress leaving accident and emergency care without being treated. In other words, two of the most vulnerable and marginalised groups in our community are at greatest risk and those charged with protecting them are struggling to do that.

In some instances, this is contributed to by a misunderstanding of the Human Rights Act 1998 and its application in care settings. By way of example, we learned that care staff believed they had to permit a child to leave the premises, even when there was a real risk to their safety or well-being. As a matter of law, that is incorrect but it is also dangerous when considered in practice.

It is critical that the powers and duties applicable in care settings are fully understood and that staff are equipped to protect children at risk. Exercising judgement in individual cases is challenging but made significantly more reliable if the boundaries are clearly understood and applied. This report will hopefully assist in explaining those boundaries and influence decision-making.

The shared objective for all of us must be to enable children and young people to overcome barriers, not of their own making, and achieve the bright future they all deserve.

A handwritten signature in black ink, appearing to read 'A. Kilpatrick', written in a cursive style.

Alyson Kilpatrick BL
Chief Commissioner

Key Recommendations

The Northern Ireland Human Rights Commission (NIHRC) makes a number of key recommendations. These are based on the evidence set out within this report and should not be considered in isolation, but are aimed at providing a basis on which to move forward. The NIHRC recommends:

- 1) A human rights based approach is adopted towards tackling the issue of children being reported missing from care. For example, Articles 2, 3 and 4 ECHR are clear that all reasonable steps should be taken to protect a child from real and immediate threats to life, ill-treatment and exploitation. Article 8 ECHR confirms that a blanket approach towards interfering with a child's correspondence such as telephone calls should not be taken. Instead, such interference must be in the best interests of the individual child, for a legitimate aim and only for as long as is necessary. Furthermore, it is accepted that Article 5 ECHR can have conflicting priorities, but this can be resolved by looking at what is in an individual child's best interests (for example, taking into account age) and whether there are other competing rights involved and the surrounding circumstances (for example, is there a threat of exploitation). As Article 3(1) of the UN CRC states, the best interests of the child must be a primary consideration.**
- 2) There is a focus on early intervention. It was identified that there can be a pattern with children reported missing from care and that the act of going missing can possibly be prevented by recognising the pattern and children's home staff, with the support of public authorities, taking steps earlier to work with the child concerned to address the issues that may lead them to leave the home without authorisation.**
- 3) There is specialised training for public authorities and service providers that are dealing with children in care or responding to reports of a child going missing from care.**

This includes training on human rights, trauma-informed practice and de-escalation;

- 4) Children, particularly children identified as the most at risk, are educated on understanding, identifying and accessing support to protect them from grooming and child sexual exploitation. This connects to a broader piece on ensuring relationship, sex and identity education for all children in Northern Ireland comprehensively deals with what is a healthy and unhealthy relationship, and the tools or support available to help children avoid or get out of an unhealthy relationship.**
- 5) That the good work that has been undertaken to date, for example between the Police Service NI and the Health and Social Care Board, is promptly rolled out across Northern Ireland. Any programmes going forward should be effectively developed using an evidence basis on what is working or not working (taking into account variables such as rurality), efficiently resourced on a long-term basis, and subject to regular monitoring and evaluation as appropriate. This work should also be cross-sectoral where appropriate.**
- 6) Children and their representative organisations are consulted on how to address children reported missing from care, including the root causes and suggestions for tackling these issues. These views should be reflected in actions and targets going forward.**

1.0 Introduction

1.1 The Northern Ireland Human Rights Commission (the Commission), pursuant to Section 69(1) the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights.

1.2 The Commission bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights as incorporated by the Human Rights Act 1998 and the treaty obligations of the Council of Europe (CoE), European Union (EU) and United Nations (UN) systems. The relevant international treaties in this context include:

- CoE European Convention on Human Rights 1950 (ECHR);¹
- CoE Convention on Compensation for Victims of Violent Crimes 1983;²
- CoE Convention on Cybercrime 2001;³
- CoE Convention on Action against Trafficking in Human Beings 2005;⁴
- CoE Convention on the Protection of Children and Young People against Sexual Exploitation and Sexual Abuse 2007 (Lanzarote Convention);⁵
- CoE Convention on Preventing and Combating Violence against Women and Domestic Violence 2011 (Istanbul Convention);⁶
- Charter of Fundamental Rights of the EU 2000;⁷
- EU Directive on combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography 2011;⁸

¹ Ratified by the UK in 1951.

² Ratified by the UK in 1990.

³ Ratified by the UK in 2011.

⁴ Ratified by the UK in 2007.

⁵ Ratified by the UK in 2018.

⁶ Signed by the UK in 2012. The UK has not yet ratified the Lanzarote Convention, but has committed to do so with the enactment of the Preventing and Combating Violence against Women and Domestic Violence (Ratification of Convention) Act 2017. The UK Mission at Geneva has also stated, "the UK's approach to signing international treaties is that we only give our signature where we are fully prepared to follow-up with ratification in a short time thereafter". See UK Mission at Geneva, 'Universal Periodic Review Mid-term Progress Update by the United Kingdom on its Implementation of Recommendations Agreed in June 2008' (UKMIS), at Recommendation 22 (France).

⁷ Ratified by the UK in 2000.

⁸ EU Directive 2011/93/EU, 'Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography, and Replacing Council Framework Decision 2004/68/JHA', 13 December 2011.

- EU Directive on establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime 2012 (EU Victims Directive).⁹
- UN Convention on the Elimination of All Forms of Discrimination against Women 1979 (UN CEDAW);¹⁰
- UN Convention on the Rights of the Child 1989 (UN CRC);¹¹
- Optional Protocol to the UN Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2000;¹²
- UN Convention on the Rights of Persons with Disabilities 2006 (UN CRPD);¹³

1.4 In addition to these treaty standards, there exists a body of 'soft law' developed by the human rights bodies of the United Nations (UN) and the Council of Europe (CoE). These declarations and principles are non-binding but provide further guidance in respect of specific areas. The relevant standards in this context include:

- UN Resolution on the Rights of the Child 1977;¹⁴
- UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985;¹⁵
- CoE Committee of Ministers Recommendation concerning sexual exploitation, pornography, and prostitution of, and trafficking in, children and young adults 1991;¹⁶
- CoE Parliamentary Assembly resolution on the sexual exploitation of children 2002;¹⁷
- CoE Committee of Ministers Recommendation concerning the protection of children against sexual exploitation 2011;¹⁸
- EU Agenda for the Rights of the Child 2011;¹⁹

⁹ EU Directive 2012/29/EU, 'Directive Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.

¹⁰ Ratified by the UK in 1981.

¹¹ Ratified by the UK in 1991.

¹² Ratified by the UK in 2009.

¹³ Ratified by the UK in 2009.

¹⁴ A/RES/51/77, 'UN General Assembly Resolution on the Rights of the Child', 20 February 1977.

¹⁵ A/RES/40/34, 'UN General Assembly Principles of Justice for Victims of Crime and Abuse of Power,' 29 November 1985.

¹⁶ CoE Committee of Ministers, 'Recommendation Rec(91)11 Concerning Sexual Exploitation, Pornography and Prostitution of and Trafficking in Children and Young Adults', 9 September 1991.

¹⁷ CoE Parliamentary Assembly, 'Resolution on the Sexual Exploitation of Children: Zero Tolerance', 5 September 2002.

¹⁸ CoE Committee of Ministers, 'Recommendation Rec (2001)16 Concerning the Protection of Children against Sexual Exploitation', 31 October 2001.

¹⁹ COM(2011)60, 'EU Agenda for the Rights of the Child', 15 February 2011 .

- Resolution of the European Parliament on the 25th anniversary of the UN Convention on the Rights of the Child 2014;²⁰
- Resolution of the European Parliament on Child Sexual Abuse Online 11 March 2015.²¹

- 1.5 In a number of community engagements, the issue of children in care absconding from their placements has been raised with the Commission. Concern has been expressed, in particular, by the Police Service NI, that these children are particularly vulnerable including with respect to child sexual exploitation. Throughout this document reference is made to phrases such as 'child prostitution' and 'child pornography' when they are contained within the name of an international treaty or a quote. The Commission is aware that this is outdated language and has amended the language within this report where possible to acknowledge such activity as child sexual exploitation.
- 1.6 The Commission initially met with the Police Service NI in May 2017 to discuss the issue and the Police Service NI's work with the Health and Social Care Board in respect of this matter. The Commission understands that the issue is one which is of concern to the Health and Social Care Board and Health Trusts, as well as the Police Service NI.²²
- 1.7 Following the meeting in May 2017, the Commission committed to reviewing the issue and considering how the Commission could assist. Subsequently, the Commission committed to producing a piece of work analysing the human rights of children who are reported missing whilst in the care of the State in its 2019-2020 business plan.
- 1.8 The following analysis represents the completion of this work and the Commission's considered views on the human rights of children who are reported missing from care.

²⁰ RES 289/57, 'Resolution of the European Parliament on the 25th anniversary of the UN Convention on the Rights of the Child', 27 November 2014.

²¹ 2015/2564(RSP), 'Resolution of the European Parliament on Child Sexual Abuse Online', 11 March 2014.

²² The Commission is also aware that the Department of Health and the Department of Education are currently carrying out a consultation in respect of the draft strategy for children in care. The Department of Health has also noted that the issue of children in care 'going missing' continues to be one of 'particular focus' for the Department of Health and the health and social care system. In line with this, the Health and Social Care Board and the Police Service NI are currently carrying out work under a joint strategic action plan on Children Missing from Residential Care.

2.0 Children in Care

- 2.1 Children in care may be defined as those children who live in a residential children's home, live with foster parents or who are placed with their own parents by the Trust.²³ The Trust may have some legal responsibility for the child by virtue of a court order or the child may have been placed in care with the consent of their parents.
- 2.2 A 'child in care' is a child who is in the care of a Trust or who is provided with accommodation by the Trust for a continuous period of more than 24 hours.²⁴ Throughout this document reference is made to a child or children in care where possible, however, there will be occasions when the less favoured phrase of 'looked after children' cannot be changed as it has been used in a quote or title of a document, such as the 'Looked After Children Strategy'.
- 2.3 According to statistics from the Department of Health, as of 31 March 2021, there were 3,530 children in care in Northern Ireland.²⁵ This is the highest number recorded since the introduction of the Children's Order (NI) 1995.²⁶
- 2.4 In 2020/21, 81 per cent of children in care were placed with foster parents and 6 per cent of children in care were placed in residential care.²⁷
- 2.5 Children who leave care can have their life chances affected by issues such as disability, poor educational attainment or the reasons why they came into care and it is acknowledged that they require

²³ The current Health and Social Care Board guidance on children missing from care defines care as children "either under Article 21, or subject of a Care Order under Article 50, or an Interim Care Order under Article 57 of the Children (NI) Order 1995. It also applies to children who are the subject of an Emergency Protection Order, subject to Police Protection under Article 65, Wardship or subject of a Care Order to another Authority but being supervised on its behalf by the Health and Social Care Trust. A child in care who is the subject of a Care Order may be placed at home with his/her parent".

²⁴ Article 25, Children's Order (NI) 1995.

²⁵ Information Analysis Directorate, 'Children's Social Care Statistics for Northern Ireland 2020/21' (DoH, 2021), at 6.

²⁶ Ibid, at 27.

²⁷ Ibid.

extra assistance from public authorities in order to achieve their fullest potential.²⁸

- 2.6 Although human rights protect all children, due to their vulnerability and life circumstances, the human rights of children in care will require extra attention and effort to ensure that they are protected and fulfilled.

Human rights of children in care

- 2.7 The human rights guaranteed to children overall are contained within a number of international treaties which have been ratified by the United Kingdom (UK). The UN CRC details specific rights that are guaranteed to children. It is the primary international treaty regarding the human rights of children.
- 2.8 Beyond UN CRC, children are also guaranteed the same rights as adults under the other international human rights treaties which the UK has ratified, as well as having a number of rights under soft law treaties in relation to child-specific concerns and areas. A growing area of international law is attempting to deal with issues such as child pornography²⁹ and sexual exploitation.³⁰ Equally, UN CRPD details and requires specific protections and assistance for disabled children.³¹ UN ICESCR mandates that special protections and assistance are taken on behalf of all children, regardless of parentage or any other conditions.³²
- 2.9 Additionally, under the Human Rights Act 1998, all individuals in the UK, including children, are guaranteed the rights and freedoms in the ECHR.
- 2.10 The Human Rights Act 1998 allows for individuals to take public authorities to court to access these rights.³³ In certain cases, this

²⁸ Department of Health and Department of Education, 'Strategy for Looked After Children: Improving Children's Lives' (DoH and DoE, 2018), at para 2.14.

²⁹ EU Directive 2011/93/EU, 'Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography, and Replacing Council Framework Decision 2004/68/JHA', 13 December 2011.

³⁰ Optional Protocol to the UN Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2000; CoE Convention on the Protection of Children and Young People against Sexual Exploitation and Sexual Abuse 2007 (Lanzarote Convention).

³¹ Articles 3(h), 4(3), 7, 18 (2), 23, 24, 25 and 30, UN Convention on the Rights of Persons with Disabilities 2006.

³² Article 10(3), UN International Covenant on Economic, Social and Cultural Rights 1966.

³³ Section 6, Human Rights Act 1998.

can mean compelling a public authority to take positive steps to protect rights or prohibiting the authority from taking steps which would violate the ECHR.

2.11 Where these cases concern children, there has been an increasing trend of domestic courts recognising the persuasive and significant nature of UN CRC and other international treaties and taking steps to guarantee children the rights detailed within them.³⁴

United Nations Convention on the Rights of the Child

2.12 The overarching principle of UN CRC is that all actions taken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies shall have the best interests of the child as a primary consideration.³⁵ This principle of UN CRC is clearly reflected in the Children's Order (NI) 1995.³⁶

2.13 Above this primary consideration, UN CRC elaborates on a number of rights, which equally emphasise the autonomy, evolving capacity and participation of the child as well as the State's duties to take measures to protect and support children.

2.14 In fulfilling its duties to protect children, the State Party must "ensure the child such protection and care as is necessary for his or her wellbeing",³⁷ recognise the child's right to life and ensure his or her survival and development to the "maximum extent possible"³⁸ and protect the child from any unlawful or arbitrary attacks on his or her privacy, family, home, correspondence, honour or reputation.³⁹

2.15 The State must also:

take all appropriate legislative, administrative, social and educational measures' to protect children from 'all forms of physical or mental violence, injury or abuse, neglect or

³⁴ See for example, *R(SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, at para 137; *Mathieson v the Secretary of State for Work and Pensions* [2015] UKSC 47, at paras 38–45.

³⁵ Article 3 UN Convention on the Rights of the Child 1989; Articles 5(b) and 16(d), UN Convention on the Elimination of All Forms of Discrimination against Women 1979.

³⁶ Article 3, Children's Order (NI) 1995.

³⁷ Article 3(2), UN Convention on the Rights of the Child 1989.

³⁸ *Ibid*, Article 6(2).

³⁹ *Ibid*, Article 16.

negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.⁴⁰

2.16 UN CRC further mandates that children who are temporarily or permanently removed from the care of their parents receive “special protection and assistance provided by the State”.⁴¹

2.17 State Parties must also protect children from economic exploitation and from “performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development”.⁴² Articles 34 and 36 of the UN CRC place a duty on States to protect children from use of illicit drugs, production and trafficking of drugs, sexual exploitation and sexual abuse.⁴³ States also have a duty to take appropriate measures to promote the physical and psychological recovery of any child who has been a victim of exploitation or any other inhuman or degrading treatment.⁴⁴

2.18 Alongside these duties to protect children, a number of UN CRC provisions emphasise the voice and participation of the child in matters involving their care and life as well as recognising the autonomy and agency of children. For example, Article 12(1) of the UN CRC requires that State Parties:

assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2.20 Children are therefore guaranteed the opportunity to be heard in any judicial or administrative proceedings affecting them.⁴⁵ The UN CRC Committee has noted that any assessment of a child's best

⁴⁰ Ibid, Article 19.

⁴¹ Ibid, Article 20(1).

⁴² Ibid, Article 32(1).

⁴³ See *also* Article 10(3), UN International Covenant on Economic, Social and Cultural Rights 1966.

⁴⁴ Article 39, UN Convention on the Rights of the Child 1989.

⁴⁵ Article 12(2), UN Convention on the Rights of the Child 1989.

interests must include their right to be heard as the two rights are inextricably linked.⁴⁶

2.21 Children have the right to freedom of expression,⁴⁷ including the right to seek, receive and impart information⁴⁸ and to freedom of association.⁴⁹ UN CRC specifically notes the duty on States to ensure disabled children enjoy a “full and decent life” which “promote[s] self-reliance and facilitate[s] the child's active participation in the community”.⁵⁰

2.22 UN CRC also prohibits the unlawful or arbitrary detention of a child.⁵¹ Any decision to detain a child must be taken as a measure of last resort and be for the shortest appropriate period of time.⁵²

2.23 Where any child is detained, they have the right to prompt legal assistance and to challenge the legality of their detention before a judicial authority.⁵³

2.24 In summary, under UN CRC:

- **children have the right to be protected from violence;**
- **children have the right to have their voice heard; and**
- **children have the right to have their participation facilitated.**

European Convention on Human Rights

2.25 Similar to UN CRC, the ECHR places obligations on public authorities to protect children. These obligations apply not only to protecting

⁴⁶ CRC/C/GC/14, ‘UN CRC General Comment No 14: Right of the Child to Have His or Her Best Interest Taken as a Primary Consideration’, 29 May 2013, at para 43.

⁴⁷ Article 13, UN Convention on the Rights of the Child 1989.

⁴⁸ Ibid.

⁴⁹ Ibid, Article 15.

⁵⁰ Ibid, Article 23.

⁵¹ Ibid, Article 37(b).

⁵² This provision regarding deprivation of liberty has been highlighted and taken into account by the High Court of Northern Ireland. See *OC's (A Minor) Application and LH's (A Minor) Application In the Matter of a Decision by a Health and Social Care Trust* [2018] NIQB 34, at para 27.

⁵³ Article 37(d), UN Convention on the Rights of the Child 1989.

children from the acts of public authorities (including staff), but also from the acts of private individuals.⁵⁴

2.26 Children have a right to life under Article 2 ECHR and to be free from torture and inhuman and degrading treatment under Article 3 ECHR. The right to be free from torture, inhuman and degrading treatment is absolute and cannot be interfered with under any circumstances. Where there is a real and immediate threat, these rights require the authorities to take reasonable steps to safeguard the child's right to life or to prevent them from suffering inhuman and degrading treatment.⁵⁵

2.27 Where a child's right to life has been breached, there is a positive procedural obligation on the authorities to carry out an effective investigation that has the possibility of leading to the identification and prosecution of the offender.⁵⁶

2.28 The UK and NI Government is required to put in place laws to prevent children from suffering inhuman and degrading treatment and to protect children from such harm, as required by the positive obligations under the ECHR.⁵⁷

2.29 In serious cases including those involving issues such as sexual abuse or rape, there will be a positive obligation on the authorities to investigate.⁵⁸ The European Court of Human Rights (ECtHR) has recognised the obligations on the State to protect children in detention or who are in their care from inhuman and degrading treatment.⁵⁹

2.30 Whether or not the relevant treatment has reached the level of breaching Article 3 ECHR will be determined by the facts of each case.

2.31 Article 4 ECHR absolutely prohibits slavery, servitude and all forms of compulsory or forced labour. The ECtHR has elaborated that

⁵⁴ *X and Y v the Netherlands* (1985) ECHR 4, at para 62.

⁵⁵ *Centre for Legal Resources on Behalf of Valentin Câmpeanu v Romania* (2014) ECHR 789, at para 130.

⁵⁶ *Nencheva and Others v Bulgaria* (2013) ECHR 554.

⁵⁷ *Z and Others v UK* (2001) ECHR 333.

⁵⁸ *MC v Bulgaria* (2011) ECHR 586, at para 153.

⁵⁹ *A and S v Lancashire County Council* [2012] EWHC 1689, at para 123.

'servitude' encompasses "an obligation to provide one's services that is imposed by the use of coercion".⁶⁰ Under Article 4 ECHR, there is a duty on the State to put in place a legislative and administrative framework to combat forced labour and servitude.⁶¹ The ECtHR will then examine if the national authorities have carried out an effective investigation into allegations of breaches of Article 4 ECHR.⁶²

2.32 As with UN CRC, the ECHR provides that no one shall be unlawfully deprived of their liberty save for under certain conditions.⁶³ The right not to be deprived of liberty shall be revisited later.

2.33 Children also have the right to private and family life under Article 8 ECHR. This provision also carries a particular positive obligation on the authorities as regards children to ensure that their Article 8 ECHR right is safeguarded and to further take positive steps to protect their "physical and psychological integrity".⁶⁴ Where the level of treatment suffered by children does not reach the threshold of Article 3 ECHR, it can be considered under Article 8 ECHR.⁶⁵ In respect of the decision to take children into care, the ECtHR has outlined the factors to be taken into consideration, mainly highlighting the protective nature of any such decision:

a variety of factors may be pertinent, such as whether by virtue of remaining in the care of its parents the child would suffer abuse or neglect, educational deficiencies and lack of emotional support, or whether the child's placement in public care is necessitated by the state of its physical or mental health.⁶⁶

2.34 Under the right to private and family life, the State must not, unnecessarily interfere with a child's family life and should only separate children from their parents in exceptional circumstances.⁶⁷ The ECtHR has ruled that "everything must be done" in order to

⁶⁰ *Siliadin v France* (2011) ECHR 2110.

⁶¹ *CN and V v France* (2012) ECHR 374, at para 108.

⁶² *Ibid*, at paras 70-82.

⁶³ Article 5, European Convention on Human Rights 1950.

⁶⁴ *X and Y v the Netherlands* (1985) ECHR 4, at paras 22 and 23.

⁶⁵ *Jankovic v Croatia* (2008) ECHR 140, at para 4.

⁶⁶ *Saviny v Ukraine* (2008) ECHR 1741, at para 50.

⁶⁷ *YC v UK* (2010) ECHR 1228, at para 134.

ensure children retain personal relations with their families and to attempt to rebuild the family.⁶⁸ Although the State has a wide margin of appreciation in terms of the initial decision to remove a child from their parents, the above obligations remain regardless of where the child is placed.⁶⁹ Like UN CRC, the ECtHR has confirmed that all decisions taken by the courts in respect of children must be taken in their “best interests”.⁷⁰

2.35 A number of provisions under the ECHR safeguard individual autonomy and freedom from State interference, these provisions extend to children. Article 9 ECHR guarantees the freedom of thought, conscience and religion, whilst Article 10 ECHR guarantees freedom of expression and information. The ECHR does not replicate UN CRC as it does not require that children in court proceedings are heard, however, case law from the ECtHR indicates that this will be a factor taken into account by the court when deciding if the national authorities made the correct decision.⁷¹

2.36 In summary, under the ECHR:

- **public authorities have to protect children from the acts of individuals;**
- **where a there is a real and immediate risk to a child’s rights under ECHR Article 2 (the right to life) and Article 3 (protection from torture, inhuman or degrading treatment), public authorities must take reasonable steps to prevent any possible violations; and**
- **where a child’s rights under Article 2 and Article 3 ECHR are breached, public authorities have to investigate these allegations.**

⁶⁸ Ibid, at para 134.

⁶⁹ Ibid, at para 137.

⁷⁰ *K and T v Finland* (2000) ECHR 174, at para 178.

⁷¹ In, the ECtHR considered the case of a 13 year old girl who did not wish to have contact with her father. The father complained to the ECtHR on the basis that the domestic courts did not order a psychological report on the issue. Considering the domestic proceedings as a whole, the ECtHR noted that the girl had been questioned three times by the District Judge and, each time, had expressed the view that she did not wish to see her father. The ECtHR noted that “having had the benefit of direct contact with the girl, the District Court was well placed to evaluate her statements and to establish whether or not she was able to make up her own mind”. See *Sommerfeld v Germany* (2003) ECHR 341, at para 72.

Human rights and the role of the corporate parent

- 2.37 Often, when a child is in non-voluntary care, a public authority will be acting in the role of the 'corporate parent'. This is usually by way of the courts granting the public authority 'parental responsibility' through a court order.⁷²
- 2.38 Therefore, although the human rights obligations on public authorities in respect of children exist without this role, it is often through this title that these obligations are met.
- 2.39 In Northern Ireland, the Department of Health is the corporate parent, but subsequently delegates this function, to one of the five Health and Social Care Trusts who have responsibility for the children residing in their Trust area.
- 2.40 The overarching principle of our domestic law is that decisions taken in respect of a child's upbringing must be taken with the child's welfare as the "paramount consideration".⁷³ The Children's Order (NI) 1995 gives a brief definition of parental responsibility,⁷⁴ but does not elaborate on what this entails from the Trust's perspective or on the duties imposed on the Trust by their acquisition of parental responsibility, although there is a general duty of authority to safeguard and promote every child's welfare where they are in the care of the Trust.⁷⁵
- 2.41 There is currently no legal definition of 'corporate parenting' in Northern Ireland, however, the Children's Order places a number of duties on persons running a children's home⁷⁶ and on the authorities responsible for the homes.⁷⁷ The Adoption and Children Bill, introduced into the NI Assembly in September 2021, proposes the introduction of a set of 'corporate parenting principles' as an amendment to the Children Order.⁷⁸ Within England and Scotland

⁷² Where an authority is granted a care order in respect of a child, that authority shall automatically have parental responsibility for the child in question. See Article 52(3)(a), Children's Order (NI) 1995.

⁷³ Article 3, Children's Order (NI) 1995.

⁷⁴ Article 6(1), Children's Order (NI) 1995.

⁷⁵ Article 26(1), Children's Order (NI) 1995.

⁷⁶ Article 92, Children's Order (NI) 1995 – namely, to safeguard the child and promote his or her welfare as well as to consult the child before making a decision in relation to them.

⁷⁷ Article 93, Children's Order (NI) 1995 – namely, to ensure that the persons running the home are safeguarding the child and promoting his or her welfare and to ensure that children in the home are visited for the purposes of their welfare.

⁷⁸ Adoption and Children Bill, clause 123.

corporate parenting has been placed on some form of statutory footing. Local Councils in England now operate under a set of Corporate Parenting Principles which are defined in section 1 of the Children and Social Work Act 2017. In the Children and Young People (Scotland) Act 2014, the responsibility of a corporate parent has been extended to bodies outside of the local authority with formalised duties. In Wales, corporate parenting is set out in guidance for local Councils.⁷⁹ However, there are proposals to develop a new corporate parenting chapter within the Social Services and Wellbeing (Wales) Act 2014 to provide clear statutory guidance to all departments within local authorities about their responsibilities and duties towards children in care in Wales.⁸⁰

2.42 The Department of Health has observed that “the label is intended to signify that a local authority or Health and Social Care Trust has a legal and moral duty to provide the kind of support that any good parents would provide for their own children.”⁸¹

2.43 The Department of Health requires Trusts to have a “corporate parenting policy and strategy which defines the whole organisation’s responsibilities to act as a good parent in ensuring best outcomes for children and young people who are looked after or care experienced.”⁸²

2.44 In its most recent Strategy, ‘A Life Deserved: “Caring” for Children and Young People in Northern Ireland’, the Departments of Health and Education have jointly committed to placing “corporate parenting principles on a statutory basis⁸³”. The Strategy further sets out the role of the corporate parent and its obligations. It states that:

As a Corporate Parent, a HSC Trust is responsible for safeguarding the child and promoting his or her wellbeing and welfare. This means that the Trust as a corporate entity

⁷⁹ Department of Health, ‘Adoption and Children (Northern Ireland) Bill: A Consultation Document’, (DoH, 2017), at para 2.9.5.

⁸⁰ Gov.Wales, ‘Extending Corporate Parenting Across Public Services: Looked After Children’. Available at: <https://gov.wales/extending-corporate-parenting-across-public-services-looked-after-children-html>

⁸¹ Department of Health, ‘Adoption and Children (Northern Ireland) Bill: A Consultation Document’ (DoH, 2017), at para 2.9.1

⁸² Department of Health, ‘Standards – Leaving Care Services in Northern Ireland’ (DoH, 2012), at 11.

⁸³ Department of Health and Department of Education, ‘A Life Deserved: “Caring” for Children & Young People in Northern Ireland’, (February 2021), at p.22.

must have the same goals for the child or young person as a parent and to act for the child or young person as a parent would be reasonably expected to act. The Health and Social Care Trust assumes moral as well as legal responsibility for enabling looked after children and young people in its care to experience happy and fulfilling lives.⁸⁴⁸⁵

2.45 The above discussion highlights many features of being a corporate parent that might reasonably be said to overlap with the human rights duties on the State regarding children in care:

- protecting or safeguarding⁸⁶ the child against all forms of violence,⁸⁷ sexual abuse or exploitation,⁸⁸ physical or mental neglect,⁸⁹ torture, inhuman or degrading treatment,⁹⁰ self-harm,⁹¹ violence from other children,⁹² and other harmful practices;⁹³
- providing the child with an adequate standard of living;⁹⁴
- providing the child with necessary healthcare;⁹⁵
- provision of education to ensure the “development of the child's personality, talents and mental and physical abilities to their fullest potential”;⁹⁶
- recognising the right of the child to rest, leisure and play.⁹⁷

2.46 Importantly, although domestically the role of the corporate parent is placed with the Department of Health, human rights standards charge the State itself with protecting and guaranteeing these rights. The standards are not prescriptive as to which domestic body must be responsible for human rights, instead leaving these arrangements for the State to organise internally.

⁸⁴ Ibid, at para 2.3.

⁸⁵ Departments of Health and Department of Education, 'Strategy for Looked After Children: Improving Children's Lives' (DoH and DoE, 2018), at para 2.7.

⁸⁶ Article 19, UN Convention on the Rights of the Child 1989; CRC/C/GC/13, 'UN CRC Committee's General Comment No 13: Right of the Child to Freedom from All Forms of Violence', 18 April 2011.

⁸⁷ CRC/C/GC/13, 'UN CRC Committee's General Comment No 13: Right of the Child to Freedom from All Forms of Violence', 18 April 2011, at para 17.

⁸⁸ Ibid, at para 25.

⁸⁹ Ibid, at paras 21 and 22.

⁹⁰ Ibid, at para 26.

⁹¹ Ibid, at para 28.

⁹² Ibid, at para 27.

⁹³ Ibid, at para 29.

⁹⁴ Article 26, UN Convention on the Rights of the Child 1989.

⁹⁵ Article 24(1), Ibid.

⁹⁶ Article 29(1)(a), Ibid; Protocol No 1, Article 2, European Convention on Human Rights 1950.

⁹⁷ Article 31, UN Convention on the Rights of the Child 1989.

2.47 Therefore, whilst in many cases the corporate parent will be the relevant body charged with the care and protection of the child, other public authorities will invariably have different duties to children based on their statutory responsibilities and the circumstances of each child.

2.48 Where a child requires protection and the threat against that child has reached a criminal level, the obligation to safeguard and to investigate any offenders will fall on the Police Service NI. Human rights standards require that the State has an appropriate legislative and administrative scheme in place to allow for the protection of children from the offences listed above⁹⁸ and that the State, in this case the Police Service NI, take steps to carry out an adequate investigation capable of leading to the identification and punishment of any offenders where the treatment engages Articles 2 or 3 ECHR.

2.49 In summary, regarding human rights and the role of the corporate parent:

- **human Rights standards do not specify which public authority must be responsible for what human rights;**
- **'corporate parent' is not legally defined; and**
- **many of the features of being a corporate parent overlap with the human rights duties on the State.**

Secure accommodation

2.50 Article 44 of the Children's Order (NI) 1995 makes provision for the placement of children in care in 'secure accommodation', which is defined as "accommodation provided for the purpose of restricting liberty".⁹⁹

⁹⁸ *X and Y v the Netherlands* (1985) ECHR 4, at para 62.

⁹⁹ Article 44(1), Children's Order (NI) 1995.

- 2.51 By virtue of this provision, secure accommodation is a separate and distinct placement from either a children's home¹⁰⁰ or foster placement,¹⁰¹ although the obligations to safeguard children and promote their welfare remain the same.¹⁰² The use of a voluntary or registered children's home for the purposes of restricting liberty is prohibited by legislation.¹⁰³
- 2.52 The legislation stipulates that a child in care may only be placed in secure accommodation where the child has a history of absconding, is likely to abscond from any other description of accommodation¹⁰⁴ and if the child absconds, they are likely to suffer significant harm¹⁰⁵ or injure themselves or other persons.¹⁰⁶ Importantly, there is a duty on Trusts to take reasonable steps to avoid the need for children to be placed in secure accommodation.¹⁰⁷
- 2.53 Where the Trust is of the view that the test for secure accommodation is met, the Trust must apply to the court for an order under Article 44.¹⁰⁸ The maximum period a child can be kept in secure accommodation without the case coming before the court is 72 hours in a 28 day period.¹⁰⁹ The court will then decide if the relevant criteria has been met¹¹⁰ and, if an order is made, will set a maximum time period for the child to be kept in secure accommodation.¹¹¹ The maximum initial time period is three months.¹¹²

¹⁰⁰ Article 90 of the Children's Order (NI) 1995 defines a Children's Home as "a home which provides (or usually provides or is intended to provide) care and accommodation for children." Article 91 of the 1995 Order provides further detail regarding which institutions are not Children's Homes.

¹⁰¹ Article 106 Children's Order (NI) 1995 defines a 'private foster placement' as where a child is looked after and accommodated by someone who is not their parent, a person with parental responsibility or a relative. Article 107 of the 1995 Order stipulates that the placement must be for more than 28 days and further defines what will not count as a private foster placement.

¹⁰² Regulation 11, Children (Secure Accommodation) Regulations (Northern Ireland) 1996.

¹⁰³ Regulation 13, Ibid.

¹⁰⁴ Article 44(2)(a)(i), Children's Order (NI) 1995.

¹⁰⁵ Article 44(2)(a)(ii), Ibid.

¹⁰⁶ Article 44(2)(b), Ibid.

¹⁰⁷ Schedule 2, para 8(c), Ibid.

¹⁰⁸ Ordinarily the child will already be placed in secure accommodation prior to the application coming before the court – *Re AK* [2000] NI 205. As per this case, no application for a secure accommodation order can be made unless there is a place available for the child in a secure unit. See Children Order Advisory Committee, 'Best Practice Guidance' (SLS Legal Publications (NI), 2010), at para 5.32.2.1.

¹⁰⁹ Regulation 6(1), Children (Secure Accommodation) Regulations (Northern Ireland) 1996.

¹¹⁰ Article 44(4), Children's Order (NI) 1995.

¹¹¹ Article 44(5), Ibid.

¹¹² Regulation 7, Children (Secure Accommodation) Regulations (Northern Ireland) 1996. Regulation 8 of the Children (Secure Accommodation) Regulations (Northern Ireland) 1996 also provides for a maximum further period of 6 months subsequent to the initial 3 months.

2.54 The guidance to the Children’s Order sets out the rationale behind Article 44, noting as follows:

the purpose of the statutory framework, which governs the restriction of liberty of children being looked after by Trusts, is to protect them from unnecessary and inappropriate placement in secure accommodation. It also ensures that administrative decisions taken by the Trust or others within that framework are scrutinised and endorsed by the court where the placement in secure accommodation is for longer than a specified period.¹¹³

2.55 From the guidelines, the following should be noted as significant:

- it will be unlawful for the liberty of a child to whom Article 44 applies to be restricted unless one of the above criteria is met, no matter how short the period;¹¹⁴
- a child must not continue to have their liberty restricted once the statutory criteria cease to apply, even if there is a court order authorising restriction of liberty;¹¹⁵
- any practice or measure which prevents a child from leaving a room or building of their own free will may be deemed by the court to constitute “restriction of liberty”;¹¹⁶
- the locking of a child in a room, or part of a building, to prevent him leaving voluntarily is included in the statutory definition;¹¹⁷
- whilst a child is in secure accommodation there is an ongoing duty on the Trust to review the placement within one month¹¹⁸ and to keep records¹¹⁹ whilst the child is in secure accommodation noting, amongst other criteria:

¹¹³ Department of Health, ‘The Children (NI) Order 1995 – Guidance and Regulations – Volume 4 – Residential Care’ (DoH, 2000), at para 15.1.

¹¹⁴ Ibid, at para 15.3.

¹¹⁵ Ibid.

¹¹⁶ Ibid, at para 15.4.

¹¹⁷ Ibid.

¹¹⁸ Regulation 10, Children (Secure Accommodation) Regulations (NI) 1996. Regulation 10 further provides that reviews should be carried out at intervals not exceeding 3 months where the child continues to be kept in that accommodation. It further stipulates that at least one of the three persons carrying out the review should not be employed by the Trust looking after the child. Regulation 11 provides details of what should be included in the review. During the COVID-19 pandemic, there is the possibility for these review processes to be relaxed. According to new temporary regulations, children in care placed in secure accommodation continue to have their first review within one month of the commencement of the placement and subsequent reviews should be conducted at intervals not exceeding four months (as opposed to the current three months). See Regulation 6, Children’s Social Care (Coronavirus) (Temporary Modification of Children’s Social Care) Regulations (Northern Ireland) 2020; Department of Health, ‘COVID-19: Guidance to Accompany the Children’s Social Care (Coronavirus) (Temporary Modification of Children’s Social Care) Regulations (Northern Ireland) 2020, at 10.

¹¹⁹ Regulation 12, Children (Secure Accommodation) Regulations (NI) 1991.

the date and time of any occasion on which the child is locked on his own in any room in the secure accommodation other than his bedroom during usual bedtime hours, the name of the person authorising this action, the reason for it and the date on which and time at which the child ceases to be locked in that room.¹²⁰

2.56 The guidelines also mirror Article 37 UN CRC by acknowledging that depriving a child of their liberty should be a step of last resort. This provision states that:

restricting the liberty of children is a serious step which must be taken only when there is no appropriate alternative. It must be a “last resort” in the sense that all else must first have been comprehensively considered and rejected – never because no other placement was available at the relevant time, because of inadequacies in staffing, because the child is simply being a nuisance or runs away from his accommodation and is not likely to suffer significant harm in doing so, and never as a form of punishment.¹²¹

2.57 Given what is at stake for the child, a high degree of “procedural protection” is included in the statutory requirements.¹²² The legislation therefore provides further safeguards for children by stipulating that the court cannot exercise its function under the secure accommodation provision where the child is not legally represented.¹²³ These safeguards must be “practical and effective” so as to adequately protect the child’s interests.¹²⁴

¹²⁰ Regulation 12(g) Children (Secure Accommodation) Regulations (NI) 1991.

¹²¹ Department of Health, ‘The Children (NI) Order 1995 – Guidance and Regulations – Volume 4 – Residential Care’ (DoH, 2000), at para 15.5.

¹²² *CM v A Health and Social Services Trust* [2011] NICA 41, at para 13.

¹²³ Save for where the child has been informed of their right to apply for legal aid and has either failed to do so or has refused to do so. The issue of whether or not the child must be present for the hearing has been dealt with in a number of Northern Irish cases with ultimately concluding that highly unusual circumstances would have to arise before the court will make a secure accommodation order in the absence of the child. The duration of any order made in the absence of the child will be interim and limited. See Article 44(7), Children’s Order (NI) 1995; *CM v A Health and Social Services Trust* [2011] NICA 41, at para 16.

¹²⁴ *CM v A Health and Social Services Trust* [2011] NICA 41, at para 14.

2.58 In response to the COVID-19 pandemic, on 7 May 2020 the Department of Health brought into force regulations aimed at temporarily modifying children’s social care arrangements during the pandemic.¹²⁵ The regulations remove or relax statutory requirements, instead requiring that decisions are made on the basis of Departmental guidance, except in the case of secure accommodation where any change to statutory requirements must be made by legislation.¹²⁶ The guidance is clear that if a Health and Social Care Trust has the capacity to do so, it should continue to comply with the normal timescales for reviews.¹²⁷ However, if this is not possible, regulations enable the requirement for a first review of a child in care placed at home, in foster care or in children’s homes to take place within four weeks (it should take place within two weeks), the second review to take place within six months after the first review (it should take place within three months), and subsequent reviews should continue to be conducted not more than six months after the date of the previous review.¹²⁸ Children in care that have been placed in secure accommodation continue to have their first review within one month of the commencement of the placement and subsequent reviews should be conducted at intervals not exceeding four months (as opposed to the current three months).¹²⁹ Further, for secure accommodation, the number required to review keeping a child in secure accommodation is reduced from three to two people by the regulations.¹³⁰ They potentially reduce the ability to effectively monitor the care of children in care, including secure accommodation.

2.59 The regulations allow for such temporary measures for a maximum period of six months, subject to review. In September 2020, the

¹²⁵ Children’s Social Care (Coronavirus) (Temporary Modification of Children’s Social Care) Regulations (Northern Ireland) 2020.

¹²⁶ Regulation 10, Children’s Social Care (Coronavirus) (Temporary Modification of Children’s Social Care) Regulations (Northern Ireland) 2020.

¹²⁷ Department of Health, ‘COVID-19: Guidance to Accompany the Children’s Social Care (Coronavirus) (Temporary Modification of Children’s Social Care) Regulations (Northern Ireland) 2020, at 11.

¹²⁸ Regulations 4 and 9, Children’s Social Care (Coronavirus) (Temporary Modification of Children’s Social Care) Regulations (Northern Ireland) 2020; Department of Health, ‘COVID-19: Guidance to Accompany the Children’s Social Care (Coronavirus) (Temporary Modification of Children’s Social Care) Regulations (Northern Ireland) 2020, at 9-10. See also Children’s Homes Regulations (Northern Ireland) 2005.

¹²⁹ Regulation 6, Children’s Social Care (Coronavirus) (Temporary Modification of Children’s Social Care) Regulations (Northern Ireland) 2020; Department of Health, ‘COVID-19: Guidance to Accompany the Children’s Social Care (Coronavirus) (Temporary Modification of Children’s Social Care) Regulations (Northern Ireland) 2020, at 10. See also Children (Secure Accommodation) Regulations (Northern Ireland) 1996.

¹³⁰ Regulation 6, Children’s Social Care (Coronavirus) (Temporary Modification of Children’s Social Care) Regulations (Northern Ireland) 2020. See also Children (Secure Accommodation) Regulations (Northern Ireland) 1996.

Department of Health and health and social care trusts were on track to return operations for child care arrangements back to normal by the end of that month.¹³¹ However, in October 2020, the regulations were renewed for a further six months until 21 May 2021 in response to an increasing strain on the health and social care trusts due to a second wave of COVID-19.¹³² In April 2021, a further consultation was launched proposing further extension of the modifications for a further six months due to the ongoing threat posed by the pandemic.¹³³ However, following concerns raised about the continuation of the restrictions, the Department of Health made the decision not to proceed with any of the modifications.¹³⁴ Therefore the regulations ceased to have effect from 7 May 2021 and the usual statutory duties across social care children's services resumed.

2.60 From a human rights perspective, the purpose of secure accommodation can be said to exist for the protection of children at risk of significant harm and to provide public authorities with a statutory path to ensure their safety. The purpose of the statutory framework, as noted in the guidelines, is to ensure that no child's liberty is unlawfully or extensively restricted without recourse to a court,¹³⁵ a lawyer and statutory duties on the Trust to review their placement and keep records whilst they are in secure accommodation. The legislation then performs the dual purpose of protecting significantly at risk children whilst also safeguarding their right to liberty.

2.61 In summary, regarding secure accommodation:

- **the use of a voluntary or registered children's home for the purposes of restricting liberty is prohibited;**

¹³¹ Letter from Department of Health to NI Assembly Committee for Health, 27 October 2020.

¹³² Ibid; Children's Social Care (Coronavirus) (Temporary Modification of Children's Social Care) (Amendment) Regulations (NI) 2020.

¹³³ Department of Health, 'Consultation on proposals to extend modifications to children's social care regulations' (DoH, 2021).

¹³⁴ Department of Health, 'Proposals to extend modifications to children's social care legislation: summary and analysis of responses', (DoH, 2021).

¹³⁵ Regulation 6(1) of the Children (Secure Accommodation) Regulations (NI) 1996 stipulates that the maximum time that a child can be held in secure accommodation without being brought before the court is 72 hours in a period of 28 days.

¹³⁶ Safeguarding Board NI, 'Getting Focused and Staying Focused: Looked After Children, Going Missing and Child Sexual Exploitation – A Thematic Review' (QUB, 2015), at 25.

- **there is a statutory duty to safeguard and promote the welfare of children in secure accommodation;**
- **a child can be held in secure accommodation for a maximum of 72 hours in a 28-day period without recourse to a court. After this, an application to court must be made;**
- **the Trust must take reasonable steps to avoid the need for the child to be placed in secure accommodation;**
- **the secure accommodation legislation exists to ensure that decisions regarding children’s liberty are scrutinised by the court;**
- **children must be party to the secure accommodation proceedings unless they have refused;**
- **the guidance to the legislation regards locking children in a room or part of a building as within the statutory definition of secure accommodation;**
- **a child’s placement in secure accommodation should be subject to review by the Trust.**

3.0 Children Missing from Care

3.1 As noted in the introduction, a key issue in respect of children in care are those who are repeatedly reported missing from care. Children in care are more likely to be reported missing than other children and those in residential care are three times more likely to be reported missing.¹³⁶ More serious still are the reasons that children go missing from care and the dangers they are subsequently exposed to.

Statistics

3.2 According to data provided to the Commission by the Police Service NI, in 2020/21, the Police Service NI received 4,732 reports of children going missing in NI, which involved 1,213 individual

¹³⁶ Safeguarding Board NI, 'Getting Focused and Staying Focused: Looked After Children, Going Missing and Child Sexual Exploitation – A Thematic Review' (QUB, 2015), at 25.

children.¹³⁷ Of these, there were 2,321 missing persons reports from Residential Children's Homes, relating to 182 individual children.¹³⁸ Compared to 2019/20, the overall number of missing persons reports has decreased (from 5,723), however, there has been a small increase of 21 more missing person reports from Residential Children's Homes (previously 2,300) with the number of individual children reported going missing decreasing to 182 (from 205 children).¹³⁹ During the Commission's community visits, local police officers expressed concerns regarding a 'revolving door' effect where a young person is returned to residential care, after which they subsequently abscond again. It has been noted that there is a "particular link" between children reported missing from care and child sexual exploitation.¹⁴⁰

Potential reasons for children going missing from care

- 3.3 In January 2020, with the support of VOYPIC, Commission staff met with young adults that had come through the care system with experiences in children's homes, foster homes and secure accommodation. In November 2020, the Commission also hosted a roundtable with key stakeholders that were public authorities or provided support to children in care. Those the Commission spoke to indicated that the main reasons for children going missing from care were – 1) due to peer pressure, 2) a cry for help, 3) for the thrill and attention of being chased by police, 4) trying to meet up with biological family or to return home, 5) to obtain drugs.
- 3.4 Views were expressed that the age range in children's homes was too broad and was contributing to issues with peer pressure, with younger children being influenced by the actions or pressure from older children. It was highlighted during the roundtable that consideration should be given to segregating boys and girls within children's homes. For example, there is a rule that there are to be no relationships within children's homes. Without ignoring the possibility of same-sex relationships, it was suggested that the peer pressure that comes from romantic relationships would be reduced

¹³⁷ Email from Police Service NI to NI Human Rights Commission, 16 June 2021.

¹³⁸ Email from Police Service NI to NI Human Rights Commission, 16 June 2021.

¹³⁹ Email from Police Service NI to NI Human Rights Commission, 21 August 2020.

¹⁴⁰ Safeguarding Board for NI, 'Getting Focused and Staying Focused, Looked After Children, Going Missing, and Child Sexual Exploitation, A Thematic Review' (QUB, 2015), at 25.

if boys and girls were placed in separate children's homes. It was also highlighted that from the experience of those that we spoke to, drug use is an issue across children's homes and contributes to peer pressure.

- 3.5 Regarding a cry for help, views were expressed that children that are reported missing from care tend to have cycles of behaviour. It was felt that if children's home staff took the time and care to recognise the early signs of this behaviour and to lend an ear and advice to those children at this early stage it would help reduce the number of children that complete the cycle of behaviour by running away.
- 3.6 With the exception of one or two children's homes, children were left to their own devices. By comparison, they felt that the individual care provided in foster homes and the sense of security felt in secure accommodation (i.e. Lakewood) were beneficial. It was highlighted that staff rotas and the reliance on agency staff within children's homes made it difficult for children to build a relationship with staff. It was also highlighted that moving children from one children's home to another was also not useful.
- 3.7 It was raised that older children tend to be reported missing from care, it was implied that this could be a cry for help and consideration needs to be given to how to support those children in the transition from living in a children's home to an independent life.
- 3.8 In terms of the thrill of being chased by the police, it was highlighted that boredom is a contributing factor with a lack of activities and excursions within children's homes. It was raised that children in care need some form of respite. One children's home that organised excursions was identified as offering an example of good practice. Interestingly, it was also stated that there are more rules and consequences required within children's homes. It was felt that currently the only 'threat' is to call the police, but what is needed are ground rules to manage this behaviour.
- 3.9 If a child in care misses their curfew, it was noted how quickly the children's homes are to declare that child missing and call the

police. It was further raised that this needs to be balanced against public authorities' obligations and consideration of the age and vulnerability of the individual child involved. It was highlighted during the roundtable that a careful balance is required. This is supported by research conducted in England and Wales by the Howard League for Penal Reform found that children living in children's homes were being criminalised at excessively high rates compared to other children, including those in other types of care.¹⁴¹ The research found that this was due to staff of children's homes "resorting to the police, often over minor incidents that would never come to officers' attention if they happened in family homes".¹⁴² It also concluded that "there appears to be a 'tipping point' around the age of 13, at which time these children lose society's sympathy and, rather than being helped, they are pushed into the criminal justice system".¹⁴³ In the Commission's discussions this was raised as an issue in Northern Ireland.

- 3.10 From a human rights standpoint, public authorities are required to be proactive, take reasonable steps and to act in a child's best interests to protect them from a real and immediate threat. Therefore, staff of children's homes or police officers could be accountable if they do not take a situation where a child has gone missing from care seriously. However, stakeholders have highlighted that there is the need to strike a balance between ensuring children in care are protected from exploitation and criminality, while also not being so cautious that getting the police involved has the opposite effect.
- 3.11 It was raised by stakeholders that many children in care will have some history of trauma or abuse, which can be triggered and cause a child to respond in an aggressive manner when confronted by a figure of authority. It can also lead to affected children to make poor decisions. For example, if a child refuses to go with police the situation can quickly escalate to a child being charged with assaulting a police officer or causing criminal damage. It was stressed by stakeholders that a child's experience of trauma or

¹⁴¹ Howard League for Penal Reform, 'Criminal Care: Children's Homes are Criminalising Children' (HLPR, 2016).

¹⁴² Ibid.

¹⁴³ Ibid.

abuse needs to be taken into account and that there is the need for specialised training to ensure that a child who responds in a confrontational manner or makes poor decisions due to underlying issues of trauma is not criminalised.

- 3.12 It was suggested that a similar approach for children in care homes to that of children in foster homes would be beneficial, for example, staff dropping off and picking children up from social engagements. It was suggested by stakeholders that the police should only be called where there is a real risk to the child. However, this requires careful consideration to ensure the right balance is struck and the actions taken are in line with the human rights requirement on public authorities to take reasonable steps to prevent a real and immediate risk and to protect the best interests of the child.

Steps taken by public authorities

- 3.13 In February 2020, the Commission met with representatives of the Health and Social Care Board and Police Service NI. During that meeting locking doors to keep children in children's homes was discussed and both organisations confirmed that it is not viewed as an option, as it is believed to be a violation of Article 5 ECHR. It is felt that the situation is complex and difficult, often resulting in children using their rights against their own safety. When the same question had been posed to young adults that had come through the care system, the response differed depending on the age of the children involved. They believed that locking doors for older children was pointless and that older children would just find another way out of the children's home. They did state that they felt it would not be a bad idea for younger children in care and the boundaries set by locking the doors might help to break the cycle of younger children being influenced by older children in the children's home.
- 3.14 The Police Service NI has work ongoing to identify and engage with the children that are most frequently reported missing from care. On a monthly basis data is gathered for children who have been reported missing three or more times (in a rolling six months) and further information is added if they have been involved as a victim or suspect in certain crime types. This information is sent to the

local policing district to ensure a focus on engagement, prevention and early interaction.¹⁴⁴

- 3.15 The Police Service NI and Health and Social Care Board have been conducting joint work aimed at tackling the issue of children reported missing from care. This included running pilots of specific training for police officers on how to deal with children in care. Progress in rolling this training out across all districts has been delayed by COVID-19.¹⁴⁵ A NI Framework for Integrated Therapeutic Care remains in the process of being developed, having been delayed by COVID-19, and implementation will commence from January 2022.¹⁴⁶ Implementation leads in each Trust area have been appointed and took up post in June 2021.¹⁴⁷
- 3.16 Much of the work has focused within the Western Trust area, with positive feedback. Limited human and financial resources were identified as constraints, however, it was reported that the better communication and understanding of the issues within health and social care and police on the ground and more broadly was having a positive impact and resulting in a year-on-year reduction of children reported missing from care.
- 3.17 The Police Service NI and Health and Social Care representatives are engaging across NI, however there is not yet consistency across all areas. Work is ongoing to establish the type and frequency of interface engagement and an agreement will be made regarding attendance and frequency of meetings in due course.¹⁴⁸ The Police Service NI has issued via email, updated operational guidance on missing persons, which is emphasised in student officer training. There are plans to extend this training to qualified district officers.¹⁴⁹ The Police Service NI also has plans to expand disaggregation of available data to include smaller age brackets (for example 18-21 years old or 21-25 years old) and extend to statistics on drug use, missing persons, violent crime and sexual exploitation.¹⁵⁰ Data that is currently disseminated to local districts

¹⁴⁴ Email correspondence from Police Service NI to NI Human Rights Commission, 14 October 2020.

¹⁴⁵ Email correspondence from Police Service NI to NI Human Rights Commission, 21 August 2020.

¹⁴⁶ Email correspondence from Department of Health to NI Human Rights Commission, 22 October 2021.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

includes children who have repeatedly gone missing three or more times in a six month period with additional information, including reference to any involvement in violent crime, sexual crime or drugs.¹⁵¹

- 3.18 Consideration is being given to including developing a contractual agreement between older children and the children's home as an example of effective way of working within the pending regional guidance on missing children.¹⁵² Such agreements aim to provide the young person with an element of autonomy and teach them about responsibility, in preparation for the transition from children's homes into independent living.
- 3.19 A Protocol for Children Missing from Care and Homes continues to be developed, with progress impacted by Covid-19.¹⁵³ A formal consultation is expected in the late autumn, to be completed by March 2022.¹⁵⁴ An additional evaluative piece has been completed by Queen's University Belfast analysing the views of young people, staff and Police Service NI on being missing, what it means and how best to respond to this issue. The findings of this research will be taken into account within the revised regional guidance on missing children and incorporated into joint Police Service NI and Health and Social Care Trust training on this issue.¹⁵⁵

Potential human rights violations

- 3.20 The NSPCC has noted that children in care who are reported missing "face a significant risk of harm, and are likely to be exposed to the risk of alcohol and drugs, criminal and sexual victimisation including prostitution, sexually transmitted diseases and arrest".¹⁵⁶
- 3.21 An additional issue to those listed above may be the exposure to child sexual exploitation.
- 3.22 The Safeguarding Board for NI defines child sexual exploitation as:

¹⁵¹ Ibid.

¹⁵² Ibid.

¹⁵³ Email correspondence from Police Service NI to NI Human Rights Commission, 17 June 2021.

¹⁵⁴ Email correspondence from the Department of Health to NI Human Rights Commission, 22 October 2021.

¹⁵⁵ Email correspondence from Police Service NI to NI Human Rights Commission, 17 June 2021.

¹⁵⁶ National Society for the Prevention of Cruelty to Children, 'Children Who Go Missing From Care: A Participatory Project with Young People as Peer Interviewers' (NSPCC, 2012), at 1.

a form of sexual abuse in which a person(s) exploits, coerces and/or manipulates a child or young person into engaging in some form of sexual activity in return for something the child needs or desires and/or for the gain of the person(s) perpetrating or facilitating the abuse.¹⁵⁷

3.23 It has been recognised that children in care, as a group, are particularly vulnerable to child sexual exploitation. A comprehensive thematic review of child sexual exploitation has noted that whilst child sexual exploitation can affect any child, it is more likely to affect children who are already vulnerable.¹⁵⁸ This review found that “child sexual exploitation is particularly linked to ‘going missing’ from the family home, foster home or residential care, being homeless, the misuse of substances and alcohol and being in the ‘Looked After’ system”.¹⁵⁹

3.24 Although no one factor can be pointed to in identifying a risk of being subject to child sexual exploitation, a number of interlinking factors have been acknowledged, such as:

family problems: arguments at home; abuse and/or violence; running away from home or from substitute care; truanting from school; drugs; sleeping rough; and losing contact with family and social networks. Often it is the cumulative and compound nature of negative experiences that significantly increase the risks for later re-victimisation, including through sexual exploitation.¹⁶⁰

3.25 In June 2020, the Criminal Justice Inspection NI published its inspection report on child sexual exploitation, which considers the frontline response and investigation of child sexual exploitation, including such cases that involve children in care. The report found improved awareness of child sexual exploitation among staff¹⁶¹ and improved multi-agency structures aimed at tackling this issue, including regular coordination between Police Service NI and social

¹⁵⁷ Safeguarding Board for NI, ‘Child Sexual Exploitation: Definition and Guidance’ (SBNI, 2014), at 1.

¹⁵⁸ Safeguarding Board NI, ‘Getting Focused and Staying Focused: Looked After Children, Going Missing and Child Sexual Exploitation – A Thematic Review’ (QUB, 2015), at 25.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid, at 28.

¹⁶¹ Criminal Justice Inspection NI, ‘Child Sexual Exploitation in NI: An Inspection of the Criminal Justice System’s Response’ (CJINI, 2020), at 38.

services.¹⁶² However, the Criminal Justice Inspection concluded that:

the Police Service NI needed to demonstrate that all child protection risks within a Child Sexual Exploitation risk assessment has been actioned. The Criminal Justice Inspectorate NI acknowledges the role of Social Services in respect of child protection procedures and safety planning, but it was not apparent from the Police Service NI system that child protection procedures had been routinely followed for all children assessed at high risk of child sexual exploitation and the consequent outcome; it was also unclear what if any safeguarding actions had been undertaken for children assessed at medium or low risk of child sexual exploitation. Longer term safeguarding/safety plans for children were not evident on the Police Service NI system and this was an area for improvement.¹⁶³

3.26 The Criminal Justice Inspection NI's report also found that "there was also a concern that little was known about the perpetrators of child sexual exploitation and the criminal justice system was urged to develop its response in this respect".¹⁶⁴

3.27 There is currently no criminal offence of child sexual exploitation, however perpetrators may commit a number of offences whilst engaging in this behaviour including; sexual assault or rape,¹⁶⁵ sexual activity with a child under the age of 15¹⁶⁶ or paying for sexual services of a child.¹⁶⁷

3.28 Equally, a number of international bodies have recently turned their attention to the issue of child sexual exploitation, including the UN Committee on the Rights of the Child (UN CRC Committee) which is tasked with examining the UK's compliance with the UN CRC.

¹⁶² Ibid, at 39.

¹⁶³ Ibid, at 60.

¹⁶⁴ Ibid, at 80.

¹⁶⁵ Section 5, Sexual Offences (NI) Order 2008.

¹⁶⁶ Section 16, Ibid.

¹⁶⁷ Section 37, Ibid.

3.29 In its 2016 Concluding Observations, the UN CRC Committee recommended that the UK:

- a) systematically collect and publish comprehensive and disaggregated data on child exploitation and abuse, including through mandatory reporting, in all settings;
- b) develop and implement comprehensive multi-sectoral strategies on child exploitation and abuse, including online, to ensure effective prevention, early detection and intervention, at national as well as at devolved levels, in Overseas Territories and Crown Dependencies;
- c) implement the recommendations of the Marshall Inquiry into child sexual exploitation in Northern Ireland;
- d) further develop comprehensive services to support children who are victims or at risk of sexual exploitation and abuse;
- e) strengthen the capacity of law enforcement authorities and the judiciary to detect and prosecute child sexual exploitation and abuse, and grant effective remedies to the child victims.¹⁶⁸

3.30 Articles 3 and 9 of the Optional Protocol of UN CRC regarding the sale of children, child prostitution and child pornography requires States to prohibit sexual exploitation of the child under their national criminal law and to adopt social policies and programmes to prevent child sexual exploitation. The State is further required to promote and raise awareness of these issues through education and training.¹⁶⁹

3.31 In 2018, the United Kingdom ratified the Council of Europe's Convention on Protection of Children against Sexual Exploitation and Sexual Abuse (the Lanzarote Convention). Articles 4, 5, 6 and 7 of the Lanzarote Convention require Member States to undertake preventative measures to combat child sexual exploitation and to

¹⁶⁸ CRC/C/GBR/CO/5, 'UN CRC Committee's Concluding Observations on the Fifth Periodic Report of the United Kingdom of Great Britain and Northern Ireland', 12 July 2016, at para 44.

¹⁶⁹ Article 9(2), Optional Protocol to the UN Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2000.

take additional steps to raise awareness of the issue amongst children and those who work with children.

- 3.32 The Lanzarote Convention provides definitions of the sexual abuse of children,¹⁷⁰ requires Member States to prohibit the corruption of children¹⁷¹ and the solicitation of children¹⁷² via the internet for the purpose of committing sexual abuse and the aiding and abetting of offences against children.¹⁷³ The Lanzarote Convention also lists a number of aggravating factors¹⁷⁴ including where the child was a “particularly vulnerable victim”,¹⁷⁵ the offence was committed by several people acting together¹⁷⁶ or within the framework of a criminal organisation.¹⁷⁷
- 3.33 Where children missing from care are victims of crime, for example rape or sexual exploitation, this will fall within the boundaries of Article 3 ECHR (freedom from inhuman and degrading treatment). The State’s investigative and preventative duties are therefore engaged by this issue.
- 3.34 Where children are further exposed to drugs and alcohol, criminal behaviour and potential diseases, this may engage their right to life under Article 2 ECHR and trigger the State’s positive obligations under this provision.
- 3.35 Previous work has identified a number of issues in interrupting and preventing children in care from absconding and consequently becoming at risk or exposed to Article 2 or Article 3 ECHR violations.
- 3.36 The challenges can include legal requirements as to when certain areas and doors of the children’s home can be locked,¹⁷⁸ the ability and willingness of staff to utilise restraint or other physical measures to prevent absconding¹⁷⁹ and delay in accessing both

¹⁷⁰ Article 18, CoE Convention on the Protection of Children and Young People against Sexual Exploitation and Sexual Abuse 2007 (Lanzarote Convention).

¹⁷¹ Article 22, Ibid.

¹⁷² Article 23, Ibid.

¹⁷³ Article 24, Ibid.

¹⁷⁴ Article 28, Ibid.

¹⁷⁵ Article 28(c), Ibid.

¹⁷⁶ Article 28(e), Ibid.

¹⁷⁷ Article 28(f), Ibid.

¹⁷⁸ Safeguarding Board NI, ‘Getting Focused and Staying Focused: Looked After Children, Going Missing and Child Sexual Exploitation – A Thematic Review’ (QUB, 2015), at 50.

¹⁷⁹ Ibid.

secure accommodation and services for young people, such as counselling and mental health services.¹⁸⁰

3.37 Stakeholders also raised questions around limiting the access of children in care to mobile phones and the internet, which are common modes of communication for children and can be used to facilitate a child in care going missing. This included querying at what stage staff can look at a child's phone and what actions can be taken, for example, when access to a phone or internet can be banned and for how long. This was raised particularly in the context of preventing exploitation of a child, including sexual exploitation. In such instances there is a requirement to consider the child's right to privacy and what is in their best interests. The ECtHR has stated that telephone correspondence with 'others' falls within the remit of Article 8 ECHR.¹⁸¹ Additionally, the ECtHR has confirmed that the:

the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life, and the natural family relationship is not terminated by reason of the fact that the child is taken into public care. Moreover, telephone conversations between family members are covered by the notions of 'family life' and 'correspondence' within the meaning of Article 8 [ECHR].¹⁸²

3.38 It is understood that all forms of censorship, interception, monitoring, seizure and screening of correspondence come within the scope of Article 8 ECHR.¹⁸³ Furthermore, the ECtHR has clarified that Article 8 ECHR protections apply when impeding someone from initiating correspondence.¹⁸⁴ However, the right to respect for private life (Article 8 ECHR) can be limited when it is in accordance with law and the limitation is only for as long as necessary and proportionate in pursuit of a legitimate aim. Article 8(2) of the ECHR identifies "the prevention of disorder or crime" and "for the protection of health or morals" as legitimate aims.

¹⁸⁰ *Ibid*, at 54.

¹⁸¹ *Lüdi v Switzerland* (1992) ECHR 50, at para 39; *Klass v Germany* (1978) ECHR 4, at para 41; *Malone v UK* (1984) ECHR 10, at para 64.

¹⁸² *Margareta and Roger Andersson v Sweden* (1992) ECHR 1, at para 72.

¹⁸³ *Campbell v UK* (1992) ECHR 41, at para 33; *Amann v Switzerland* (2000) ECHR 88, at para 33.

¹⁸⁴ *Golder v UK* (1975) ECHR 1, at para 43.

3.39 It is unlikely that a blanket ban or a ban for a period beyond where there is a threat to one of the legitimate aims set out in Article 8(2) ECHR or a threat to the child's best interests would be human rights compliant. Consideration must be given to each individual case, therefore the steps required for one child may be disproportionate for another. Consideration should also be given to whether other potential rights are at play, such as protecting a child's right to life (Article 2 ECHR), freedom from slavery (Article 4 ECHR) and freedom from torture or ill-treatment (Article 3 ECHR), all of which in the case of a real and immediate threat are likely to carry greater weight when balanced against the right to privacy (Article 8 ECHR).

3.40 In summary, concerning children missing from care:

- **joint work is occurring between health and social care trusts and Police Service NI, but much remains at a pilot stage and resources are constraining its roll-out;**
- **young adults with experience of being reported missing from care are in favour of more boundaries and earlier pastoral intervention from children's home staff to reduce instances of children going missing from care;**
- **children reported missing from care are more vulnerable to a range of criminal behaviours that may violate their human rights;**
- **a child's experience of trauma or abuse must be taken into consideration, particularly in terms of protecting a child from criminalisation for actions linked to such experiences. This includes ensuring those in contact with children in care, including the police, are provided with specialised training on human rights, trauma-informed practice and de-escalation;**
- **child sexual exploitation is one of these behaviours and the UK has a number of obligations under international law to prevent and protect children against child sexual exploitation. The UK has put in place a legislative and administrative framework to protect children against these criminal behaviours, however, concerns remain as to how these protective measures can operate in practice. Human rights provide guiding principles on how to reach a decision in this regard. For example,**

Article 8 ECHR should be considered before interfering with a child’s correspondence, such as telephone calls. Where relevant, the proposed actions should also consider what is required to protect a child from real and immediate threats to their Articles 2, 3 and 4 ECHR rights. A need has also been identified to educate children, particularly children identified as the most at risk, on understanding, identifying and accessing support to protect them from grooming and child sexual exploitation. This connects to a broader piece on ensuring relationship, sex and identity education in Northern Ireland comprehensively deals with what is a healthy and unhealthy relationship, and the tools or support available to help children avoid or get out of an unhealthy relationship.

4.0 Deprivation of Liberty

Right to liberty

- 4.1 Both ECHR¹⁸⁵ and UN CRC¹⁸⁶ recognise and protect the right to liberty. The right is also protected by UN CRPD¹⁸⁷ and the Charter of Fundamental Rights of the EU.¹⁸⁸ The protection of the EU Charter will arguably be retained to a degree in Northern Ireland in terms of the interpretation and implementation of the Ireland/Northern Ireland Protocol and legislation made applicable under its terms, though this remains to be tested.
- 4.2 Article 5 ECHR sets out the circumstances under which a person can be deprived of their liberty¹⁸⁹ and requires that any deprivation of liberty must be “in accordance with a procedure prescribed by law”. The aim of Article 5 ECHR is to ensure that no one is deprived of their liberty arbitrarily.¹⁹⁰
- 4.3 The ECtHR has confirmed that Article 5 ECHR is aimed at the idea of liberty in its “classic sense” – the physical liberty of the person.¹⁹¹

¹⁸⁵ Article 5, European Convention on Human Rights 1950.

¹⁸⁶ Article 37(b), UN Convention on the Rights of the Child 1989.

¹⁸⁷ Article 14, UN Convention on the Rights of Persons with Disabilities 2006.

¹⁸⁸ Article 6, Charter of Fundamental Freedoms of the EU 2000.

¹⁸⁹ Article 5(1), European Convention on Human Rights 1950.

¹⁹⁰ *Engel and Others v the Netherlands* (1976) ECHR 4, at para 58.

¹⁹¹ *Ibid.*

Although Article 5 ECHR is not confined to persons under arrest and in prison,¹⁹² it is distinguishable from a restriction on liberty¹⁹³ and whether or not a person has been deprived of their liberty will be decided on the basis of the facts of each case, considering the “type, duration, effects and manner” of the measures taken.¹⁹⁴

- 4.4 Importantly, the ECtHR has specifically acknowledged that a situation can still amount to a deprivation of liberty, even where the measures were taken to ensure the individual’s safety or in their interest’s.¹⁹⁵ The purpose for which an individual’s liberty is deprived is not decisive in considering if Article 5 ECHR is engaged.¹⁹⁶
- 4.5 Where a person has been found to be deprived of their liberty, even if it is for a relatively short period of time, this will not affect the fact of their deprivation.¹⁹⁷
- 4.6 Under Article 37 UN CRC, no children must be deprived of their liberty unlawfully or arbitrarily. Where children are deprived of their liberty it must be a measure of last resort and for the shortest appropriate period.¹⁹⁸

Positive obligations

- 4.7 Both the ECHR and UN CRC place positive obligations on the State in respect of the right to liberty. The positive obligations under the ECHR deal with the fact of a person’s detention,¹⁹⁹ while the obligations under UN CRC relate to conditions of detention.
- 4.8 The ECtHR has interpreted Article 5 ECHR as requiring the State not only to abstain from unlawfully interfering with the right to liberty, but also to take positive steps to ensure that individual’s right to liberty is protected and not unlawfully interfered with.²⁰⁰ The State must therefore take steps to safeguard the right to liberty of

¹⁹² *Guzzardi v Italy* (1980) ECHR 5, at para 93.

¹⁹³ Protocol No 4, Article 2, European Convention on Human Rights 1968.

¹⁹⁴ *Guzzardi v Italy* (1980) ECHR 5, at para 95.

¹⁹⁵ *Khlaifia and Others v Italy* (2015) 757, at para 71.

¹⁹⁶ *Rozhkov v Russia* (2017) ECHR 114, at para 74.

¹⁹⁷ *Rantsev v Cyprus and Russia* (2010) ECHR 22, at para 317. In this particular case, the period of detention was two hours.

¹⁹⁸ Article 37(b), UN Convention on the Rights of the Child 1989.

¹⁹⁹ Articles 3 and 8, European Convention on Human Rights 1950.

²⁰⁰ *Storck v Germany* (2005) ECHR 406, at para 102.

vulnerable individuals, “including reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge”.²⁰¹ This includes deprivations of liberty carried out by private persons.²⁰²

4.9 The ECtHR has explicitly acknowledged that Article 5 ECHR applies to minors.²⁰³

4.10 Article 37 UN CRC requires that every child deprived of their liberty is treated with humanity and respect and in a manner that acknowledges the needs of the child, depending on his or her age.²⁰⁴ This includes being separated from adults and being allowed to maintain contact with their family, unless it is not in their best interests.²⁰⁵ UN CRC also guarantees children in detention the right to prompt access to legal assistance and to challenge the fact of their detention before a competent, independent court that will issue a prompt decision.²⁰⁶

What amounts to a deprivation of liberty?

4.11 The question as to what amounts to a deprivation of liberty is an important one, as once a situation reaches the level of a deprivation, there is an obligation upon the State to comply with the procedural aspects of Article 5 ECHR. This means that the way in which the person is deprived of his or her liberty must be carried out in a procedure prescribed by law²⁰⁷ and further entitles that individual to the ability to challenge that detention before a court.²⁰⁸

4.12 The ECtHR has been clear that the circumstances that will amount to a deprivation of liberty will depend on the facts of each situation.²⁰⁹ However, the ECtHR has notably considered some of the following factors when deciding if an individual was detained:

²⁰¹ Ibid.

²⁰² Ibid, at para 108.

²⁰³ *Nielsen v Denmark* (1988) ECHR 23, at para 58.

²⁰⁴ Article 37(c), UN Convention on the Rights of the Child 1989.

²⁰⁵ Ibid.

²⁰⁶ Article 37(d), Ibid.

²⁰⁷ Article 5(1), European Convention on Human Rights 1950.

²⁰⁸ Article 5(4), Ibid.

²⁰⁹ *Guzzardi v Italy* (1980) ECHR 5, at para 95.

- the ability to leave the relevant area;²¹⁰
- the degree of supervision and control the individual is under;²¹¹
- if the person does leave the relevant area, will they be brought back;²¹²
- the availability of other social contacts and ability to contact them without prior authorisation;²¹³
- reporting requirements to the authorities;²¹⁴
- whether the individual consented to the deprivation;²¹⁵ and
- the cumulative impact of the entirety of the individual's circumstances.²¹⁶

4.13 In previous cases, the ECtHR considered the circumstances of a child held on a locked hospital ward and whether this amounted to a deprivation of liberty.²¹⁷ These cases identified a number of key factors, which are relevant to whether a set of circumstances will amount to a deprivation of liberty in respect of a child. These are:

- if the parent took decision to place the child in the relevant area;²¹⁸
- if the restrictions on the child's movements and contact with the outside world are similar to those that might be experienced by children in their family homes;²¹⁹
- the purpose for the locking of doors, i.e. for the child's safety and that of others;²²⁰
- if the child can leave the relevant area, if this requires permission and supervision whilst outside the area;²²¹
- if the child continues to see family members, friends and attend school;²²²
- the age of the child and who would normally make decisions for a child of that age;²²³ and

²¹⁰ *Storck v Germany* (2005) ECHR 406, at para 73.

²¹¹ *Ibid.*

²¹² *Ibid.*

²¹³ *Guzzardi v Italy* (1980) ECHR 5, at para 95.

²¹⁴ Better described as the need to 'check-in'. See *Guzzardi v Italy* (1980) ECHR 5, at para 95.

²¹⁵ Referred to as the 'subjective element'. See *Storck v Germany* (2005) ECHR 406, at para 74.

²¹⁶ *Guzzardi v Italy* (1980) ECHR 5, at para 95.

²¹⁷ *Nielsen v Denmark* (1988) ECHR 23.

²¹⁸ *Ibid.*, at para 63.

²¹⁹ *Ibid.*, at para 70.

²²⁰ *Ibid.*

²²¹ *Ibid.*

²²² *Ibid.*

²²³ *Ibid.*, at para 72.

- if, where the child has absconded, the police would normally search for and return a child to their parents because of the age of the child.²²⁴

4.14 The ECtHR considered that the presence of all of the above factors points away from a deprivation of liberty. However, these factors provide some guidance, they should not be regarded as a decisive checklist to be used by authorities.

4.15 In one particular case, the ECtHR considered a mother's decision to place her twelve year old son in a psychiatric institution, on the basis of apparently sound medical advice, was an exercise of normal parental responsibility.²²⁵ The ECtHR was clear that parents do not have unlimited authority to consent to a deprivation of liberty in respect of their child²²⁶ and that, had the decision to admit the boy been taken by a psychiatrist or a decision of the State, the outcome may have been different.²²⁷

4.16 The domestic courts in the UK have also looked at the issue of what circumstances will amount to a deprivation of liberty, taking into account the jurisprudence of the ECtHR.

4.17 An early ruling from the Court of Appeal in England and Wales confirmed that secure accommodation fell under Article 5(1)(d) ECHR by stating that "the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority" and is therefore a lawful exception to Article 5 ECHR.²²⁸ The Court of Appeal arrived at this conclusion by considering ECtHR case law, which advised that "educational supervision" should not be rigidly equated with "classroom teaching" and could include assistance to correct dysfunctional behaviour.²²⁹

4.18 The UK Supreme Court has ruled that the 'acid test' for whether or not a deprivation has taken place is whether the person is under

²²⁴ Ibid.

²²⁵ Ibid.

²²⁶ Ibid.

²²⁷ Ibid, at para 63.

²²⁸ *Re K (A Child) (Secure Accommodation Order: Right to Liberty)* [2001] 1 FLR 526.

²²⁹ *Koniarska v UK* (2000) ECHR 785.

continuous supervision and control and is not free to leave.²³⁰ These are two separate criteria. For example, a person might not be under continuous supervision, but the inability to leave may amount to a deprivation of liberty.²³¹

4.19 When reasoning this test, the UK Supreme Court did not find factors regarding the individual's consent or compliance with the placement, the purpose behind the placement or the normality of the placement to be relevant or persuasive.²³²

4.20 With particular reference to children, the UK Supreme Court noted the following:

- factual restrictions of liberty should be determined by comparing the child's situation with that of another child of the same age and station whose freedom is not limited;²³³
- courts will therefore compare children of the same age and familial background to determine if one's liberty is restricted;²³⁴
- all children are or should be subject to some level of restraint;²³⁵
- the level of restraint will change with the age, maturity and circumstances of the child;²³⁶
- by reference to their age, it is unlikely that very young children and infants will have their liberty deprived by the normal measures taken to curtail their liberty. These measures are common to all children of that age;²³⁷
- a local authority or foster carer who has parental responsibility for the child cannot consent to a deprivation of liberty on behalf of the child.²³⁸

4.21 The UK Supreme Court returned to the aim of Article 5 ECHR noting that, "the purpose of Article 5 is to ensure that people are not deprived of their liberty without proper safeguards, safeguards

²³⁰ *Cheshire West and Chester Council v P* [2014] UKSC 19, at para 54.

²³¹ *Ibid*, at para 49.

²³² *Ibid*, at para 55.

²³³ *Ibid*, at para 77.

²³⁴ *Ibid*.

²³⁵ *Ibid*, at para 78.

²³⁶ *Ibid*.

²³⁷ *Ibid*, at para 79.

²³⁸ *Re D (A Child) (Deprivation of Liberty)* [2015] EWHC 922 (Fam), at para 29.

which will secure that the legal justifications for the constraints which they are under are made out.”²³⁹ Importantly, the Supreme Court reflected the ECtHR case law, that the purpose for which the child is detained has no bearing on the decision as to whether a deprivation of liberty has taken place.²⁴⁰ Although this domestic case relates specifically to children with learning disabilities,²⁴¹ the criteria developed by the Supreme Court is instructive in relation to broader cases and scenarios.

4.22 In the time since the UK Supreme Court provided the above judgment, the lower courts have continued to deal with questions as to what type of circumstance will amount to a deprivation of liberty.²⁴² This will invariably continue to be the case due to the fact that both the UK Supreme Court and the ECtHR are of the view that each case will be dealt with on its own circumstances. Of the guidance that can be drawn together from these cases, the following is relevant:

- where a child is the subject of a care order, the question as to whether or not they are deprived of liberty will be determined by whether or not they are ‘confined’;
- ‘confined’ is a term from the ECtHR which is defined as meaning held “in a particular restricted space for a not negligible length of time”;²⁴³
- young children will generally not be confined by their placements in foster homes²⁴⁴ or having doors closed/being placed in playpens etc.²⁴⁵
- a typical 15 year old is not free to leave their home²⁴⁶ and so, when considering if a 15 year old in care is confined, the relevant question is more likely to be if they are under the complete supervision and control of the local authority;²⁴⁷

²³⁹ *Cheshire West and Chester Council v P* [2014] UKSC 19, at para 56.

²⁴⁰ *Ibid*, at para 28.

²⁴¹ *Ibid*, at para 11.

²⁴² The majority of this jurisprudence emanates from the courts in England and Wales which, although not binding to the courts in Northern Ireland, produce judgments that have persuasive effect here.

²⁴³ *Storck v Germany* (2005) ECHR 406, at para 74.

²⁴⁴ *Re D (A Child)* [2017] EWCA Civ 1695, at para 39.

²⁴⁵ *Ibid*, at para 158.

²⁴⁶ In the sense that they will usually be brought back by the police to their parents if they run away. See *Re A-F (Children)* [2018] EWHC 138 Fam, at para 31(i).

²⁴⁷ *Re A-F (Children)* [2018] EWHC 138 Fam, at paras 32 & 12(ii).

- when comparing a child in care with a child not in care, the comparison should look at a child of the same age, station, familial background and relative maturity.²⁴⁸ Where the issue relates to a child with a disability, the appropriate comparator is a child of the same age without a disability.²⁴⁹

4.23 The High Court in England and Wales has also provided the following 'rule of thumb' in relation to the age of children, stating that:

- i) a child aged 10, even if under pretty constant supervision, is unlikely to be 'confined'...
- ii) a child aged 11, if under constant supervision, may, in contrast be so "confined", though the court should be astute to avoid coming too readily to such a conclusion.
- iii) once a child who is under constant supervision has reached the age of 12, the court will more readily come to that conclusion.²⁵⁰

Authorising a deprivation of liberty

4.24 The High Court in England and Wales has recently considered the procedure necessary to authorise a 'confinement' under Article 5 ECHR. Keeping in mind that the legislation is different between Northern Ireland and England and Wales, the following appears to be important elements of an Article 5 ECHR compliant procedure that also incorporates elements of UN CRC:

- 1) where the circumstances in which a child will be living amount to a deprivation of liberty, an application to the court will be necessary;²⁵¹

²⁴⁸ Ibid, at para 33.

²⁴⁹ Ibid.

²⁵⁰ Ibid, at para 43.

²⁵¹ Ibid, at para 48.

- 2) deprivation of liberty should be given a realistic meaning when considering if an application is necessary;²⁵²
- 3) the court does not need to sign off on each element of a 'confinement'. An order authorising the deprivation is all that is required;²⁵³
- 4) there should be an oral hearing in order to determine if a deprivation of liberty order is required;²⁵⁴
- 5) the child must be a party to these proceedings and should be able to express their views to the Judge in person, if of the age and inclination to do so;²⁵⁵
- 6) a child's right to a fair trial will be particularly important in secure accommodation proceedings and should be dealt with under the criminal limb of Article 6 ECHR;²⁵⁶
- 7) the guardian-ad-litem in any care proceedings should also be involved;²⁵⁷
- 8) where an order is made, it must be reviewed by a Judge at least once a year.²⁵⁸

4.25 Overall, the High Court in England and Wales has indicated that where a deprivation of liberty is both necessary (required for the child's welfare and in their best interests) and proportionate (the least restrictive regime possible) it will be lawful as a matter of substance.²⁵⁹

4.26 In summary, regarding deprivation of liberty:

²⁵² Ibid.

²⁵³ Ibid, at para 49.

²⁵⁴ Ibid, at para 50(i).

²⁵⁵ Ibid, at para 50(ii).

²⁵⁶ *Re C (Secure Accommodation Order: Representation)* [2001] EWCA Civ 458. Consideration under the criminal limb of Article 6 ECHR provides the child with more extensive procedural rights than consideration under Article 6's civil limb. This includes the right to adequate time and facilities for preparation of defence (Article 6(3)(b) ECHR), to free access to an interpreter (Article 6(3)(e) ECHR) and free legal assistance and representation (Article 6(3)(c) ECHR).

²⁵⁷ *Re A-F (Children)* [2018], at para 50(ii).

²⁵⁸ Ibid, at para 55(ii).

²⁵⁹ Ibid, at para 50.

- **deprivation of liberty means the physical liberty of the person;**
- **the purpose of Article 5 ECHR (right to liberty and security) is to ensure people are not deprived of their liberty without adequate safeguards;**
- **secure accommodation is one of the lawful exceptions under Article 5 ECHR;**
- **a deprivation of liberty is so, regardless of how short a time period it is for;**
- **the purpose for which a person is deprived of their liberty is irrelevant when considering if their Article 5 ECHR right is engaged;**
- **the test for children is whether they are 'confined' or 'under continuous supervision and control';**
- **a Trust cannot consent to a deprivation of liberty on behalf of a child in its care;**
- **once a set of circumstances amount to a deprivation of liberty, there must be a judicial authorisation of these circumstances;**
- **the reasons for which a child's liberty was deprived and 'best interests' will only be considered when discussing if the deprivation was justified.**

5.0 Restrictions on Liberty of Movement

Right to liberty of movement

- 5.1 The ECHR protects the right to liberty of movement and freedom to choose one's residence within the State territory under Protocol No 4, Article 2. This right can be restricted where it is in accordance

with law and for a legitimate reason.²⁶⁰ The UK signed Protocol No 4 in 1963, but has not taken the step to ratify this Protocol. Consequently, it has stated its intention to adhere to the duties contained within this provision in good faith, but is not bound to do so. This provision of the ECHR has also not been included in Schedule 1 of the Human Rights Act 1998, which means that it has not been incorporated into domestic law, as with other provisions of the ECHR. However, it useful to explore the ECtHR's interpretation of this right, particularly in relation to Article 5 ECHR. The distinction between deprivation of liberty (Article 5 ECHR) and restrictions on liberty of movement (Protocol No 4, Article 2 ECHR) have also been noted by the domestic courts.²⁶¹

5.2 The ECtHR has been careful to distinguish between a deprivation of liberty, as described above, and a restriction on movement which is visibly a less serious restriction given that the text contains none of the procedural safeguard required by Article 5 ECHR.

5.3 The ECtHR has defined the distinction between the two rights as one of "degree or intensity" rather than "nature or substance".²⁶² In making this distinction, the ECtHR examines the circumstances of each case, before deciding if the restriction on the individual is a deprivation of liberty or restriction of movement.

5.4 The ECtHR has acknowledged that:

although the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion, the Court cannot avoid making the selection upon which the applicability or inapplicability of Article 5 [ECHR] depends.²⁶³

²⁶⁰ Protocol No 4, Article 2(1) ECHR sets out the legitimate reasons as follows: "necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

²⁶¹ *Re D (A Child)* [2017] EWCA Civ 1695, at para 95; *Re K (A Child) (Secure Accommodation Order: Right to Liberty)* [2001] 1 FLR 526, at paras 99-101.

²⁶² *De Tommaso v Italy* (2017) ECHR 205, at para 80.

²⁶³ *Guzzardi v Italy* (1980) ECHR 5, at para 93.

5.5 Article 5 ECHR and Protocol No 4, Article 2 ECHR are similar in that both will require a factual judgement as to whether a restrictive measure or measures will fall within their boundaries.

What will amount to restrictions on liberty of movement?

5.6 As this is a fact-based judgement, there is no definitive guidance from the ECtHR as to what will amount to a restriction on movement. As with deprivation of liberty, the domestic courts have gone on to apply the below principles to cases before them.

5.7 The following principles can be ascertained from the domestic case-law:

- many aspects of the normal exercise of parental responsibility that interfere with a child's freedom of movement will not engage Article 5 ECHR, but will instead be regarded as a restriction on movement;²⁶⁴
- examples are:
 - putting young children into bed;
 - 'grounding' teenagers;
 - sending children to boarding school;
 - allowing schools to restrict a child's movements;
 - requirements for children to be back within certain boundaries by a certain time period.²⁶⁵

5.8 A sensible rule of thumb for defining restrictions of movements may be to apply the criteria from the UK Supreme Court's 'acid test' – that a child in care is subject to the same restrictions as a child living with its parents, who is of the same age, station and familial background, and where these restrictions alter and adapt to the child's age, capacity and level of maturity, it is likely to be a restriction on movement.²⁶⁶

²⁶⁴ *Re D (A Child)* [2017] EWCA Civ 1695, at para 95.

²⁶⁵ *Re K (A Child) (Secure Accommodation Order: Right to Liberty)* [2001] 1 FLR 526, at paras 99-101.

²⁶⁶ *Cheshire West and Chester Council v P* [2014] UKSC 19, at para 54.

What action can be taken?

5.9 The distinction between which categories various measures will fall into is an important one because, as detailed above, Article 5 ECHR carries with it various procedural guarantees that must be complied with once a situation reaches a deprivation of liberty. In contrast, beyond requiring that any restriction on liberty of movement is in accordance with law and proportionate in pursuit of a legitimate aim, the ECtHR has not attached any procedural requirements to Protocol No 4, Article 2 ECHR.

5.12 Within a domestic setting, in the exercise of parental responsibility granted to it by the courts, it appears that the Trust can authorise various restrictions on a child's liberty of movement in the normal course of corporate parenting. Drawing from the best practice of the ECHR, such restrictions should be in accordance with the law and proportionate in pursuit of a legitimate aim. Where these restrictions are called into question, at this point the decision-maker's consideration of the best interests of the child and the obligations under UN CRC may be relevant.

5.13 Understandably, questions will still arise from time to time as to whether a specific restriction constitutes a deprivation of liberty (Article 5 ECHR) or restrictions on liberty of movement (Protocol No 4, Article 2 ECHR).

5.14 In summary, regarding liberty of movement:

- **the difference between a deprivation of liberty and a restriction on liberty of movement is one of degree and intensity;**
- **establishing whether a deprivation of liberty or restriction on liberty of movement has occurred will be decided by a court on the facts of each case;**
- **many normal aspects of the exercise of parental responsibility and corporate parenting will fall under a restriction on liberty of movement, rather than deprivation of liberty; and**

- **best practice of the ECHR and UN CRC indicates that any restriction on a child’s liberty of movement should be in accordance with the law, proportionate, in pursuit of a legitimate aim and in the best interests of the child.**

6.0 The Grey Area

Difference between a deprivation of liberty or a restriction on liberty of movement

- 6.1 There is no legal litmus test²⁶⁷ to indicate the difference between a deprivation of liberty and a restriction on liberty of movement or bright line separating the two.²⁶⁸ The question is one of “pure opinion”.²⁶⁹
- 6.2 This disappointing lack of clarity appears to arise primarily from the requirement that every court will deal with every scenario on its own facts. These judgments will then serve only to provide imprecise guidelines for professionals working on the ground, perhaps until the situation they are dealing with also comes before a court.
- 6.3 It is understandable that, in the face of a court which may rebuke a Trust for breaching a child’s human rights by depriving them of their liberty unlawfully, many professionals will prefer to err on the side of caution and seek legal advice before taking steps to restrict a child’s liberty. Specifically, in relation to children who are reported missing from care, there are hard cases which require the Trust to both protect the child from harm and also respect their right to liberty. Where a child is willingly and repeatedly moving towards harm, this may seem like an impossible task.
- 6.4 Whilst other bodies have provided guidance as to what will amount to a deprivation of liberty, based on the previous analysis, the Commission suggests the questions below are useful as a test to

²⁶⁷ Neil Allen, ‘Restricting Movement or Depriving Liberty’ (2009) *Journal of Mental Health Law* 19, at 32.

²⁶⁸ *Secretary of State for the Home Department v AH* [2008] EWHC 1018, at para 21(i).

²⁶⁹ *Ibid.*

indicate whether a deprivation or a restriction is proposed. The answers to these questions do not represent definitive guidance for professionals, but may assist them when considering what steps to take in the face of these hard cases. The questions are as follows:

1) What age is the child in question?

If 12 or over, it is more difficult to justify a greater degree of supervision though each case turns on its circumstances.

2) Can the child leave the relevant area?

Not definitive criteria, but may point towards a deprivation of liberty if they cannot.

3) What level of supervision and control is the child under?

For children 12 and over, constant supervision and control will point towards a deprivation of liberty, though again each case will be looked at on its specific facts.

4) Are other children of the same age subject to the same restrictions in their family homes?

If so, this may point towards a restriction on liberty of movement.

5) Can the child still see other social contacts with the restriction in place?

If no, this may point towards a deprivation of liberty.

6) What is the context for any restriction being imposed, for example, time of day, is it known where the child is going and who with, is there known risks of child sexual exploitation?

The context may indicate a justified restriction on the right to liberty or liberty of movement.

Applying the questions

- 6.5 The Commission is aware that one of the key issues that has arisen in respect of children reported missing from care is that of locked doors. While the courts have been clear that the presence of a locked door is not determinative of whether or not a child is confined,²⁷⁰ the act of locking a door may still seem drastic by its very nature.
- 6.6 However, the fact of a locked door will only be one element in the determination of whether or not a deprivation of liberty has taken place. The key factors which should be returned to are supervision and control and the age of the child.

Eight-year-old

- 6.7 An eight-year-old child, living in foster care or in a children's home, cannot leave either placement by way of the front door. This rule is enforced by the locking of the front door of the property. This is a common set of circumstances for the majority of eight year olds and is not a deprivation of liberty.²⁷¹
- 6.8 'Grounding' an eight-year-old child to their bedroom for a specified period of time is also unlikely to amount to a deprivation of liberty. Where the door of the bedroom is locked or bolted or physical restraint is used to ensure the child remains in their room, this will likely swing the balance towards a deprivation of liberty.

12-year-old

- 6.9 At 12 years old, it is more difficult to justify a greater degree of control and supervision of a child. Locking a child of this age in their bedroom will place the child under the complete supervision and control of the children's home staff or foster parents. This will likely amount to a deprivation of liberty.

²⁷⁰ *Re A-F (Children)* [2018] EWHC 138 Fam, at para 17.

²⁷¹ *Re S (Habeas Corpus), S v Haringey London Borough Council* [2003] EWHC 2734, at para 28.

6.10 The locking of the front door of the children's home for security purposes, as opposed to for the purposes of restricting movement, is likely to represent a restriction on movement. The more relevant considerations are if the child can leave the children's home without permission. Has the child asked to leave the children's home and have they been repeatedly denied this opportunity where others their age would be allowed to. If the answer to these questions is yes, this points towards a deprivation of liberty.

6.11 Consideration should be given to the context of the individual circumstances, which may provide justification for a deprivation of liberty or restriction on freedom of movement. This is particularly true if there is a known immediate and real risk to the child's life (Article 2 ECHR) or a threat of ill-treatment (Article 3 ECHR). As non-derogable rights, any known real and immediate risk concerning Articles 2 or 3 ECHR is likely to provide justification for depriving liberty or restricting freedom of movement. Also drawing from Article 3(1) UN CRC, the best interests of the child should be a primary consideration. Some scenarios to be considered are:

- the time of day that a 12-year-old is seeking to leave the children's home, for example, if it is at night;
- where is the 12-year-old seeking to go, for example, is it a late night party;
- who is the 12-year-old seeking to leave the children's home with, for example, is a car of older males waiting outside;
- is the 12-year-old seeking to leave the children's home on the same day or night that they previously left or went missing from the children's home and were found or are known to have returned from a threatening or inappropriate situation?

15-year-old

6.12 At 15 years old, the child's advancing years point towards a lesser degree of supervision and control again. As with a child of twelve years old, locking a 15-year-old in their bedroom or using physical

restraint to ensure the child remains in their room will be a deprivation of liberty.

- 6.13 Many 15 year olds living with their parents will be able to leave their own homes to socialise during appropriate hours. Continuous refusal to allow the child to leave the placement and the ongoing control of the child's movements and activities will likely amount to a deprivation of liberty.
- 6.14 As with a 12-year-old, consideration should be given to the context of the individual circumstances in which a 15-year-old is seeking to leave the children's home or in which they had previously been reported missing, which may provide justification for depriving liberty or restriction on freedom of movement.
- 6.15 Ultimately, as noted above, there is no definitive checklist that can be provided for professionals to assist when deciding what will amount to a deprivation of liberty. The courts will continue to deal with each case on its own facts and, in the absence of definitive legislative criteria, professionals working with children should seek to implement best practices and consider seeking legal advice where they continue to be unsure.

7.0 Conclusion

- 7.1 Under human rights standards, children have both the right to liberty and the right to be protected from harm and their best interests safeguarded. The difficulties in practically realising these rights does not absolve public authorities from their obligations to fulfil them.
- 7.2 Ultimately, the ECtHR has been clear the purpose for which a person is detained is not a relevant factor when deciding if their Article 5 ECHR right is engaged. A 'well-meaning' decision to deprive a child of their liberty will still engage Article 5 ECHR no matter how benevolent the intent or the extent of the danger from which they require protection.

- 7.3 Equally, the solution to an intractable problem – such as children repeatedly reported missing from care – cannot be to continuously deprive these children of their liberty. As has been emphasised by others, where perpetrators of child abuse and exploitation take advantage of young people, these perpetrators must be the prime target of the State’s efforts to curb the problem. There is also an investigative obligation for these crimes under the ECHR that cannot be discharged by simply locking children in their rooms.
- 7.4 Practically, where a foster carer or social worker becomes aware that a child is planning to abscond or has absconded from a property and move towards real and immediate physical or psychological danger, they should take reasonable steps to ensure the child’s rights to be free from violence are being protected. These might include calling the police or seeking additional social work support. It could also involve taking proportionate steps to restrict or prohibit a child’s correspondence with particular individuals that pose or facilitate a real and immediate threat. Where the same child repeatedly exhibits this behaviour or their life is at risk, consideration should be given as to whether the test for secure accommodation is met. Ongoing support work should be carried out with the child at all times to ensure that any steps to deprive a child of their liberty is for as short a duration as possible and to assist the child to engage in society, free from self-harming behaviours.
- 7.5 It has also been highlighted through engagement with key stakeholders that the cycle of a child absconding or being reported missing from care could be prevented or broken by foster carers, social workers or children’s home staff taking the time and care to recognise the early signs of this behaviour and to lend an ear and advice to those children at this early stage. Furthermore, rolling out specialised training on this issue across the Police Service NI will assist in taking approaches that also break the cycle.