Tithe an Oireachtais
Houses of the Oireachtas

An Comhchoiste um Leanaí, Comhionannas, Míchumas, Lánpháirtíocht agus Óige

Tuarascáil maidir leis an nGrinnscrúdú Réamhreachtach ar Scéim Ghinearálta Bille um Chúram Leanaí (Leasú), 2023

Meitheamh 2023

Joint Committee on Children, Equality, Disability, Integration and Youth

Report on pre-legislative scrutiny of the General Scheme of a Child Care (Amendment) Bill 2023

June 2023

33/CDEI/15

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Senator Mary Seery Kearney *Fine Gael*	Senator Ned O'Sullivan *Fianna Fáil*		

FOREWORD

The Committee met with a number of witnesses in public session on 9 May 2023 and 16 May 2023 to discuss the General Scheme of a Child Care (Amendment) Bill 2023. It also sought and received several targeted submissions. The Committee would like to extend a sincere thank you to those involved for their participation. Some of the key recommendations of the Committee stemming from this process are as follows:

- All children and young people in care, including in a voluntary care arrangement, must have an assigned social worker and be supported by them, a Guardian ad Litem and an independent advocate, as required.
- The workability issues the Department cited in relation to providing free legal advice in cases of voluntary care must be overcome. Once they are and resources have been put in place to facilitate free legal advice for parents in cases of voluntary care, then it should be rolled out to all other care orders as well.
- The representation and input of disabled children and their carers, particularly those with care experience, should be legislated for in both the Children and Young People's Services Committees and the National Child Care Act Advisory Committee.
- The General Scheme should include specific provisions for protecting unaccompanied minors.
- The court should be satisfied that all available preventative and supportive interventions have been provided and have failed to protect the child before it considers a care order. The State should be legally obliged to provide these supports and interventions.

This is the first time in 30 years that the Child Care Act has been subject to substantial review, albeit that amendments have been made in the interim. Now is the time to be ambitious and brave in committing to providing for children, especially those in care. The updating of this legislation is an opportunity to mobilise resources and act on learnings from the last three decades to ensure we do better for children. It is through

this lens that many of the recommendations here are proposed. The Committee trusts the Minister will give serious consideration to the recommendations proposed.

A common thread during discussions around the provisions contained in the General Scheme was the lack of resources available to make what we know is best practice a reality. For example, consistency of social workers for both parents and children was discussed, as was the provision of appropriate supports to enable children to stay in their family home. So far, the State has failed to provide the known building blocks for successful outcomes to families. The Committee was informed of a number of tragic cases in this regard during pre-legislative scrutiny. When a family comes into contact with the Child and Family Agency, difficult questions must be considered, such as:

- Are the correct personnel, resources and services available to this family, in line with their rights and needs, to give them every chance, before a care arrangement is considered?
- Is the State, by intervening, doing a better job or achieving a better outcome, overall, for the family than if it hadn't intervened at all?

Many provisions in the General Scheme are welcome, as are measures being taken by the Child and Family Agency to address the problems identified. For example, the Committee welcomes the development of a National Child Care Act Advisory Committee and the fact that of 220 social workers qualifying this year, the Child and Family Agency has secured 163 of those as permanent posts.

However, many elements of the General Scheme need significant strengthening. Several other elements, that had been expected to be included in the General Scheme, based on well-known issues, are missing. For example, private family arrangements or kinship care, aftercare and special care are not addressed, nor are provisions for unaccompanied minors, updates to aftercare or the 'in camera' rule. Under other Heads there is placeholders, stating that the relevant policy is still under consideration by the Department, which makes holistic scrutiny of the whole General Scheme impossible.

This legislation will frame elements of policy responses to some of the biggest issues of our times going forward, such as the homelessness emergency, the refugee crisis, and the crisis in the disability sector, as well as poverty, mental health, and addiction. It must be considered and mobilised in a way that is intersectional and interdepartmental.

Kathleen Funchion T.D.

Cathaoirleach

28 June 2023

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RECOMMENDATIONS

The Committee recommends that:

1. The commitment to support families within the guiding principles must be met with the resources needed to make that a reality.

2. Independent advocacy support for parents of children who come into contact with the Child and Family Agency should be developed as a matter of urgency, underpinned by a statutory footing.

3. An explicit duty on relevant agencies to assess and support a child's significant relationships should be included in the guiding principles and guidelines.

4. 'Meaningful relationship' within the guidelines should be expanded to include information around identity, cultural consideration and the wider understanding of how children perceive themselves within their kinship groups.

5. It should be clarified that the Guiding Principles in Head 4 apply to more generalised decision-making under the proposed Act, rather than an individual child in an individual piece of decision-making. The Guiding Principles regarding the best interests of the child should also apply generally, to those working under the various elements of the Act, from those drafting guidance under the proposed Act (Head 5), to the Agency (Head 6) or the proposed new Children and Young People's Services Committees (Head 9) and so on.

6. Whilst there is an obligation proposed to have regard to the Guiding Principles, there should also be an express requirement to record the reasoning of the decision-maker, through record-keeping by those operating under the Act.

7. *"in so far as practicable"* in Head 4(1)(g) should be amended and tightened up to provide less of a broad caveat, as currently it leaves too much scope for not abiding by the guiding principles.

8. Independent advocacy should be a right for children in care and should be provided for in this legislation. Resources and regulations should be provided accordingly.

9. The Guidelines in Head 5 should have a due regard obligation.

10. There should be consultation during the development of the proposed guidelines in Head 5. This should include work to ensure that the guidelines are informed by social work values and best practices.

11. The Duty of the Agency in Head 6 should have explicit reference to the obligation to uphold the rights of the child, as enshrined under the Constitution and in the UNCRC.

12. Appropriate and timely services and family supports must be provided if voluntary care is going to work as a temporary measure as envisioned in the General Scheme.

13. Contact between the child and parent and others whom the child has significant relationships with must be supported where appropriate, as it is key to successful reunification.

14. A time limit should be placed on the duration of voluntary care arrangements.

15. A limit should be put on the amount of times the voluntary agreement can be renewed.

16. There should be formal reviews before the expiry of the agreement, with a review of the care plan to take place alongside this.

17. All children and young people in care, including in a voluntary care arrangement, must have an assigned social worker and be supported by them, a guardian ad litem and an independent advocate, as required.

18. A GAL should be appointed to the child six weeks in advance of the review of a voluntary arrangement.

19. The independent advocate and GAL should participate in the reviews.

20. Parents must be well informed about the arrangement, it especially needs to be made very clear to parents, in advance of a voluntary care arrangement, the manner in which the withdrawal of consent is to be communicated.

21. Parents of children considering a voluntary care arrangement should be provided with access to both free independent legal advice and independent advocacy support at no cost to them.

22. Further consideration should be given to who can consent to a voluntary arrangement and to further defining in loco parentis.

23. There should be an independent oversight mechanism for voluntary care arrangements.

24. The Head 25 provision for enhanced rights for foster carers should not be used to reduce the birth parent's agency in cases where they are engaging positively and satisfy the elements of a 'meaningful relationship' and there is a realistic prospect of reunification.

25. Heads 17, 18 and 19 should be amended to make explicitly clear in the Bill that the risk of harm posed to a child, based on a live assessment of risk which takes into account past harm, is what forms the basis for care order proceedings initiated by the Child and Family Agency. The likelihood of future harm should be considered only where the basis for the application made by the Agency would remain unchanged.

26. Legislation should be brought forward in a more complete way going forward. Everything that needs to be in the legislation should be. Policy issues should be resolved before a General Scheme is drafted or referred for scrutiny.

27. Private Family Arrangements and Kinship care should be included in the General Scheme, in line with recommendations from the UN Committee on the Rights of the Child and in collaboration with relevant stakeholders.

28. Suspected intent to perform forced marriage and female genital mutilation should be named explicitly as criteria for an emergency care order.

29. Further consultation with stakeholders on Head 14 should be undertaken to examine the concerns raised here in relation to emergency care orders.

30. It should be essential, rather than desirable, for a child to be visited by or on behalf of the Child and Family Agency during a supervision order.

31. Early years centres should be listed alongside schools in Head 19(4) as an essential intervention that could be listed as part of a supervision order.

32. Consideration should be given to amending the text in Head 19 to provide that the court may give directions on its own motion or that of another party to the proceedings.

33. Head 19 should include a reference to the principle from constitutional and European human rights law that intervention in family life must be proportionate, to provide a safeguard against children being taken out of family homes prematurely.

34. As another safeguard against children being taken out of family homes prematurely, the court should be satisfied that all available preventative and supportive interventions have been provided and have failed to protect the child before it considers a care order. The State should be legally obliged to provide these supports and interventions.

35. As with voluntary care orders, interim ones should be short, support-focused interventions that centre on providing families with every chance for successful reunification.

36. Where there is an extension to an interim care order, the child's social worker should be required to visit the child at least once per month, as opposed to periodically, as is currently stated in Head 17(5)(b).

37. The workability issues the Department cited in relation to providing free legal advice in cases of voluntary care must be overcome. Once they are and resources have been put in place to facilitate free legal advice for parents in cases of voluntary care, then it should be rolled out to all other care orders as well.

38. Informed consent and due process must be built-in to all care proceedings.

39. Suitable, accessible information should be provided to parents and children by The Child and Family Agency and the courts at every juncture.

40. The duty on the court to provide a written decision, in plain and accessible language, should apply to all care orders.

41. Further consultation with stakeholders should be undertaken to investigate the need for lowering the threshold for making a child a party to proceedings, the risks and benefits of doing so and whether it is seeking to resolve issues that would be better served through the provision of other supports and resources, such as easy access to GALs, social workers and independent advocates.

42. Proposals on the admissibility of hearsay evidence in child care proceedings should be completed and included in the General Scheme.

43. Head 25 hearings should include consideration of whether the parent(s) is engaging and/or carrying out the functions that would transfer to the foster parent and whether there is a likely prospect of reunification.

44. Under Head 25, the child's views should be taken into consideration early on and throughout the application for enhanced foster carer rights.

45. There should be a mechanism in place for the GAL to outline the child's views during deliberations on enhanced rights for foster parents, if the child wishes.

46. Foster carers should be made aware by the Child and Family Agency of the steps required to secure enhanced rights and actively supported to engage in the process.

47. The child's wishes should be central within deliberations on enhanced rights for foster carers and the child should be supported by a GAL, social worker and independent advocate as required.

48. The foster care committee system should be reviewed to assess how practice varies geographically and to address any gaps in terms of service review and enhancement.

49. Foster care must be properly resourced, including via raises to the foster care allowance, the introduction of a state pension for foster carers, better provision of supports for foster carers, better support services for foster children and timely access to the assessments and interventions required by children in foster care placements.

50. Where a service proposes to operate as a provider of a relevant service, they should be legally obliged to have a child safeguarding statement in place before, not from, the date on which they commence.

51. The powers of inspection, compellability and enforcement available to the Child and Family Agency in relation child safeguarding statements need to be strengthened as a priority.

52. The Child and Family Agency should be given additional resources to strengthen its existing powers, including such powers where a joint protocol is already in place.

53. The Child and Family Agency should continue and intensify information campaigns around the requirements for relevant organisations and persons under Children First. These should be aimed at providers as well as parents/guardians.

54. Consideration should be given to protections for whistle-blowers/persons of conscience reporting on concerns.

55. Child protection should take precedent over data protection where it concerns the cooperation and sharing of information among relevant agencies.

56. All those working with victims of abuse should be trained in line with best practice.

57. Head 10 should be used in conjunction with Children First for improving the safeguarding of children more effectively than currently proposed in the General Scheme. It should make cooperation mandatory, not optional. The discretion should be removed and the duty to cooperate should go further than information sharing.

58. Sanctions should be introduced for the non-reporting of mandated concerns.

59. The Department, policymakers and Special Rapporteur for Child Protection should engage in discussions on the proposed Head 10 and on learnings stemming from the UK experience.

60. Heads 13 and 44 should be further considered, in line with the observations of key stakeholders as detailed in this report.

61. The General Scheme should be amended to include strong legal provisions to ensure that the State meets children's needs, especially those in care and those with a disability or both.

62. The representation and input of disabled children and their carers, particularly those with care experience, should be legislated for in both the Children and Young People's Services Committees and the National Child Care Act Advisory Committee.

63. Head 22 should be amended to mandate that the HSE, or any other relevant bodies whom the duty to cooperate under Head 10 applies to, attend proceedings and other Heads need to legally oblige such bodies to cooperate and deliver services, particularly for those with disabilities.

64. Section 47 should be amended so that the court can make directions for services to additional public bodies to ensure greater accountability and more effective service provision for children where interagency co-operation is required, through direct court oversight.

65. The Department and policymakers should revisit the General Scheme with insight from disabled people or organisations who represent them. Every Head must be considered with regard to 'how can we build in some additional legal protection for children with additional needs here?' and 'how can we use this Bill to make all agencies do better for disabled children?'.

66. People with disabilities or additional needs should not be overlooked in the legislative process. Relevant departments and policymakers should seek engagement and enable their participation when creating legislation.

67. A review of the 'in camera' rule should be undertaken as a priority and the recommended legislative amendments arising from that review should be made within the next 12 months, to take account of advances in social media and the need for young people in care to be able to develop and express their identity.

68. The Child and Family Agency and the Department should urgently coordinate to establish what resources are needed to enable section five of the 1991 Act to operate in the safest way possible for children temporarily out of home and the resources required should be delivered immediately.

69. Arrangements under Head 8 should be reviewed after three months at the latest, not six months as proposed in the General Scheme.

70. The Heads involving the duty of various bodies to cooperate should be strengthened and used to tackle homelessness.

71. A lower age limit should be reconsidered under Head 8, in collaboration with The Child and Family Agency, The Child Law Project and other social workers with expertise in this area.

72. A child who is deemed homeless and accommodated under section 5, should have this duration considered for the purposes of aftercare eligibility.

73. A social worker should be appointed for children accommodated under section 5 and this should be explicit in the section.

74. It should be clarified that Children First Act applies to these services as homelessness is not listed as a relevant service in schedule 1 of the Children First Act 2015.

75. Section five should not operate in isolation from the rest of the Act. Children under this section should receive the services, attention and care that children 'in care' under other parts of the Act get.

76. Head 8 should apply to a situation where it is dangerous for a child to remain in their home due to violence or other threatening behaviour where the safety of others is at risk, or a situation where the child is a danger to themselves.

77. Head 8 should explicitly underline that where a child requires welfare and protection beyond their immediate need of accommodation, a care arrangement should be considered on assessment. A further assessment shall happen within three months, rather the proposed six months.

78. Clarity is needed to identify whether the state is acting in loco parentis in this section, and what duties they assume as a result.

79. Children under this section should be able to be brought 'into care' if they so wish.

80. Accommodation provided under this section should be regulated and inspected.

81. Aftercare eligibility should be brought within the scope of the General Scheme and amended to ensure that:

A. Aftercare is placed on a statutory footing for every child leaving State care;

B. Aftercare supports are extended to 26 years of age based on an assessment of need;

C. Discrimination in the allocation of aftercare services based on progression in further and higher education should be removed.

82. The eligibility criteria for aftercare should be widened to allow flexibility for consideration of individual circumstances and the impact of these on a young person's need for aftercare. Circumstances to be considered should include: The length of time the child and their family were known to or involved with social services; The length of time a child spent in care before the age of 13 and whether a child was taken into care after their 17th birthday. The level of vulnerability and risk experienced by a young person should be considered, as should waiving of the criteria requiring a young person to have spent 12 cumulative months in care.

83. Bespoke aftercare should be provided to neurodiverse children and children with disabilities and the Child and Family Agency-HSE Joint Protocol for Interagency Collaboration should be updated in this respect.

84. A pathway for foster care involvement in aftercare should be available, where appropriate.

85. It should be considered whether, if a person leaving care becomes a relevant person for the purposes of the Assisted Decision Making legislation, a duty should be placed on the Child and Family Agency to assist the child in entering into an appropriate assisted decision-making arrangement, including the making of a Part 5 application in appropriate circumstances.

86. Appropriate new provisions on special care should be developed and included in the General Scheme. Funding should be provided accordingly.

87. The General Scheme should include specific provisions for protecting unaccompanied minors.

88. The status of a child as an unaccompanied minor itself should be enough to enable him or her to go into care.

89. Upon leaving care, their status as care leavers should override their status as international protection applicants for the purposes of eligibility for aftercare.

90. Constructive consultation with early learning and school age care providers should continue, including in the development of forthcoming regulations. Input from providers should be sought to increase workability.

91. The regulatory and administrative burden on providers should be reduced insofar as possible, without compromising safety and safeguarding. Again, input from providers should be sought to increase workability and learn from what works well as far as providers are concerned.

92. The regulations for various service providers, including childminders, should contain some discretion in relation to past convictions to prevent them from inadvertently penalising certain communities and further decreasing the pool of available workers in the childcare sector.

93. The AIM programme should be expanded, along with other initiatives to support children with disabilities or additional needs to access early learning and childcare.

94. The drafting of the guidelines that will apply to childminders should be completed as a priority, so that minders and parents have time to plan and establish how they will be impacted.

95. Providers designated as relevant bodies must be supported and resourced in order to meet any new roles and responsibilities they have arising out of the new provisions and regulations.

96. The regulations that are developed for childminders should be proportionate, appropriate, and specific to the setting of childminding. The childminding sector should continue to be involved in their development.

INTRODUCTION AND WITNESSES

The Child Care Act, 1991 is the primary legislation in Ireland that addresses the welfare of children who may not receive adequate care and protection. The General Scheme of the Child Care (Amendment) Bill 2023, which will update the 1991 Act, among others, was referred to the Joint Committee on Children, Equality, Disability, Integration and Youth on 18 April 2022 for pre-legislative scrutiny. The General Scheme was published on 19 April, with the accompanying press release listing its aims as follows:

- provide for the review and update of the Child Care Act 1991, the primary Act guiding child welfare and protection in Ireland;
- capture positive policy and practice developments and address legislative gaps identified during the review process; and
- revise and update the regulation of early learning and childcare services.[1]

This follows a commitment in *Better Outcomes Brighter Futures – The National Policy Framework for Children and Young People 2014-2020* to review and reform the 1991 Act. It also follows on from substantial stakeholder consultation undertaken by the

[1] gov.ie - Landmark review of the Child Care Act 1991 receives approval to be drafted (www.gov.ie)

Department since 2017. A synopsis of that process and publications arising from it have been published by the Department here.

Links to the transcripts of the meetings held on 9 and 16 May 2023, as well as the submissions received, are contained in Appendix 1.

The aim of this report is to outline some of the important issues flagged during the pre-legislative scrutiny process and to make recommendations as to how they should be addressed.

This report examines the General Scheme under six broad themes as follows:

1. Heads 4, 5 & 6: Guiding Principles, Guidelines and Duty of the Agency

2. Proposed amendments to care orders and arrangements

3. Measures for collaboration and inter-agency cooperation in the operation of the Act

4. Other observations on child welfare and protection

5. Regulation of the provision of early learning services

6. Regulation of non-relative childminders

There are five Acts that the General Scheme proposes to amend, as follows:

- Child Care Act 1991
- Children First Act 2015
- Child and Family Agency Act 2013
- National Vetting Bureau (Children and Vulnerable Persons) Act 2012
- Child Care (Amendment) Act 2022

Many of the recommendations made here are grounded in the United Nations Convention on the Rights of the Child (UNCRC). The Committee upholds that the UNCRC provides a vital framework and mandate for protecting children's rights in the State. The Committee reiterates is longstanding recommendation that the UNCRC should be incorporated into domestic legislation.

Witnesses

Tuesday 9 May 2023

Department of Children, Equality, Disability, Integration and Youth

- Ms Lara Hynes, Acting Assistant Secretary, Child Policy and Tusla Governance Division
- Mr Toby Wolfe, Principal Officer, Early Years Quality Unit
- Ms Marie Kennedy, Principal Officer, Alternative Care Policy Unit
- Ms Gill Barwise, Assistant Principal Officer, Child Protection Policy and Legislation Unit

Office of the Ombudsman for Children

- Dr Karen McAuley, Head of Policy,
- Ms Nuala Ward, Director of Investigations
- Ms Ciara Gill, Policy Officer

The Child and Family Agency (Tusla)

- Ms Kate Duggan, Interim Chief Executive Officer
- Mr Cormac Quinlan, Assistant National Director Practice Reform
- Ms Pamela Benson, Head of Legal Services
- Ms Fiona McDonnell, National Service Director

Barnardos

- Ms Suzanne Connolly, Chief Executive
- Ms Freda McKittrick, Head of Guardian ad Litem Service

Tuesday 16 May 2023

Early Childhood Ireland

- Ms Teresa Heeney, Chief Executive
- Ms Frances Byrne, Director of Policy

EPIC

- Ms Marissa Ryan, Chief Executive Officer
- Mr Conor Stitt, Research and Policy Manager

Irish Foster Care Association

- Ms Bernadette Neville, Interim Chief Executive Officer
- Ms Karen Cahill, Co-ordinator, IFCA National Helpline Service

The Independent Guardian ad Litem Agency

- Ms Claire Quinn, Director and Guardian ad Litem
- Ms Nicola McCarthy, Guardian ad Litem

Glossary

Abbreviations and terms used throughout this report include:

The General Scheme = The General Scheme of a Child Care (Amendment) Bill 2023

The 1991 Act = The Child Care Act 1991

The Department = The Department of Children, Equality, Disability, Integration and Youth

The Committee = The Committee on Children, Equality, Disability, Integration and Youth

UNCRC = United Nations Convention on the Rights of the Child

GAL = Guardian ad Litem

OCO = The Ombudsman for Children's Office

IASW = The Irish Association of Social Workers

EPIC = Empowering People in Care

TIGALA = The Independent Guardian Ad Litem Agency

IFCA = Irish Foster Care Association

The Agency = the Child and Family Agency (often referred to as Tusla)

1. Heads 4, 5 & 6: Guiding Principles, Guidelines and Duty of the Agency

1.1 Head 4: Guiding Principles

The insertion of Guiding Principles is broadly welcomed by the Committee and the stakeholders it engaged with during the pre-legislative scrutiny process, particularly in terms of this Head's intent to strengthen the child-centred focus of the Act and ensure the decision-making process adheres to the best-interest principle. However, the

Committee is of the view that several recommended changes could strengthen this new section further.

Family Relationships

The primacy given to supporting families is particularly welcome. Family support is essentially the second principle within the Bill, being mentioned only after the best interests of the child and along with some really important principles, such as the preference being to keep children with their families and the need to engage the child in decisions being made about them. However, the Committee is fully aware that a lack of resources is an impediment to providing the required level of supports to families based on the experiences of those trying to access supports, those in private family arrangements and those working in the sector or engaging with The Child and Family Agency.

As positive as it is to see family support prioritised in the General Scheme, it is imperative that it is appropriately resourced to provide actual help to families. The need for resources to make the proposals in the General Scheme a reality is a recurring theme.

On relationships, the Committee heard a convincing case for including an explicit responsibility on the Child and Family Agency to assess and support each individual child's significant relationships during their time in care, with the child's needs front and centre, regardless of the arrangement (i.e. whether voluntary, court ordered or private). Continued contact between children, parents and extended family is key to maintaining relationships, aiding decision-making, providing stability in care and supporting successful reunification.[2]

The Irish Association of Social Workers (IASW) suggested that within the Guiding Principles, 'meaningful relationship' should be expanded to include information around identity, cultural consideration, and the wider understanding of how children perceive themselves within their kinship groups. IASW noted that the needs of the child in regard to what constitutes a 'meaningful relationship' within the family will require

[2] For more on explicit attention being given to family relationships see Barnardos contribution in the transcript of the 9 May 2023 meeting or IASW's submission.

ongoing support and assessment throughout their time in care. It was suggested that the Agency have a responsibility to regularly review this provision, with regard to the sizable minority of children that return to their birth family and children who form long term relationships with their foster families.

A child's right to identity is enshrined in the UNCRC via Article 8 which provides that the child has a right "to preserve his or her identity, including nationality, name and family relations".[3] Enabling adoptees or those in care to maintain cultural connections is now something we strive for and culture is increasingly recognised as an element of best practice for those engaged in social work.[4] As such, the suggestion from IASW to enshrine the right to this type of information in the legislation is an important one. This Committee, in dealing with Mother and Baby Homes, has seen the lasting impact that failing to provide people with information around who they are and where they come from can have.

A child's best interests

In her submission to the Committee, Special Rapporteur on Child Protection Caoilfhionn Gallagher KC, highlights the General Comment regarding Article 3.1 of the UNCRC, which emphasises, at paragraph 6, that the child's best interests are a threefold concept, as follows:

(a) A substantive right

(b) A fundamental, interpretative legal principle

(c) A rule of procedure

In consideration of this three-pronged Article 3.1 obligation, the Special Rapporteur suggests amendments to address the following two matters:

a) There is presently no indication that **Head 4 applies to more generalised decision-making under the proposed Act, rather than an individual child in an individual piece of decision-making**. The Guiding Principles regarding the best interests of the child should also apply to, for example, those drafting guidance under

[3] Convention on the Rights of the Child | OHCHR
[4] Culture features prominently in CORU guides such as this one for example.

the proposed Act (see Head 5), to the Agency (see Head 6) or the proposed new Children and Young People's Services Committees (see Head 9). This could either be achieved through amendment of Head 4, or amendment of Heads 5, 6 and 9 to reflect this principle.

(b) There is **no requirement regarding record-keeping by a person exercising a function under the Act**. Whilst there is an obligation proposed to have regard to the Guiding Principles, there should also be an express requirement to record the reasoning of the decision-maker, as Article 3.1 requires.

The Committee supports the view of the Special Rapporteur on both of these issues and recommends that amendments are made to (i) clarify that the Guiding Principles apply in a generalised way to those making decisions under the Act, not just to individual decisions about individual children, and (ii) create an express requirement to record the reasoning of the decision-makers through record-keeping under the Act.

Another issue the Special Rapporteur highlights in Head 4 is the **need to tighten and refine the standard caveat language of *"in so far as practicable"*** in Head 4(1)(g). It is, she says, important that the general scheme recognises that decisions may need to be made in urgent and time-pressured circumstances, but it is also of concern that the current wording is very broad and open-ended, with a large caveat. The Committee agrees. "*In so far as practicable*" leaves too much room for not abiding by the Guiding Principles.

1.2 Independent advocates and the voice of child

The case for providing independent advocacy is grounded in Article 12 of the UNCRC, which provides for the child's right to be heard and to participate in decision-making, including through a representative or appropriate body. As EPIC informed the Committee, the United Kingdom enshrined the right to independent advocacy for children in care in 1989 and advocates are now provided through local authorities. In Ireland, independent advocacy for adults with disabilities was established by the *Citizens Information Act 2007* and is carried out by the National Advocacy Service for People with Disabilities. Currently, the Child and Family Agency provide funding to EPIC, who only have nine advocates operating across the whole of Ireland.

Given the focus within the Guiding Principles on enabling the child to express their views and participate in decisions about them, Head 4 appears to be the best place to legislate for the child's right to an independent advocate. There was some discussion during pre-legislative scrutiny around empowerment and developing agency as goals in social work, but also of the difficulty involved for the Child and Family Agency, which can be seen as the 'State's enforcer', to do so. The Committee is of the view that independent advocates would be an appropriate solution and would give real meaning to the principle of giving due weight to the child's wishes. Furthermore, independent advocates can play a key role in making proceedings more accessible for young people. EPIC told the Committee in its contribution:

> "*In EPIC's experience, successful care journeys are contingent on: the child's views being sought and considered; efforts being made to gain a clear picture of their wishes, thoughts, and feelings; and children and young people in care being viewed with agency and as rights holders. While in the care system, children and young people are too often expected to contend with a complex array of systems and processes and to engage with a range of professionals and State agencies that most adults would find difficult to navigate. As a result, their ability to ensure their wishes and feelings are heard, understood and taken seriously by agencies can be impeded. The provision of independent advocacy is intended to empower children and young people to express their views and that they are supported to do so*."[5]

The Child and Family Agency told the Committee:

> "*We also very much support the right to advocacy and the need for advocacy. We support EPIC to provide advocacy for children in care services. We also fund legal representation through EPIC, which is very important to us. As part of our new guidelines in supporting separated children and unaccompanied minors referred to us, we have now contracted an advocacy service to support*

[5] EPIC during the meeting of 16 May 2023.

those young people and to ensure that they have advocacy services. Obviously, however, we remain challenged in terms of increasing that level of support that is available."[6]

In its contribution, the Department acknowledged that independent advocacy for parents and children is a good idea but said it does not believe it necessarily needs to be put in the statute, as many issues are better approached from a policy or operational perspective rather than mandating them in legislation. Considering that there have been calls for such advocacy from many quarters over many years now, yet EPIC still has only nine advocates operating across the whole of Ireland, the Committee is of the view that it is time to legislate for this. It does, however, recognise the work that has been done to enable advocacy to date, be it through EPIC, the National Advocacy Service for People with Disabilities or other avenues, and commends the ability of the Department, the Child and Family Agency, EPIC and others to come together in agreeing that it is a good idea.

Given that the General Scheme proposes to vindicate the rights of a child to be heard in matters affecting them, the Committee recommends that independent advocates are provided for all children involved in care arrangements when required. EPIC informed the Committee that, at present, independent advocacy services are not regulated, because EPIC is the only organisation providing an independent advocacy service to children and young people, specifically those in care and leaving care. While EPIC has Garda vetting, high standards and codes of practice, they are in favour of statutory guidance. The Committee also supports this recommendation.

It would be remiss to exclude foster carers from a discussion on centring and promoting the child's voice and wishes. It must be acknowledged that foster carers do much of the day-to-day advocacy on behalf of children in care. It is important that foster carers are enabled to continue that work and to contribute collaboratively with Guardian ad Litems (GALs), advocates and social workers where appropriate. In recognition of this, we recommend a pathway for foster care involvement in aftercare,

[6] The Child and Family Agency during the meeting of 9 May 2023.

where appropriate, in section 4.4 which deals with aftercare and care leavers. Some of the specific proposals in relation to foster carers enhanced rights are examined in more detail in the section on Head 25.

1.3 Head 5: Guidelines and Head 6: Duty of the Agency

Head 5 makes provision for the issuing of guidelines regarding the implementation of the Act, the ability for the Minister to request a report on the functioning of elements of the Act and a mechanism for feeding that information into guidance.

EPIC recommends that the guidelines should be unambiguous in outlining when and how a child's views shall be sought and that the implementation guidelines should have the legal status of a statutory instrument, such as a regulation, to reflect the state's obligations under Article 12 of the UNCRC and Article 12 and Article 42A of Bunreacht na hÉireann. EPIC proposes that, to ensure the right of children and young people to express their views and to have them taken into account in all decisions affecting them, there would be explicit by reference to all instances where their views should be sought in the Guidelines proposed in Head 5.

The Committee supports the suggestion of a prescriptive list of instances where the child's views must be taken into account. However, the Committee is of the view that if such a list is developed, that, in order to give the Child and Family Agency and the courts leeway to consult the child's views in any and all situations, and not limit that to certain prescribed situations, an item should be included on the list that reads "and all instances where their views should be sought". The provision for guidelines to be made was welcomed by the Special Rapporteur, but she recommended that consideration be given to (i) a due regard obligation and (ii) an inbuilt requirement to consult prior to publication of the Guidelines.

In respect of Head 6, regarding the duty of the Agency, she recommends the inclusion of express reference to the obligation to "have regard to the rights of children, whether under the Constitution or otherwise", or similar language. The IASW recommend that the guidelines are informed by social work values and best practices. The Committee agrees and is of the view that this could be incorporated into an inbuilt requirement for consultation on the guidelines as recommended by the Special Rapporteur.

The Committee recommends that:

1. The commitment to support families within the guiding principles must be met with the resources needed to make that a reality.

2. Independent advocacy support for parents of children who come into contact with the Child and Family Agency should be developed as a matter of urgency, underpinned by a statutory footing.

3. An explicit duty on relevant agencies to assess and support a child's significant relationships should be included in the guiding principles and guidelines.

4. 'Meaningful relationship' within the guidelines should be expanded to include information around identity, cultural consideration and the wider understanding of how children perceive themselves within their kinship groups.

5. It should be clarified that the Guiding Principles in Head 4 apply to more generalised decision-making under the proposed Act, rather than an individual child in an individual piece of decision-making. The Guiding Principles regarding the best interests of the child should also apply generally, to those working under the various elements of the Act, from those drafting guidance under the proposed Act (Head 5), to the Agency (Head 6) or the proposed new Children and Young People's Services Committees (Head 9) and so on.

6. Whilst there is an obligation proposed to have regard to the Guiding Principles, there should also be an express requirement to record the reasoning of the decision-maker, through record-keeping by those operating under the Act.

7. *"in so far as practicable"* in Head 4(1)(g) should be amended and tightened up to provide less of a broad caveat, as currently it leaves too much scope for not abiding by the guiding principles.

8. Independent advocacy should be a right for children in care and should be provided for in this legislation. Resources and regulations should be provided accordingly.

9. The Guidelines in Head 5 should have a due regard obligation.

10. There should be consultation during the development of the proposed guidelines in Head 5. This should include work to ensure that the guidelines are informed by social work values and best practices.

11. The Duty of the Agency in Head 6 should have explicit reference to the obligation to uphold the rights of the child, as enshrined under the Constitution and in the UNCRC.

2. Proposed amendments to care orders and arrangements

2.1 Head 7: Voluntary Care

"*At every stage, it must be asked: can this child return home*?"[7]

In 2022, the Child and Family Agency had 5,863 children in care, of whom 21% were in voluntary care. The changes proposed in the General Scheme endeavour to place voluntary care on a more temporary footing, which is welcomed by Members and stakeholders. Restricting the use of voluntary care agreements to circumstances where family reunification is a realistic prospect, with a reasonable timeframe, refocuses the objective of voluntary care as a temporary family support measure. The provision of appropriate and timely services will be key to realising the goal of reunification. Without support services being made available, voluntary care has the potential to hinder rather than help. Providing contact and supports will be key to making voluntary care a temporary and effective option. The consequences of not doing this, for families and the care system, are significant. As described by Barnardos in their contribution:

> "*It is about having access to a mental health and addiction services that will support parents to resume managing the care of their children. At the same time, there must be access to services to help children recover from whatever experiences they have been through that led to them coming into care and whatever damage has been done by the inevitable separation and loss from their family life, their family home and the breakdown of the family. The process*

[7] OCO during the meeting of 9 May 2023.

should be time limited and focused and a lot of effort should go in at the early stages. We want these children home with their families, but it must be safe and sustainable to return them. We do not want to see children bouncing in and out of care and then coming back into the system much later, with much more difficult problems that are much more of a challenge for the care system to manage."[8]

It has been widely documented that children in voluntary care receive fewer protections and supports than those in other care arrangements. The Committee is in agreement with the majority of stakeholders it engaged with, who said that the proposals on voluntary care could be strengthened with a limit being placed on the duration of voluntary care arrangements; a limit on the amount of times the agreement can be renewed; having formal reviews before the expiry of the agreement, with a review of the care plan to take place alongside this; and for children to have access to independent advocates who participate in the reviews. TIGALA suggested that a GAL could be appointed to the child six weeks in advance of the review of a voluntary arrangement. The Committee supports that recommendation and, in addition, is of the view that a social worker and advocate need to be available to the child from the outset also.

The Committee are grateful to the experts who, through the pre-legislative scrutiny process, offered their first-hand experience, using real-world examples of cases where children or young people have been left without the long-term care planning, oversight, aftercare and supports which children or young people in care on foot of non-voluntary care orders have received. This provided a good body of evidence around where the gaps in supports and safeguards are currently in terms of voluntary care.

The UN Committee on the Rights of the Child recently made two very specific recommendations in relation to the use of voluntary care in Ireland as follows:

"(a) Ensure sufficient family-based and community-based care options for children who cannot stay with their families, including by allocating sufficient financial resources for foster care, adoption and specialized support for children with disabilities, with a

[8] Barnardos during the meeting of 9 May 2023.

view to reducing the number of children who are placed in informal or so-called "voluntary" care arrangements;

(b) Establish a maximum duration for the placement or continued placement of children in "voluntary" care."[9]

These correspond fully with the Committee's considered opinion on these matters.

2.1.1 Three days without consent

7(4) provides that where consent is withdrawn, the Agency may continue to maintain the child in its care for a period not exceeding three working days from the receipt of such a notification. Stakeholders, such as the Legal Aid Board, flagged that the proposal whereby the Child and Family Agency may continue to maintain a child in voluntary care for up to three days following notification of the withdrawal of consent for the arrangement may need consideration. Is it voluntary care if consent has been withdrawn? The Legal Aid Board underlined that it needs to be made very clear to parents, in advance of a voluntary care arrangement, the manner in which the withdrawal of consent is to be communicated.

2.1.2 Children who entered voluntary care without informed parental consent

The Explanatory Note for Head 7 states that the policy intent is to restrict voluntary care to circumstances where informed parental consent can be secured. As outlined, this approach is welcome. However, an implication of this change is that certain cohorts of children who had previously entered care under section 4 – for example children who appear lost or abandoned and unaccompanied minors – will no longer be eligible to enter care under the revised section 4. This needs further consideration and explanation.

2.1.3 Need for independent legal advice

While the provisions placing a duty on the Child and Family Agency to provide the child, the parents of the child or the person acting in loco parentis with information on the proposed nature of the voluntary care arrangement are welcome, stakeholders the Committee engaged with advocate for providing parents with a right to access

[9] Committee on the Rights of the Child: Concluding observations – Ireland

independent legal advice in relation to voluntary care. This would go some way towards safeguarding against the power imbalance that arises in such situations, bearing in mind that voluntary care arrangements may be made in circumstances where it is made clear to the parents that if a voluntary care arrangement is not accepted the Child and Family Agency's next course of action may be to apply for a care order.

The Department informed the Committee that the provision of independent legal advice to parents was significantly considered but ruled out on the basis of workability. It pointed to the booklet to be provided by the Child and Family Agency and the requirement to review voluntary arrangements as safeguards. The Committee urge the Department to overcome workability issues around the provision of free legal advice to this significant cohort of families who find themselves in what is often described as a stressful and precarious scenario.

2.1.4 Need to widen who can consent?

In their submission, the Child Law Project advises that consideration should be given to reviewing the categories of persons whose consent is required in light of the provisions of the *Children and Family Relationships Act 2015* and relevant case law. For example, the High Court has interpreted section 4 to include an unmarried father with guardianship rights with access to, but not physical custody of, his child. This Bill may also be an opportunity to provide a statutory definition of the phrase "any person acting in loco parentis". In light of the changing dynamic and demographics within families, the Committee considers this to be a good idea.

2.1.5 How do such reviews fit with regular 'child in care' reviews?

The Child Law Project also flagged that consideration should be given as to how this 'Head 7 review' will interact with the 'child in care' reviews provided for in Regulations developed under section 42 of the *Child Care Act 1991*, asking, is this an additional review or a re-statement of the purpose of the 'child in care' review? Consideration should also be given to aligning the timelines of the reviews. Under the Regulations, a 'child in care' review should take place two months after a child initially enters care and every six months for first two years of their care placement. After this period, a review should take place annually.

2.1.6 Need for independent oversight of reviews of Voluntary care?

In their submission, the Child Law Project urges that consideration be given to providing independent oversight of voluntary care reviews. The Ombudsman for Children's Office (OCO) also did, stating: "*An independent person should examine these voluntary care agreements because at every stage, it must be asked: can this child return home? It is not strong enough at present*."[10]

The Special Rapporteur observes that the proposals around voluntary care have scope for significant improvement and give rise to concerns. In particular, she identifies the oversight process for children in voluntary care and whether a maximum term should be applied as needing more consideration.

2.1.7 Need for an upper time limit

A time limit on the length of a voluntary care arrangement has not been included. In its contribution, the Department told the Committee:

> "*The reason we were loath to put in a hard cap was because the variety of different situations in which voluntary care might be utilised. We were conscious of a situation where, for example, mental health issues or serious health issues of a parent that meant a child was going into voluntary care for an extended period, but maybe not all of the time. We were conscious of providing flexibility for the Child and Family Agency in a framework where it is viewing that arrangement as inherently temporary and to be phased out as soon as possible so the child can be reunified with their family. That was the consideration that lead to the lack of a hard cap regarding voluntary care*."[11]

Other stakeholders the Committee engaged with urged that an upper time limit on the length of a voluntary care arrangement be provided in the Bill. In the past these types of arrangements have been seen to drag on, to the detriment of those involved. The Child Law Project provided examples of the poor practice it has observed in this regard. Barnardos recommend that a maximum term be applied to voluntary

[10] OCO during the meeting of 9 May 2023.
[11] The Department during the meeting of 9 May 2023.

arrangements after which a legal order is required for a child to continue in care, suggesting a serious review after six months. Barnardos also recommend that the review of a child in voluntary care should include formal consideration of how reunification plans are progressing and should identify and provide the services that are needed to successfully return children to their parents' care. They underlined the importance of maintaining contact between parent and child and providing the required support services. Barnardos said:

> "*There must be a maximum period within which the State will have to provide evidence for why a child should continue in care, which will be done by way of a legal system that must be gone through. Otherwise, the child should be returning home. As a social worker who has worked with families, a key point is that parents need to be supported and given the services they require to have their children returned to their care*."[12]

EPIC suggest that voluntary care arrangements should have a maximum period before judicial proceedings are automatically commenced to review the continuation of the arrangement. EPIC also pointed out that a child that is subject to a court application will have a right to have their views sought and considered through the appointment of a GAL.

The Child and Family Agency caution that an upper time limit on voluntary arrangements needs due consideration, as the complicating factors families have to deal with, such as drug misuse and mental health issues can take time to resolve, as can safety and reunification planning.[13] However, the Committee note that an independent review of a voluntary arrangement would allow for these factors to be considered if required. As previously mentioned, the Special Rapporteur said that further consideration needs to be given to the idea of a maximum term for voluntary care.

[12] Barnardos during the meeting of 9 May 2023.
[13] The Child and Family Agency during the meeting of 9 May 2023.

2.2.8 Provision of information to parents

While the Committee welcomes the obligation for the Child and Family Agency to provide information to parents during the consideration of voluntary arrangements, it is essential that information is provided in accessible language and that it clearly outlines the conditions that must be met for family reunification to take place. It is of the utmost importance that parents are fully informed of what they are signing up to. As such, access to both free independent legal advice and independent advocacy support for parents of children who come into contact with the Child and Family Agency is needed.

The Committee recommends that:

12. Appropriate and timely services and family supports must be provided if voluntary care is going to work as a temporary measure as envisioned in the General Scheme.

13. Contact between the child and parent and others whom the child has significant relationships with must be supported where appropriate, as it is key to successful reunification.

14. A time limit should be placed on the duration of voluntary care arrangements.

15. A limit should be put on the amount of times the voluntary agreement can be renewed.

16. There should be formal reviews before the expiry of the agreement, with a review of the care plan to take place alongside this.

17. All children and young people in care, including in a voluntary care arrangement, must have an assigned social worker and be supported by them, a Guardian ad Litem and an independent advocate, as required.

18. A GAL should be appointed to the child six weeks in advance of the review of a voluntary arrangement.

19. The independent advocate and GAL should participate in the reviews.

20. Parents must be well informed about the arrangement, it especially needs to be made very clear to parents, in advance of a voluntary care arrangement, the manner in which the withdrawal of consent is to be communicated.

21. Parents of children considering a voluntary care arrangement should be provided with access to both free independent legal advice and independent advocacy support at no cost to them.

22. Further consideration should be given to who can consent to a voluntary arrangement and to further defining in loco parentis.

23. There should be an independent oversight mechanism for voluntary care arrangements.

2.2 Heads 14, 17, 18. 19 Other care orders and arrangements

2.2.1 Private Family Arrangements/Kinship Care

From the Committee's deliberations, there is evidence that Private Family Arrangements and Kinship Care are even less secure than voluntary care arrangements, in the sense that they have even fewer formal supports and safeguards. Yet, these arrangements are not dealt with in the General Scheme. In its contribution, the Department informed the Committee that the current thinking is that they will not be addressed in the Bill. The Committee strongly recommends the inclusion of provisions regarding these arrangements in the Bill. Private Family Arrangements and Kinship Care could be dealt with under Head 7, as was suggested by both Barnardos and the Special Rapporteur.

On Kinship Care, the OCO told the Committee:

> "*Our understanding is that the Department is trying to figure out its policy position in that regard and the outcome of that, in turn, may be what is required under legislation to organise and figure out these very insecure placements for children. It is very important for this to be resolved for the many children who have contacted us, as well as the grandparents, uncles and aunties who*

seeking reassurances regarding the children whom they are looking after…It is important that it is not allowed to drift. There is a need for timelines and expectations. Anything that needs to be included in the legislation should be included."[14]

The UN Committee on the Rights of the Child called on Ireland to develop a policy on the rights of children in informal Kinship Care in February 2023.[15] The issues associated with Kinship Care are well known and well documented. The Committee wish to highlight the following resource in this regard:

- 'Private Family Arrangements' for Children in Ireland: The Informal Grey Space In-Between State Care and the Family Home – by Kenneth Burns, Conor O'Mahony and Rebekah Brennan.

IFCA referenced some collaborative work they have done with Kinship Care Ireland, which does not have an advocacy service at present. The experience of organisations such as IFCA and Kinship Care Ireland who have been assisting families with these arrangements should be drawn on to assist the Department in completing these policies.

In line with many of the stakeholders who came before it and the UN Committee on the Rights of the Child, the Committee urges the Department to complete a policy on Private Family Arrangements and Kinship Care and to clarify these matters in the Bill. Kinship Care has been legislated for in Scotland through the Children and Young People (Scotland) Act 2014 . It may be instructive for the Department to consider that legislation and that of other jurisdictions. As referenced by IFCA in their submission, recent legal cases have found that these arrangements currently lack legal clarity and create vulnerability for the child, their parents, the person acting in loco parentis, and the Child and Family Agency. This needs to be resolved. The Department did inform the Committee that it is being looked at and that they are approaching it from a child

[14] OCO during the meeting of 9 May 2023.
[15] Page 9 Committee on the Rights of the Child: Concluding observations – Ireland

centred and interdepartmental point of view, so that issues such as guardianship payments which would tie in with the Department of Social Protection can be addressed.

While the Committee welcomes this and the consideration by the Department of supports for children who are not in the care of their parents more broadly, this is another area that was not ready in time for inclusion in the General Scheme. There are various others. There are frequent 'gaps' or policies lacking on issues which have been called for and were included in discussions and papers published as part of the review of the Act over the last number of years. The merit of taking a piecemeal approach like this, with promises of further future amending Bills, is questionable. It would be preferable to have these things included in the main General Scheme that will undergo pre-legislative scrutiny, so that it can be considered in the round and issues aren't left to drift. A lack of action on these issues has serious real-life consequences for those affected. The Committee agrees with the OCO in that anything that needs to be included in the resulting legislation should be included in the General Scheme, which is not the case here. Policy issues should be resolved before drafting of proposals and scrutiny of interlinked proposals, particularly where primary legislation is concerned.

2.2.2 Head 14: Emergency Care Order

Head 14 provides that the court may extend the period of an emergency care order up to a maximum of 15 days. ByrneWallace caution that, after eight days, it would be difficult to prove to the court that there is likely to be a serious risk if the child is returned. The Child and Family Agency told the Committee it "*would have welcomed the introduction of a once-off emergency care order for a period of 15 days, which could then proceed to an interim care order*."[16]

The Child Law project urge that consideration be given to deleting this provision. They question the rationale in the explanatory note, which states "*eight days may not give the Agency sufficient time to carry out an assessment of the child's circumstances,*

[16] The Child and Family Agency during the meeting of 9 May 2023.

and that in a particularly complex situation, additional time may be required." Further information is needed, they say, on the difficulties that have arisen and what additional assessments could be undertaken in this additional seven-day period. It should be noted that the Act provides the Child and Family Agency with an option to apply to the court for an interim care order, which, in the Child Law Project's experience, are rarely refused.

In their submission, EPIC acknowledges that it takes time to ascertain the complexity of specific situations but noted that the child can be subject to a stressful, vulnerable situation by virtue of being placed in care, which may not be in their best interests. EPIC called for further discussion and debate with stakeholders on this Head via public consultation.

The Legal Aid Board question the necessity of this provision, when interim care orders are available. They also flagged a need to deal with two further issues in the context of emergency care as follows:
1. In respect of new-born infants, there should be a presumption in favour of keeping the child with the mother in the maternity hospital and this option should be available to the courts.
2. Consideration should be given to also giving the Child and Family Agency the option of an emergency care order in cases where it has reasonable suspicion that it is intended to remove the child from the jurisdiction for the purposes of forced marriage or female genital mutilation.

While number two here may fall into the already existing precondition that there is an immediate and serious risk to the health or welfare of a child, forced marriage and female genital mutilation are such serious issues of abuse that they warrant being named explicitly here, to remove any room for doubt that they do meet the criteria for an emergency care order.

Given some of the issues raised and suggestions made here, the Committee recommends that further consultation with stakeholders on Head 14 is undertaken to examine these.

2.2.3 Heads 17, 18 & 19: Care Orders, Interim Orders and Supervision Orders

Head 19 restates the provision that on application from the Child and Family Agency the court may give directions as to the care of the child to the parent and that these directions may include for medical or psychiatric examination, treatment or assessment. It adds new directions which include provisions to ensure the child attends school and is adequately cared for on a day-to-day basis (provision of adequate food, warmth, clothing, hygiene and supervision) and allows for unspecified 'further actions' as the court directs. Commenting on the potential for this Head to ensure that every avenue is exhausted before the Child and Family Agency seeks an application to take a child into care, the Department told the Committee:

> "*Through this Bill, we hope to revive the supervision order. The supervision order is not being used as much as it was, for various reasons, including various challenges related to the way it operated. We are strengthening what the Child and Family Agency can do under a supervision order. In this regard, it can go to see the child in school or without the parents present. Also, the parents can be required to do certain things for the children, such as bringing them to medical appointments. The reason behind this is to make the option a real one in terms of the care of children at risk of going into care. Potentially, the supervision order might be used when there is a worry that the child might have to be taken into care, or it could be at the other end, when the child is being reunited with parents, as a way that allows the Child and Family Agency to proportionately keep an eye on what is going on. The measure has been introduced to try to make what I have described a genuine option*."[17]

Stakeholders provided mixed observations in relation to this Head during pre-legislative scrutiny but welcomed it for the most part. An issue Barnardos flagged is that it should be essential, rather than desirable, for a child to be visited by or on behalf of the Child and Family Agency during a supervision order. Barnardos also

[17] The Department during the meeting of 9 May 2023.

recommended the inclusion of early years centres alongside schools in (4)(b) as an essential intervention that could be listed as part of a supervision order.

The Legal Aid Board sounded a note of caution in their submission, describing the changes to this section as:

> "*A new power given to the Court to give directions to parents regarding how their children are to be raised. This is a cause of concern in terms of its intrusiveness into the home life of a family. It is to be noted that this point the children concerned are not in the State's care. It effectively changes the role of the Child and Family Agency, in respect of a supervision order, in that they now may effectively see their role (or part of their role) as being to ensure that the Court's directions are being complied with and to seek a care order if they are not being complied with. It also appears that the section does not appear to envisage that children might be home schooled (as is the right of parents to do so) and provision should be made in this regard*."[18]

The Child Law Project said that consideration should be given to amending the text to provide that the court may give directions on its own motion or that of another party to the proceedings. They also questioned the need for 19(5) which makes failing to comply with the terms of a supervision order an offence, stating that in their experience they are not aware of this provision being used.

ByrneWallace observed that 19(5)(a) should include the word 'further' i.e. during visiting a child the Child and Family Agency shall consider "whether it is necessary to apply to the court for an interim care order, care order or a *further* supervision order".

2.2.3 Proportionality and merging 'has' with 'is likely to be'

Heads 17,18 and 19 seek to expand slightly on the use of *is likely to be* in the legislation.

[18] Legal Aid Board submission.

Head 18 proposes to amend Section 18 of the 1991 Act. The conditions for a court order in section 18 the 1991 Act are as follows:

"(a) the child has been or is being assaulted, ill-treated, neglected or sexually abused, or
(b) the child's health, development or welfare has been or is being avoidably impaired or neglected, or
(c) the child's health, development or welfare is likely to be avoidably impaired or neglected"

The General Scheme proposes to replace (a) above with:

"The child has been, is being, or is likely to be assaulted, ill-treated, neglected or sexually abused, or".

Comparing the two texts, it is apparent that the General Scheme, among other things, proposes to add "*is likely to be"* to the points dealing with assault, ill-treatment, neglect and sexual abuse. While it is unobjectionable that you would not remove a child from a situation where a court has concluded that they are likely to come to any of those harms, taking a child into care is a very serious and risky intervention. The challenges facing families affected by care orders are well known. The preference for a child to remain at home where possible is one of the most important aspects of the Act. In light of this, Members expressed concerns at this broadening of the use *of is likely to be* in the legislation, around the process of determining 'a likelihood of harm' and its potential to cause children to be taken out of family homes prematurely, particularly in circumstances where families have experienced poverty, crime or addiction. The Child Law Project expressed similar concerns in their submission, stating in relation to Heads 17, 18 and 19:

> "*Past behaviour may be indicative of future behaviour, but it is not probative, as circumstances can, and do, change. For example, evidence that a previous child met the threshold for being taken into care does not, in itself, meet the balance of probabilities standard of proof that another child will meet the*

threshold, especially if the circumstances are not identical. We would caution amending the Act by inserting the phrase "likely to be" into the same ground as past behaviour may cause confusion as it mixes up two different types of evidence."[19]

The Department sought to provide some reassurances that the threshold for this is in practice very high and that it is the court that interrogates whether that threshold has been reached, after the Child and Family Agency makes the application. One safeguard the Child Law Project advocate for is to include a reference to the principle from constitutional and European human rights law that intervention in family life must be proportionate. The Committee fully agrees with this proposal around a proportionality clause.

In addition to the proportionality clause suggested by the Child Law Project, the Committee recommends further safeguards are inserted into the Bill as follows:
1. That the court should be satisfied that all available preventative and supportive interventions have been provided and have failed to protect the child before it considers a care order.
2. The State should be legally obliged to provide the supports mentioned in 1 above.
3. That the wording of the section be amended to provide greater clarity in respect of how the likelihood of a child coming to harm is determined by the Agency. For example, a provision could be inserted into the Bill which would specify that a care order could be granted due to the future likelihood of a child coming to unavoidable harm, on the basis of an assessment of the level of current risk which also takes into account any past harm brought to the child.

This recommendation underscores the Committee's position that all State supports necessary must be made available to all families who need them in the first instance.

Various issues were raised by stakeholders in relation to Head 17 which deals with interim care orders. As with voluntary care orders, interim ones should be short,

[19] The Child Law Project submission.

support-focused interventions that centre on providing families with every chance for successful reunification. The strongest concerns are around the proposal to provide recurring interim care orders may be granted on consent for a period up to 12 months. Several stakeholders urged that this should be reduced to three or six months, citing issues with consent and facilitating the views of the child, and the priority that should be given to creating the correct conditions for a child to be able to return to the family home.

Explaining the proposal, the Department outlined in its contribution that changes to interim care orders are intended to reduce repeated court appearances by permitting the court to extend an interim care order up to 90 days in specific circumstances and to put a limit on how many interim care orders are granted. To address drift, the Department said that the Child and Family Agency will have new obligations to report on its progress regarding the application for a full care order.

While members are supportive of measures to reduce court appearances, where appropriate, and an absolute cap on how long interim orders can be applied for successively, concerns remain that some of the benefits of interim care orders may be lost in these new provisions. Namely, the benefit of an interim care order being that the court maintains oversight and social workers work more expediently if it is a shorter period, rather than having a longer period where there is a bit more of a lag in what support is implemented or offered to the family.

Barnardos suggest that, where there is an extension to an interim care order, the child's social worker should be required to visit the child at least once per month, as opposed to periodically, as is currently provided for in Head 17(5)(b). The Committee endorses this. Interim care orders should be short term and focused on the welfare of the child with the aim of making it safe for the child to return to the family home. Regular visits by the social worker will be essential to this.

Many of the arguments in favour of providing free legal advice to parents for voluntary care arrangements apply to other care orders too, including interim. The Committee thus recommends that once the workability issues the Department cited in relation to

providing free legal advice in cases of voluntary care are overcome, which should be a priority, and resources have been put in place to facilitate that, then that access to free legal advice should be rolled out to all other care orders as well. Parents of children in care are a vulnerable group going through a difficult experience and dealing with complex legal processes and various State bodies creates further challenges.

At all junctures in all care proceedings, parents should be provided with accessible records and information. The General Scheme increases the instances where either the Child and Family Agency or the courts must provide written information or reasons for decisions which is welcome, but this cannot substitute for free legal advice. Head 18(4) for example provides that where the court has granted a care order, or an extension to a care order, for a different period than that applied for by the Child and Family Agency, the court shall set out the reasons for this decision in writing. The Committee recommends that the duty to provide a written decision should apply to all care orders.

2.2.4 Head 21: Children as party to proceedings

The Committee and all stakeholders concerned are supportive of measures to facilitate the voice of the child in all decisions affecting them. There was unanimous support for measures to ensure that child-friendly material is made available to minors so that children are aware of their options, of what is happening to them and of their rights. However, there were mixed views in relation to Head 21 which proposes to lower the threshold for children to be made party to proceedings.

In their contributions, Barnardos expressed concern about the provision while TIGALA strongly supported it. The OCO state they are unsure of the basis for the provision, its necessity and appropriateness. It was pointed out during the pre-legislative scrutiny process that courts are not family friendly environments, despite efforts towards reform of this area, and that not everyone is trained in how to work closely with children, listen to them and make them feel comfortable. This is important in the context of a GAL, social worker and advocate being made available to the child as needed, which is recommended in section 2.1. The Committee recommends that further consultation with stakeholders be undertaken to investigate the need for making a child party to

proceedings, the risks and benefits of it and whether a child's involvement and representation in proceedings would be better served through the provision of other supports and resources.

2.2.5 Head 23: Hearsay evidence

Head 23 is another 'placeholder' within the Bill. The Child Law Project undertook an extensive research report on request by the then Department of Children and Youth Affairs in 2019 which explores hearsay evidence, among other issues. The Child Law Project along with ByrneWallace state in their submissions that they support the admissibility of hearsay evidence in child care proceedings. The Legal Aid Board said they would have a keen interest in such proposals, but with no proposed text available under this Head in the General Scheme it is not possible to make comments. Barnardos recommend that all legal representatives advising or acting for children shall be Garda vetted and have appropriate training and accreditation.

2.2.6 Head 25: Foster care

Head 25 does two main things. First, it proposes to remove the references to voluntary care in this section, to reflect the increased onus on birth parent consent in voluntary arrangements and remove the possibility of a foster carer getting "*like control over the child as if they were its parent*."[20] Second, it proposes to "*reduce the amount of time which a foster carer is required to have been taking care of the child, before an application for enhanced rights in respect of the child, may be made to the court*."[21]
Ireland is quite unique in that the majority of the children who are in State care live with foster care families. However, the proportion of children in foster care as compared to other care arrangements is falling, from 92% in 2018 to 90% in June 2022.[22]

Whilst it is known that foster placements tend to create better outcomes for children than other arrangements, such as residential placements, there has a been a failure

[20] Explanatory Notes, Head 25, General Scheme.
[21] As above
[22] Joint Committee on Children, Equality, Disability, Integration and Youth debate - Tuesday, 20 Sep 2022 (oireachtas.ie)

to appropriately resource foster care, as reflected in the reduction of available foster carers.[23] IFCA informed the Committee that currently there are 4,124 foster carers comprising general and relative carers.[24]

IFCA reminded the Committee of two other important factors in determining the likely success of a foster care placement:
1. With every experience of placement moves, the chances of success in subsequent placements diminish, leading to poorer outcomes for children.
2. The processes whereby children are received into care, the child's entry into the system and their experience of this travels with them into the home of the foster family and can influence the child's readiness or capacity to engage with the foster family. If their entry experience has been poor, this can be an added complicating factor impacting on the stability of the placement.

The second proposal in this Head generated some discussion during pre-legislative scrutiny. IFCA are very supportive of Head 25 and explained some of the difficulties that emerge where enhanced rights are not available, including impracticalities for children and obstacles in terms of going on a school tour, consenting to medical treatment or applying for a passport. It is imperative though, according to IFCA that foster carers are made aware by the Child and Family Agency of the steps required to secure enhanced rights and are actively supported to engage in the process.

Members sought the rationale for the measure, including more detail on when it may apply, what the process would be and where it leaves birth parents. Members are keen that the provision would not be used inappropriately and made the case that safeguards are needed, so that this provision is not used to reduce the birth parent's agency in cases where they are engaging and there is a realistic prospect of reunification. It is recognised that Head 25 could make life easier for children and foster carers, particularly where there are children with extensive disabilities, or where there are a lot of medical interventions.

[23] For more on the failure to adequately supports foster care see: Joint Committee on Children, Equality, Disability, Integration and Youth debate - Tuesday, 20 Sep 2022 (oireachtas.ie)
[24] IFCA during the meeting of 16 May 2023.

The Department informed the Committee that the rational for the provision was to enable permanency planning so the child can have a stable placement, be integrated into their foster family and the fosterer can do things like bring the child on holidays and play a role in their medical treatment, for example. It facilitates more seamless parenting by the foster parent and was widely called for during stakeholder consultation, the Department said.

The Department told Members that the foster parent can apply only if there is a full care order, not in cases of interim care orders or voluntary care. Foster parents will have to apply for the facility; it will not be given automatically. A hearing will determine whether it is to be granted by the court, so it is something that has to be considered on a case-by-case basis. It is independent in the sense that it does not have any impact on access arrangements. It is children who will most likely be remaining with the foster carer. HIQA will continue to inspect this, as part of the Child and Family Agency's care planning process and regular child in care reviews will still remain in place.

In relation to birth parents, the Department said they would:

> "*Be advised. They may not be consulted fully about the decision, because the authority sits with the foster carer at that stage. The decision around the child remaining in care until 18 has been made before a court. We will have gone through all the due process requirements, that are rightly there, in protecting the rights of parents, children and anyone else*."[25]

Barnardos welcomed the reduction of the period for foster care applications for enhanced rights, stating that, in their experience, it could help normalise life for children in foster care. However, they recommend that provision is made for children's views to be taken into consideration in the application for enhanced rights, and that where a GAL is already appointed to the child, there is a mechanism in place for the

[25] The Department during the meeting of 9 May 2023.

GAL to outline the child's views and best interests. As it stands, Barnardos told the Committee, children have no say in initiating the process and while their views will be taken into account when the foster carers make the application and social workers will make a report, they should have stronger representation in the process. Barnardos further recommended that where an application is being contested, consideration should be given to the appointment of a GAL. The Committee supports these recommendations, which are in line with the increased emphasis on making sure the child's voice is heard in proceedings.

Foster Care Committees came up during pre-legislative scrutiny as an area in need of reform. The Committee heard that there are concerns that there is a lack of standardisation in how these operate across the country, as well as a potential lack of reviewing and implementation of best practice. Given the important role foster carers play in vulnerable children's lives, the Committee would like to see this get some attention.

The Committee recommends that:

24. The Head 25 provision for enhanced rights for foster carers should not be used to reduce the birth parent's agency in cases where they are engaging positively and satisfy the elements of a 'meaningful relationship' and there is a realistic prospect of reunification.

25. Heads 17, 18 and 19 should be amended to make explicitly clear in the Bill that the risk of harm posed to a child, based on a live assessment of risk which takes into account past harm, is what forms the basis for care order proceedings initiated by the Child and Family Agency. The likelihood of future harm should be considered only where the basis for the application made by the Agency would remain unchanged.

26. Legislation should be brought forward in a more complete way going forward. Everything that needs to be in the legislation should be. Policy issues should be resolved before a General Scheme is drafted or referred for scrutiny.

27. Private Family Arrangements and kinship care should be included in the General Scheme, in line with recommendations from the UN Committee on the Rights of the Child and in collaboration with relevant stakeholders.

28. Suspected intent to perform forced marriage and female genital mutilation should be named explicitly as criteria for an emergency care order.

29. Further consultation with stakeholders on Head 14 should be undertaken to examine the concerns raised here in relation to emergency care orders.

30. It should be essential, rather than desirable, for a child to be visited by or on behalf of the Child and Family Agency during a supervision order.

31. Early years centres should be listed alongside schools in Head 19(4) as an essential intervention that could be listed as part of a supervision order.

32. Consideration should be given to amending the text in Head 19 to provide that the court may give directions on its own motion or that of another party to the proceedings.

33. Head 19 should include a reference to the principle from constitutional and European human rights law that intervention in family life must be proportionate, to provide a safeguard against children being taken out of family homes prematurely.

34. As another safeguard against children being taken out of family homes prematurely, the court should be satisfied that all available preventative and supportive interventions have been provided and have failed to protect the child before it considers a care order. The State should be legally obliged to provide these supports and interventions.

35. As with voluntary care orders, interim ones should be short, support-focused interventions that centre on providing families with every chance for successful reunification.

36. Where there is an extension to an interim care order, the child's social worker should be required to visit the child at least once per month, as opposed to periodically, as is currently stated in Head 17(5)(b).

37. The workability issues the Department cited in relation to providing free legal advice in cases of voluntary care must be overcome. Once they are and resources have been put in place to facilitate free legal advice for parents in cases of voluntary care, then it should be rolled out to all other care orders as well.

38. Informed consent and due process must be built-in to all care proceedings.

39. Suitable, accessible information should be provided to parents and children by the Child and Family Agency and the courts at every juncture.

40. The duty on the court to provide a written decision, in plain and accessible language, should apply to all care orders.

41. Further consultation with stakeholders should be undertaken to investigate the need for lowering the threshold for making a child a party to proceedings, the risks and benefits of doing so and whether it is seeking to resolve issues that would be better served through the provision of other supports and resources, such as easy access to GALs, social workers and independent advocates.

42. Proposals on the admissibility of hearsay evidence in child care proceedings should be completed and included in the General Scheme.

43. Head 25 hearings should include consideration of whether the parent(s) is engaging and/or carrying out the functions that would transfer to the foster parent and whether there is a likely prospect of reunification.

44. Under Head 25, the child's views should be taken into consideration early on and throughout the application for enhanced foster carer rights.

45. There should be a mechanism in place for the GAL to outline the child's views during deliberations on enhanced rights for foster parents, if the child wishes.

46. Foster carers should be made aware by the Child and Family Agency of the steps required to secure enhanced rights and actively supported to engage in the process.

47. The child's wishes should be central within deliberations on enhanced rights for foster carers and the child should be supported by a GAL, social worker and independent advocate as required.

48. The foster care committee system should be reviewed to assess how practice varies geographically and to address any gaps in terms of service review and enhancement.

49. Foster care must be properly resourced, including via raises to the foster care allowance, the introduction of a state pension for foster carers, better provision of supports for foster carers, better support services for foster children and timely access to the assessments and interventions required by children in foster care placements.

3. Measures for collaboration and inter-agency cooperation in the operation of the Act

Interagency collaboration is recognised as one of the main challenges in the child care sector. While some of the provisions in the General Scheme on collaboration were flagged by stakeholders as lacking vision and ambition, others have been praised. On balance the Committee finds much to be welcomed in these Heads. There is, however, gaps or areas where the General Scheme could go further.

The 1991 Act gives the State the authority to consent to examination or treatment for a child but does not compel the Child and Family Agency or the HSE to provide for this identified need. For children whose case is before the Courts there is scope for Orders in this regard to be made. As highlighted by IASW in their submission, this leads to a disparity in treatment and support between children whose cases are before the courts and those who are not. The Act should set out that any child in the care of the state will receive the assessment, treatment and intervention they require in a timely manner.

3.1 Head 9: Children and Young People's Services Committees

The Department described the Children and Young People's Services Committees as "*providing for better local co-ordination on a statutory basis*" and told the Committee it "*will mandate that certain organisations have representatives at those.*"[26] The Committee is particularly keen that those with disabilities or additional needs are represented as well as carers. Furthermore, the Committee has recently heard from organisations involved in Youth Work and other models of community support. These organisations are at the coalface of the issues that lead families into child care proceedings. They should be represented on CYPSCs, but in a broad way that takes account of the breath of services they provide, from standard targeted group work to supporting young people with complex needs to systemic family therapy. The Department's attention is drawn to the Committee's meetings of 28 March 2023 and 18 April 2023 in this regard.

On the importance of such organisations being included Barnardos said:

> "*We recommend that parents and carers are consulted and that community and voluntary partners continue to be active members of CYPSCs. Lack of community and voluntary sector involvement will result in gaps in expertise on the needs and potential responses to children and their families. There is a risk that the voice of marginalised families will not be sufficiently considered and understood in the plan*."[27]

The types of individuals and organisations who will engage in work on these committees will vary, but many will be from charities, voluntary organisations, NGOs and potentially the likes of section 39 workers, or already stretched service providers and social workers. The issue here is that this will be another ask of them, when they are likely under pressure to do more with less time, personnel and funding, as most organisations in this space are. To alleviate this, some sort of bursary or stipend or ring-fenced funding should be provided to those who participate on these committees,

[26] The Department during the meeting of 9 May 2023.
[27] Barnardos during the meeting of 9 May 2023.

to compensate them and their organisations for participating and make participation feasible.

3.2 Head 11: National Child Care Act Advisory Committee

The Committee agrees that the creation of a National Child Care Act Advisory Committee is welcome, with two important caveats:

1. It cannot be used to 'kick the can down the road'. For too long committees or working groups have been established or road maps drawn up or promised and the issues they were tasked with addressing remain. The National Child Care Act Advisory Committee needs to be a problem-solving committee that creates real solutions in real time.

2. It must be resourced appropriately. Dedicated personnel should be recruited to run this committee, as opposed to asking existing staff in the Child and Family Agency or the Department to do this as well. For the committee to work and deliver solutions it will need designated staff and resources.

As with the Children and Young People's Services Committees, the Committee requests that the National Child Care Act Advisory Committee includes those with disabilities or additional needs as well as carers and representatives from the broad youth work and community work sphere.

3.3 Head 22: Assistance to court

This Head enables the court to request a relevant body under Head 10, i.e. the same bodies the duty to cooperate applies to, and the HSE to be requested to court to assist. This could be a significant provision, in terms of strengthening interagency collaboration. It should be strengthened in a similar way to Head 10. This is discussed further in the section on disability.

3.4 Head 27: Amendment of section 47 of Principal Act

Head 27 makes a language amendment to section 47 of the 1991 Act, but other amendments to section 47 are needed: the court should have the power to make directions for services to additional public bodies. TIGALA gave some real-life

examples of how strengthening section 47 could work during pre-legislative scrutiny.[28] This Head is also discussed further in the section on disability.

3.5 Head 10: Duty of relevant bodies to cooperate

In this section we discuss Head 10 under three themes, as follows:

1. Inter-agency collaboration

2. Access to information and GDPR

3. Child safeguarding

3.5.1 Inter-agency Collaboration

Much research has been carried out by organisations on the need for effective joint protocols and the failure to deliver for children with disabilities and children in care, including by the Ombudsman, Inclusion Ireland, the Mental Health Commission, and EPIC. EPIC told the Committee that "*significant impediments remain to effective interagency collaboration for children in care*".[29]

The Committee agrees that this Head needs to mandate an all-of-State approach. Whether it is a housing, health or justice need, it has to be fulfilled by the respective State agency, since neither the Child and Family Agency nor the Department alone cannot deliver everything independently of each other. For children in care, protocols should be in place with no ambiguity as to which arm of the State has a responsibility for each critical point of a child's care and a legal obligation to deliver those services.

While a joint protocol does exist for interagency collaboration between the Health Service Executive and the Child and Family Agency, given some of the evidence the Committee heard during pre-legislative scrutiny, as well as testimony it has heard in relation to youth work, disability, children in care and assessments of needs, problems persist and much needs to be done. Progressing Disability Services (PDS) which is the national programme to reorganise disability services for young people, has failed to deliver for families. To tackle the failings of PDS to date, the HSE and the Department made commitments to publish a roadmap for the next phase of its

[28] TIGALA during the meeting of 16 May 2023.
[29] EPIC during the meeting of 16 May 2023.

implementation by June 2022.[30] It has not been published to date. Previous work this Committee has undertaken has shown that in many cases the critical services children require will not be provided unless the relevant bodies are obliged, through legislation and through the courts, to do so.

Speaking to the Committee about the very complex situations that the failure of bodies to cooperate exacerbate, the Child and Family Agency stated:

> "*It really comes down to the duty to co-operate and the need for the wider support of all State services and agencies. We have referenced this as something that needs more thought in terms of the language around it and the legislative basis. It is critical to what we are trying to do as a State agency in fulfilling our statutory obligations to care for children and take children into care. When we are faced with situations in which we have children and young people in our care and we are not able to access the appropriate services for them, that creates a bigger challenge. The outcomes of that include some of the issues we have raised today, including exploitation, delays in reunification, and children and young people going into special emergency arrangements*."[31]

As EPIC also explained in their contribution:

> "*The Department of Children, Equality, Disability, Integration and Youth and the Child and Family Agency are too often left with responsibility for all matters relating to children in care and young care leavers, including matters that should be addressed by bodies that have the statutory obligation and capacity to do so. The impact of this can result in children in care and young people leaving care sometimes being left without entitlements critical to their development, welfare and protection. This is sadly all too common in areas such as health, including access to child and adolescent mental health services, CAMHS, disability and housing and homelessness. The negative outcomes for children and young people which transpire from breakdowns in interagency collaboration are well documented. The new legislation must seek to resolve*

[30] Joint Committee on Children, Equality, Disability, Integration and Youth debate - Thursday, 2 Jun 2022 (oireachtas.ie)
[31] The Child and Family Agency during the meeting of 9 May 2023.

this or children will continue to be failed by a lack of guidance and the clear, unambiguous delegation of duty that is required to meet their needs."[32]

Those with disabilities, who often need the services most, are disproportionately affected by this failure to cooperate, which we discuss further in section 4.1 which deals with disability. In this context, the Committee notes two main issues in relation to Head 10. Firstly, the wording requires strengthening, currently reading "may cooperate" rather than "shall cooperate" and "is desirable" as opposed to "is necessary", for example. Secondly, the language as proposed seems geared towards information sharing, as opposed to service provision. The Committee is strongly of the view that both these aspects should be strengthened, as the 'option' to cooperate has always existed and so, without strengthening, the provision does nothing new.

The duty to cooperate is has the potential to be a critical tool to help ensure that children and families get the support they need. Almost every stakeholder the Committee interacted with during pre-legislative scrutiny agreed that this proposed legislation offers an opportunity to turnaround some of the persistent problems discussed in this Report and to place a legal obligation on the State to do and work better and more efficiently. It should be strengthened to place a duty, rather than an option to cooperate on relevant bodies and to oblige them to collaborate on the planning, delivery and funding of services and activities, not just on information sharing.

The Committee accepts that deepening interagency work will require leadership, resourcing and culture change. Monitoring and evaluation and updating of protocols will be part of that process too. It will be important to consult with those with experience of and those working in the child care system on how best the proposal contained in this Head (and ultimately in legislation) can be rolled out.

The stakeholders the Committee engaged with expressed disappointment with near unanimity that this Head is not stronger. The Child and Family Agency told the Committee:

[32] EPIC during the meeting of 16 May 2023.

> "*Further engagement is required on this proposed duty to co-operate, and how the Child and Family Agency can ensure that children's rights and best interests are protected when co-operation is absent or not forthcoming*."[33]

In their contribution, the OCO said:

> "*One of the heads of Bill that we feel is illustrative of a lack of ambition and a lack of vision is the duty of relevant bodies to co-operate under head 10. This was an issue that we raised from the beginning of the review process in our first written submission to the Department. It is on the basis of some very serious cases that we have dealt with - some of the committee members will be familiar with Molly's case - that amplified and highlighted the very serious adverse consequences that a failure of different State bodies to co-operate and work together in the interests of the child can have on that child. Our feeling here is that what is provided for is timid and that it needs to go much further… It is an issue that we raised from the beginning as a major concern, and others have done so as well. It is also one that the Department acknowledged in its 2020 consultation paper as one of the biggest challenges to securing good outcomes for children. We feel it needs to be stronger, that the duty should be they "shall" co-operate, that the discretion is taken out of it and that it reaches beyond information sharing. There is reference to assistance I think, but it is not clear what that assistance is*."[34]

The OCO provided two examples where a duty to cooperate is better handled in legislation. Firstly, the Policing, Security and Community Safety Bill 2023 includes a duty to co-operate. Secondly, the General Scheme of the Health Information Bill 2023 was flagged, with the OCO observing that in that Bill, there is an acknowledgement that "a legislative framework needs to underpin the required change process otherwise the suboptimal outcomes that are occurring will continue."[35]

The OCO said during pre-legislative scrutiny that the General Scheme of this Child Care (Amendment) Bill:

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[33] The Child and Family Agency during the meeting of 9 May 2023.
[34] OCO during the meeting of 9 May 2023.
[35] OCO during the meeting of 9 May 2023.

> "*Strikes us as taking a taking a different tack, which is waiting for a culture, organisational attitudes and practises to change before bringing forward legislation. We do not believe that children can wait for that change to occur. We feel it needs to be much stronger*."[36]

Given the serious and widely documented consequences of not having effective inter-agency collaboration, the Committee recommends that such cooperation is made a legal requirement. It is too serious to be left as an 'option' and certainly too serious to leave up to practice/culture change.

3.5.2 Access to information and GDPR

Agencies must work together and share information in dealing with child protection and related issues. Data protection cannot be a barrier to child protection and collaboration. Child protection should take precedent over data protection. There is a provision in GDPR to allow for a balancing of rights in this regard.

The IASW suggested in their submission that this Head may be an opportunity to set out sanctions for the non-reporting of mandated concerns, as currently there is no legal recourse for professionals who fail in their duty under the Act. The Committee is inclined to agree.

The Special Rapporteur for Child Protection supports Head 10 in principle and has identified it, along with Head 4, as the two most important proposals in the General Scheme. She observes in her submission though, that a broadly equivalent provision in the UK's Children Act 2004, (sections 10 and 11) has been the subject of criticism in practice. She is, she says, willing to engage further on this. The Committee recommends that the Department, policymakers and Special Rapporteur engage in discussions on the proposed Head 10 and on learnings stemming from the UK experience.

3.5.3 Child Safeguarding

While Head 10 has mainly been discussed here in relation to getting bodies to provide children with the services they require. However, it could also play an important role

[36] OCO during the meeting of 9 May 2023.

in strengthening child safeguarding. In recent years several cases of organisational or institutional abuse have come to light which have moved the Committee to consider what more can be done to prevent abuse and harm to children. Further reforms around victims' experiences are also needed and, ultimately, a culture change, whereby all stakeholders and relevant bodies dealing with children is aware of and actively meeting their responsibilities, perpetrators are shown zero tolerance and victims feel supported.

The Committee acknowledges that there are significant issues around staffing and resources in this sector and that the Child and Family Agency proactively undertakes awareness raising around Children First, and research on the issue of abuse. The Child and Family Agency has also been forthcoming in terms of engaging with the Committee on this and on related issues. However, more robust and proactive powers of enforcement and investigation are needed. Like most of the recommendations made in this report, this section is grounded in the UNCRC, which provides for the protection against, and investigation of, abuse. The Committee believes that article 19 of the UNCRC provides a driving force for regulation and inspection by the Child and Family Agency.

While the provision of child safeguarding statements is more relevant to the Children First Act, the Committee feels it would be remiss of it not to mention in this pre-legislative scrutiny process that the inspection and enforcement powers currently available to the Child and Family Agency are in need of serious strengthening. As such, the Committee will correspond separately with the Minister advising of its recommendations on this matter. Given that this Bill works in tandem with the Children First Act and some of the Heads relate to child protection, the Committee does make some observations and recommendations on those provisions in this Report.

The Committee recommends that resources are made available for the Child and Family Agency to continue and intensify its work in educating people about Children First, and that consideration is given to protections for whistle-blowers/persons of conscience reporting on concerns.

Doing better by victims

Another important area for improvement that recent cases of abuse have highlighted is the need to do better by victims when they come forward, throughout any legal or complaints processes and, crucially, thereafter. The Committee wish to highlight the following resource in this regard:

- Annual Report of the Special Rapporteur on Child Protection 2020 – Chapter 2 deals with *Investigating and Responding to Complaints of Child Sexual Abuse*

In terms of cases where section 12 of the 1991 Act is invoked, the Committee wish to flag the following resource:

- Audit of the exercise by An Garda Síochána of the provisions of Section 12 of the Child Care Act 1991 – By Dr Geoffrey Shannon

Some victims of abuse go on to say that they regret coming forward, especially in relation to retrospective abuse. This underlines the need for reform of policy and practice in this area. The following resource is instructive on this topic:

- Barriers or Pathways? Aiding retrospective disclosures of childhood sexual abuse to child protection services – By Dr Joseph Mooney

The Committee acknowledges that the Child and Family Agency has implemented a new child abuse substantiation policy, which will be independently reviewed by Dr Joe Mooney, and recommends that care is taken to ensure that all those interacting with victims of abuse do so in line with best practice.

Much more needs to be done to safeguard children. Heads 6, 10, 13, 43, 44 and others are of relevance here. In Head 6, the Department proposes to reorient this section so that assessments of reports of harm will be dealt with by amendments to the Children First Act.

Head 13: Emergency Powers of the Gardai

Head 13 allows gardaí to bring a child to a named family member in the child's safety plan.

ByrneWallace suggest two key amendments:

1. Adding in "*or the child has been taken in to care under section 4.*

2. Amending Head 13 to provide more clarity on who the named person may be and articulating more clearly that the Agency can direct the member to deliver the child to a named person either with the consent of the parent or where a parent is not contactable.

ByrneWallace also questioned the legality of this power, as no court order or hearing will have happened at that point. They raised the question of whether the child still remains in the custody of the Agency if placed with a family member, which will need further thought.

The Child Law Project observed that the Explanatory Note for Head 13 states that the purpose of this subhead is to "address concerns that there is insufficient time" under the current provision for the CFA to make an application for an emergency care order after the Gardaí have invoked section 12 and that the change is to account for bank holidays and weekends." Further information is needed, they said, on the difficulties being experienced given social workers and judges are available on weekends to address emergencies.

The Legal Aid Board stated in their submission that it is not clear what is intended by this provision nor what the status of the child, once left with a member of their family is.

Head 44: Authority of Child and Family Agency to assess reports

Head 44 was flagged by the Special Rapporteur for Child Protection as needing further attention. It was also flagged by the OCO as of significant concern. The OCO said that the processes under Head 44 should not be dictated by case law, but on the research of previous Special Rapporteur for Child Protection, Conor O'Mahony, noting:

"*He did an excellent job in his 2022 report of setting out the technical and legal requirements that the Child and Family Agency needs to do this complex and difficult area of work. As we understand it, the judicial reviews that have been taken against the Child and Family Agency in this area are by the person about whom the allegation has been made. Our understanding is that very few have been taken by people who have made allegations. Therefore, we have a skewed system of case law that does not fully represent victims' experience. A lot more needs to be done in this area ... It is very clear what is required in legislation and that the process should not be dictated by case law. I have no doubt the representatives from the Child and Family Agency also have strong opinions on this issue*."[37]

The Committee recommends that:

50. Where a service proposes to operate as a provider of a relevant service, they should be legally obliged to have a child safeguarding statement in place *before*, not *from*, the date on which they commence.

51. The powers of inspection, compellability and enforcement available to the Child and Family Agency in relation child safeguarding statements need to be strengthened as a priority.

52. The Child and Family Agency should be given additional resources to strengthen its existing powers, including such powers where a joint protocol is already in place.

53. The Child and Family Agency should continue and intensify information campaigns around the requirements for relevant organisations and persons under Children First. These should be aimed at providers as well as parents/guardians.

54. Consideration should be given to protections for whistle-blowers/persons of conscience reporting on concerns.

[37] OCO during the meeting of 9 May 2023. The report the OCO refers to is available here.

55. Child protection should take precedent over data protection where it concerns the cooperation and sharing of information among relevant agencies.

56. All those working with victims of abuse should be trained in line with best practice.

57. Head 10 should be used in conjunction with Children First for improving the safeguarding of children more effectively than currently proposed in the General Scheme. It should make cooperation mandatory, not optional. The discretion should be removed and the duty to cooperate should go further than information sharing.

58. Sanctions should be introduced for the non-reporting of mandated concerns.

59. The Department, policymakers and Special Rapporteur for Child Protection should engage in discussions on the proposed Head 10 and on learnings stemming from the UK experience.

60. Heads 13 and 44 should be further considered, in line with the observations of key stakeholders as detailed in this report.

4. Other observations on child welfare and protection

4.1 Disability

The shortcomings of the State in looking after people with disabilities, or other additional needs, in line with their legal rights, have been well documented, including through the hearings and reports of this Committee, the Committees on Autism, Disability Matters and others. Though no engagement took place with disabled people or Disabled Persons' Organisations (DPOs) on this particular matter, it is clear from other engagements that children and young people with disabilities face additional barriers within the care system and wider service provision. Recent work by this Committee on Assessments of Need for Children detailed significant failures in meeting the needs of children seeking an assessment of their needs and the required supports or interventions. That report found that parents were using the legal right to an assessment of need, and indeed the courts, to create a pathway towards services for their children, because without being forced, legally, the State was failing to provide them.

Census 2022 recently reported 22% of the State population as having a disability compared to 13.5% in 2016.[38] Despite this, disability is not mentioned explicitly in the General Scheme, and it only mentioned in the Explanatory Note for one Head (Head 22) regarding assistance to court. It reads "*It is intended that this section could be utilised, for example, in cases where a child who is the subject of child care proceedings has complex health needs in relation to a physical or mental illness or disability*." In contrast, in their recent observations on Ireland, the UN Committee on the Rights of the Child mention disability 27 times, including specifically in relation to several items dealt with in this Bill.[39]

Given the well-documented and persistent problems faced by those with disabilities or additional needs in obtaining the support they require, the Committee recommends that strong legal provisions must be enshrined throughout this legislation, in order to ensure that the State acknowledges the rights and needs of children with disabilities, especially those in care.

Several Heads in the General Scheme could be strengthened and used to deliver more for children with additional needs specifically namely Heads 10, 22, 27 and 47 as follows.

Head 10 should be strengthened to ensure an obligation to cooperate as opposed to an option to, and that cooperation should not be limited to information sharing but should apply to a broader obligation for agencies to work together for children, including those with disabilities.

Head 22 should be strengthened in a similar way to Head 10. It currently gives the court the ability to invite or 'request' the HSE to attend proceedings. The explanatory note for that Head states:

> "*It is intended that this section could be utilised, for example, in cases where a*

[38] Health, Disability, Caring and Volunteering - CSO - Central Statistics Office & Disability - CSO - Central Statistics Office
[39] Committee on the Rights of the Child: Concluding observations – Ireland

child who is the subject of child care proceedings has complex health needs in relation to a physical or mental illness or disability."[40]

Children in child care proceedings with complex health needs in relation to a physical or mental illness or disability need so much more to be legislated for than an option to request the HSE to attend. This Head needs to be amended to mandate that the HSE or any other relevant bodies whom the duty to cooperate under Head 10 applies to attend and other Heads need to legally oblige such bodies to cooperate and deliver services, particularly for those with disabilities.

Head 27 makes a language amendment to section 47 of the 1991 Act, but other amendments to section 47 are needed: the court should have the power to make directions for services to additional public bodies. Disabled people and their advocates have been asking for essential services for decades. There now needs to be a legal obligation to deliver them. There was hope that Ireland would ratify the UNCRPD optional protocol during the lifetime of this Government. Indeed, it is a key commitment in the Programme for Government. Its ratification would provide much needed protections for disabled people and their rights. In the interim, this General Scheme needs to be strengthened, so that, at the very least, disabled children in care receive some such protections.

Section 47 of the 1991 Act should be amended to give the court a mechanism to make a mandatory direction to agencies and public bodies to provide access to mental health or disability services, or educational supports, for a child. This would result in better and more effective service provision for children where interagency co-operation is required and ensure greater accountability through direct court oversight.

The representation and input of disabled children and their carers, particularly those with care experience, should be legislated for in both the Children and Young People's Services Committees and the National Child Care Act Advisory Committee. Advice could be sought from Disabled Persons Organisations (DPOs) on how best to build this in. Currently, the General Scheme allows for other persons or bodies to be part of both these structures, without expressly naming disability services and family carers.

[40] Explanatory note, Head 22, General Scheme.

The Department told the Committee during pre-legislative scrutiny that this is something they are still considering. Given that the General Scheme seeks to promote the right of children to be heard in decisions that affect them as a Guiding Principle in Head 4, the Committee considers this advice to be urgent and essential. As referred to in the section on aftercare, disabled and neurodiverse children require bespoke aftercare supports and this should be a priority.

In line with the general findings in the Ombudsman's March 2021 'Mind the Gap' report, the Committee is concerned that children with disabilities may have been overlooked in the preparation of this legislation, have not been effectively included in consultations on it and that the impact of its failure to legislate strongly for them in it has not been fully considered. The Committee has expressed concerns about the accessibility of the legislative process generally previously. These concerns remain.

The Committee recommends that:

61. The General Scheme should be amended to include strong legal provisions to ensure that the State meets children's needs, especially those in care and those with a disability or both.

62. The representation and input of disabled children and their carers, particularly those with care experience, should be legislated for in both the Children and Young People's Services Committees and the National Child Care Act Advisory Committee.

63. Head 22 should be amended to mandate that the HSE, or any other relevant bodies whom the duty to cooperate under Head 10 applies to, attend proceedings and other Heads need to legally oblige such bodies to cooperate and deliver services, particularly for those with disabilities.

64. Section 47 should be amended so that the court can make directions for services to additional public bodies to ensure greater accountability and more effective service provision for children where interagency co-operation is required, through direct court oversight.

65. The Department and policymakers should revisit the General Scheme with insight from disabled people or organisations who represent them. Every Head must be

considered with regard to 'how can we build in some additional legal protection for children with additional needs here?' and 'how can we use this Bill to make all agencies do better for disabled children?'.

66. People with disabilities or additional needs should not be overlooked in the legislative process. Relevant departments and policymakers should seek engagement and enable their participation when creating legislation.

4.2 'In camera' rule

As discussed during pre-legislative scrutiny, currently under section 31 of the 1991 Act it is an offence to publish or broadcast any material, which may lead to members of the public being able to identify children subject to child care proceedings. This needs some consideration given the societal and technological changes since enactment. Highlighting this, EPIC told the Committee:

> "*When the legislation was drafted and interpreted social media was not an issue, and not something we would have considered. In terms of EPIC's advocacy service and what we might see reflected, we might see children in care sitting out of their class photos and feeling isolated and othered because of that. They might be told by a professional in their life that their social media presence, where they might talk about their life, identity or that they are care experienced, is illegal and they need to stop it. The need to protect the identity of children has to be balanced against their right to have a voice, to be heard, and to express themselves and their identity. Those are rights upheld in articles 12 and 13 of the United Nations Convention on the Rights of the Child. To the point about upholding a child's privacy, this obviously goes hand in hand with a conversation with the child as to safe and positive social media usage. However, it is in the overarching legislation where we see the problems, through it having a chilling effect on children's ability to express themselves online and to get on with school activities, and a different presence where they might feel isolated, but should not, because of their identity or care experience*."[41]

[41] EPIC during the meeting of 16 May 2023.

Though the intention of section 31 of the 1991 Act was to protect those involved in such proceedings, it is clear from EPIC's contribution that the rule has unintended consequences today that would not have been envisioned when it was drafted. The Committee therefore recommends that a review of the 'in camera' rule is undertaken.

The Committee recommends that:

67. A review of the 'in camera' rule should be undertaken as a priority and the recommended legislative amendments arising from that review should be made within the next 12 months, to take account of advances in social media and the need for young people in care to be able to develop and express their identity.

4.3 Head 8: Support for children temporarily out of home

Under Head 8, where it appears to the Child and Family Agency that there is no accommodation available to a child, it shall enquire into the child's circumstances and potentially make available suitable temporary accommodation. This cohort of young people is very vulnerable with limited immediate family support. Head 8 was flagged by several stakeholders, including the Special Rapporteur, as needing further attention.

The Child and Family Agency itself acknowledged that it lacks the resources required to cope with the number of referrals coming to it through section five of the 1991 Act. This issue of resourcing is a recurrent one. The Committee fully recognises that the State bears a significant responsibility to protect this cohort and an appropriate and adequate level of resourcing is required.

4.3.1 Weakening protections for homeless children

Homelessness is an unprecedented social problem in Ireland with recent monthly figures frequently reaching record highs.[42] Notably, official figures only record those in State emergency homeless accommodation, not those that are in 'own-door' temporary accommodation, domestic violence refuges, asylum seekers, people who

[42] See Number of people in homelessness hits record level for seventh straight month (irishexaminer.com) and Number homeless reaches 'deeply upsetting' record high (rte.ie)

are sleeping rough, homeless people in hospitals and prisons and the very many who are 'hidden homeless' and staying with family or friends.[43]

Homelessness impacts children most acutely and its effects in this regard are well established. In a 2019 submission to the then Committee on Children and Youth Affairs, for example, Threshold stated that "*children who have experienced homelessness are more likely to have health problems, go hungry, experience developmental delays, and have higher rates of depression, anxiety, and behaviour disorders than other children*." This Committee strongly believes that the eradication of child homelessness is a practical and attainable goal, particularly at a time of strong exchequer returns.[44]

Stakeholders the Committee engaged with made several recommendations about how this Head can do more. The most concerning observation the Committee received regarding Head 8 is that it does little to strengthen the current legal protections offered to a child who is homeless. For any proposed legislation to weaken protections for homeless children is disappointing. In fact, Head 8 envisages that children will remain in homeless accommodation for longer than six months and weakens the timelines for the review of such placements compared to those in the existing Child and Family Agency policy on same. As flagged by the Child Law Project, the current the Child and Family Agency policy is that in these placements:

> *"This plan should be reviewed, in conjunction with the young person and:*
>
> i *within two weeks of the initial placement,*
>
> ii *monthly for the next three months and*
>
> iii *three monthly reviews thereafter.*

[43] As discussed recently in the Joint Committee on Housing, Local Government and Heritage here main.pdf (oireachtas.ie) and the according to Facts and Figures - Peter McVerry Trust (pmvtrust.ie) and Latest Figures - Donate - Focus Ireland

[44] See Quarterly Financial Accounts | Central Bank of Ireland and Exchequer records €5.2bn surplus for 2022 as tax revenue tops €83bn (breakingnews.ie) and Exchequer returns: €4.4bn in tax receipts collected in April with income tax the star performer – The Irish Times

> *A critical change in the young person's circumstances will warrant a review of the assessment and plan."*[45]

Several stakeholders urged that arrangements under Head eight should be reviewed sooner than after six months. The Committee wholly agrees. Even one month in such accommodation could be deeply traumatising for children. The Committee recommends that arrangements under Head eight should be reviewed after three months, at the latest.

The issue of child and youth homelessness arose in discussions on Head 10 and the failure of various bodies to cooperate, with EPIC telling the Committee that the failure to cooperate creates organisational disjuncture and leads to homelessness, which has been noted in the youth homelessness strategy.[46] The Heads involving the duty of various bodies to cooperate should be strengthened and used to tackle homelessness.

The Child Law Project said that consideration should be given to amending section 5 to restrict its application to children aged 16 and 17. This would bring it in line with the current Child and Family Agency policy, which states that:

> *"Children under 16 years presenting as homeless or at risk of homelessness should be categorised as a child protection and welfare concern and referred to the appropriate Children and Family service for an assessment in accordance with Children First. If the assessment determines they cannot return to their parents they should be taken into care under the relevant section of the Child Care Act 1991."*[47]

The Explanatory Note for Head eight says:

> "*A policy decision has been made not to specify a lower age limit in this section, in order to provide the Child and Family Agency with some flexibility and in recognition that social work expertise is a factor in determining whether a*

[45] The Child and Family Agency (2012) National Policy & Procedure on the use of Section 5 of the Child Care Act 1991. Referenced in The Child Law Project submission.
[46] gov.ie - Youth Homelessness Strategy (www.gov.ie)
[47] The Child and Family Agency, Child and Family Agency (2012) *National Policy & Procedure on the use of Section 5 of the Child Care Act 1991*, 3. Referenced in The Child Law Project submission.

placement under this section is appropriate, having regard to the age and maturity of the child."

The Committee has reservations about 15-year-olds or younger children being placed under this section as opposed to being taken into care and about the lack of consistency between the two policies. It recommends that this Head is reconsidered in collaboration with The Child and Family Agency, The Child Law Project and other social workers with expertise in this area.

4.3.2 Other Head 8 and section 5 issues

The Committee also recommends:

- A child who is deemed homeless and accommodated under section 5, should have this duration considered for the purposes of aftercare eligibility.
- A social worker should be appointed for these children, and this should be explicit in the section.
- It should be clarified that Children First Act applies to these services as homelessness is not listed as a relevant service in schedule 1 of the Children First Act 2015.
- Section five should not operate in isolation from the rest of the Act. Children under this section should receive the services, attention, and care that children 'in care' under other parts of the Act get.
- Head 8 should apply to a situation where it is dangerous for a child to remain in their home due to violence or other threatening behaviour where the safety of others is at risk, or a situation where the child is a danger to themselves.
- This section should explicitly underline that where a child requires welfare and protection beyond their immediate need of accommodation, a care arrangement should be considered on assessment. A further assessment shall happen within 3 months, rather the proposed six months.
- Clarity is needed to identify whether the state is acting in loco parentis in this section, and what duties they assume as a result.
- Children under this section should be able to be brought 'into care' if they so wish.

- Accommodation provided under this section should be regulated and inspected.

4.4 Aftercare and care leavers

The average age at which an Irish person moves out of the family home is now about age 28, which is nine years after the average Swede and older than in many other European countries, due to the difficulty involved in finding affordable accommodation.[48] The age of eligibility for aftercare should be increased to reflect this. Scotland, for example, has opted to extend eligibility for aftercare assistance up to an individual's 26th birthday.[49] The Committee heard widespread calls for a widening of the eligibility for and support provided to young people in aftercare. Currently a person has to have spent 12 months in care between the ages of 13-18 in order to access aftercare and aftercare supports are still available for people up to 23 years old, but only if they are engaged in accredited training or education.[50] Aftercare eligibility is dealt with in section 45 of the 1991 Act.

In line with issues flagged by stakeholders in relation to aftercare, the Committee recommends that aftercare eligibility is brought within the scope of the General Scheme and amended to ensure that:

- Aftercare is placed on a statutory footing for every child leaving State care.
- Aftercare supports are extended to 26 years of age based on an assessment of need.
- Discrimination in the allocation of aftercare services based on progression in further and higher education should be removed.
- The eligibility criteria for aftercare should be widened to allow flexibility for consideration of individual circumstances and the impact of these on a young person's need for aftercare. Circumstances to be considered should include: The length of time the child and their family were known to or involved with

[48] See Age of young people leaving their parental household - Statistics Explained (europa.eu) and Average age of Irish people moving out of their childhood home is now 27.9 as housing crisis bites | Independent.ie
[49] Children and Young People (Scotland) Act 2014
[50] What are aftercare services?The Child and Family Agency - Child and Family Agency

social services; The length of time a child spent in care before the age of 13 and whether a child was taken into care after their 17th birthday.

- The level of vulnerability and risk experienced by a young person should be considered, as should waiving of the criteria requiring a young person to have spent 12 cumulative months in care.

As flagged by the Legal Aid Board, it should also be considered whether, if a person leaving care becomes a relevant person for the purposes of the Assisted Decision Making legislation, a duty should be placed on the Child and Family Agency to assist them in entering into an appropriate assisted decision-making arrangement, including the making of a Part 5 application in appropriate circumstances.

Furthermore, neurodiverse children and children with disabilities need bespoke aftercare, which should be provided through the General Scheme and, as pointed out by IFCA, The Child and Family Agency-HSE Joint Protocol for Interagency Collaboration needs examining in this respect.

The Committee heard that foster carers have no named involvement, once a child progresses to aftercare, that they feel 'invisible' or 'put to one side' at that point.[51] In cases where there a documented good relationship between the foster carer and child and a willingness to continue that through an aftercare plan, the Committee recommends that this should be facilitated and encouraged. In recognition of this, the Committee recommends a clear pathway for foster care involvement in aftercare, where appropriate.

The Committee recommends that:

68. The Child and Family Agency and the Department should urgently coordinate to establish what resources are needed to enable section five of the 1991 Act to operate in the safest way possible for children temporarily out of home and the resources required should be delivered immediately.

[51] IFCA during the meeting of 16 May 2023.

69. Arrangements under Head 8 should be reviewed after three months at the latest, not six months as proposed in the General Scheme.

70. The Heads involving the duty of various bodies to cooperate should be strengthened and used to tackle homelessness.

71. A lower age limit should be reconsidered under Head 8, in collaboration with the Child and Family Agency, the Child Law Project and other social workers with expertise in this area.

72. A child who is deemed homeless and accommodated under section 5, should have this duration considered for the purposes of aftercare eligibility.

73. A social worker should be appointed for children accommodated under section 5 and this should be explicit in the section.

74. It should be clarified that Children First Act applies to these services as homelessness is not listed as a relevant service in schedule 1 of the Children First Act 2015.

75. Section five should not operate in isolation from the rest of the Act. Children under this section should receive the services, attention and care that children 'in care' under other parts of the Act get.

76. Head 8 should apply to a situation where it is dangerous for a child to remain in their home due to violence or other threatening behaviour where the safety of others is at risk, or a situation where the child is a danger to themselves.

77. Head 8 should explicitly underline that where a child requires welfare and protection beyond their immediate need of accommodation, a care arrangement should be considered on assessment. A further assessment shall happen within three months, rather the proposed six months.

78. Clarity is needed to identify whether the state is acting in loco parentis in this section, and what duties they assume as a result.

79. Children under this section should be able to be brought 'into care' if they so wish.

80. Accommodation provided under section five should be regulated and inspected.

81. Aftercare eligibility should be brought within the scope of the General Scheme and amended to ensure that:

A. Aftercare is placed on a statutory footing for every child leaving State care;

B. Aftercare supports are extended to 26 years of age based on an assessment of need;

C. Discrimination in the allocation of aftercare services based on progression in further and higher education should be removed.

82. The eligibility criteria for aftercare should be widened to allow flexibility for consideration of individual circumstances and the impact of these on a young person's need for aftercare. Circumstances to be considered should include: The length of time the child and their family were known to or involved with social services; The length of time a child spent in care before the age of 13 and whether a child was taken into care after their 17th birthday. The level of vulnerability and risk experienced by a young person should be considered, as should waiving of the criteria requiring a young person to have spent 12 cumulative months in care.

83. Bespoke aftercare should be provided to neurodiverse children and children with disabilities and the Child and Family Agency-HSE Joint Protocol for Interagency Collaboration should be updated in this respect.

84. A pathway for foster care involvement in aftercare should be available, where appropriate.

85. It should be considered whether, if a person leaving care becomes a relevant person for the purposes of the Assisted Decision Making legislation, a duty should be placed on the Child and Family Agency to assist the child in entering into an appropriate assisted decision-making arrangement, including the making of a Part 5 application in appropriate circumstances.

4.5 Special Care

Special care is not addressed or amended in the General Scheme but is another area the Department has confirmed it is examining. Placing a child in a special care unit is a serious act and the appropriate placement is often not available. As explained by the OCO:

> "*It involves deprivation of liberty for non-criminal reasons, so it is really important that we know that it works and why it works. Our greatest concern about special care is how it fits back into the wider community, what happens when a child leaves special care and how fit for purpose the community is in taking the child back. That is a very serious… We have 58 children right now, tonight, in emergency special placements. How many of those children are there because we do not have enough special care placements or because the special care placement they were in did not work*?"[52]

Barnardos and EPIC voiced similar concerns about inappropriate placements and other issues, telling the Committee that it is extraordinarily difficult to get a child into special care and to get a child out of special care, and that the legislation regarding special care does not reflect real life cases. Investment is needed in this area. As Barnardos said:

> "*We are paying the price for previous recessions during which services were cut and families were not supported, and we now have a cohort of children with these very complex and very difficult needs… there is a question mark as to how the health services, in particular CAMHS, are supporting them as well. This really does need review, and I am glad to hear that the Department is reviewing it*."[53]

The Committee recommends that:

86. Appropriate new provisions on special care should be developed and included in the General Scheme. Funding should be provided accordingly.

[52] OCO during the meeting of 16 May 2023.
[53] Barnardos during the meeting of 9 May 2023.

4.6 Unaccompanied Minors

The issue of unaccompanied minors and separated children was discussed at length during pre-legislative scrutiny. This was due partially to the recent rise in numbers of people coming to Ireland seeking asylum, but, primarily because provisions for this cohort were expected and proposed as part of a 2020 consultation paper produced by the Department, where it was considering views on a dedicated section for unaccompanied minors and separated children. Commenting on the absence of protections for unaccompanied minors in the General Scheme, the OCO said:

> "*We made our initial submission to the Department in 2018. Subsequently, we asked it to consider all four general principles under the convention, including the principle of non-discrimination. We would like consideration to be given to the inclusion of that principle. We understand that no attention has been given to that to date*."[54]

The Child and Family Agency told the Committee that, as of 5 May 2023, there has been an increase of almost 500% in the number of such referrals to its services, and that separated children who seek international protection or unaccompanied minors should be given greater consideration in this legislation, stating:

> "*The Child and Family Agency's legislative role and remit in how we care for separated children who seek international protection or unaccompanied minors needs greater consideration within Ireland's core child care legislation*".[55]

The Agency informed the Committee on 9 May 2023 that this year, to date, there have been 144 new referrals. As of 5 May 2023, the Child and Family Agency was caring for 223 unaccompanied minors or separated children, of whom 72 are from Ukraine. Almost 4,000 children are in direct provision or International Protection Accommodation Services (IPAS) accommodation. The position of unaccompanied children was flagged as particularly concerning by the OCO, who said:

> "*We are really disappointed that unaccompanied minors are not provided for explicitly in this general scheme and we think that needs to be revisited. There*

[54] OCO during the meeting of 9 May 2023.
[55] The Child and Family Agency during the meeting of 9 May 2023.

> *is a view that a child is a child, unaccompanied minors are children, we treat them as children and, therefore, their needs and circumstances will be captured, but unaccompanied minors are in a very vulnerable position and in very particular circumstances. Something the 2020 consultation paper proposed when it was thought unaccompanied minors would be included was that the status of a child as an unaccompanied minor itself would be enough to enable him or her to go into care and that is not addressed through this general scheme*."[56]

As outlined by multiple stakeholders, clarification is required as to the type of care order that should be sought where there is no possibility of reunification. As discussed in the section on voluntary care, children who entered voluntary care without informed parental consent will no longer be put in voluntary care. The Explanatory Note for Head 7 states that the policy intent is to restrict voluntary care to circumstances where informed parental consent can be secured. However, as pointed out by many stakeholders, an implication of this change is that certain cohorts of children who had previously entered care under section 4 – for example children who appear lost or abandoned and unaccompanied minors – will no longer be eligible to enter care under the revised section 4. It is even more surprising that provisions for unaccompanied minors have not been brought forward given that the changes to voluntary care will have known effects on them. This needs further consideration and explanation. EPIC explained this well in their contribution, stating:

> "*Without explicit guidance under the childcare Act, the type of arrangement and subsequent aftercare of unaccompanied minors and separated children are conducted without legislative clarity. There are often situations where there is a lacuna in legislation whereby it is unclear as to such children's status, as either care leavers who might receive an allocated aftercare worker, an aftercare plan and respective supports, or as children who are international protection applicants and are possibly being referred from their residential care placement to direct provision, where they receive significantly diminished*

[56] OCO during the meeting of 9 May 2023.

supports compared with availing of aftercare. That lacuna is a big problem. To have that visibility and guidance in the 1991 Act is critical."[57]

In the context of the increased racism we are seeing in Ireland at the moment, the Committee has serious concerns as to why this opportunity to provide some legislative protections to such a vulnerable cohort has not been taken.[58] In relation to why unaccompanied minors are not specifically dealt with in the General Scheme, the Department informed the Committee that:

- The issue was given enormous consideration
- Ireland is considered a leader in Europe in our care of unaccompanied minors
- Some challenges are better dealt with at a policy and operational level; and
- The intention behind not making specific provision for this cohort was to protect the equity of care principle, "whereby unaccompanied minors get exactly the same level of care and are taken into care under the same thresholds as Irish-resident children".[59]

Each of these points is worth discussing further, especially as many other stakeholders who engaged with the Committee strongly called for specific provisions for unaccompanied minors. It is unclear on what basis the conclusion that Ireland is considered a world leader in this arena has been drawn.

On whether these particular challenges are better dealt with outside of legislation, it is instructive to consider the recent directions made by the United Nations Committee on the Rights of the Child in relation to Ireland. Irish government representatives recently appeared before the UN Committee on the Rights of the Child to hear the findings of a review carried out on Ireland's performance in implementing the UNCRC. Speaking ahead of that hearing, the Ombudsman said:

[57] EPIC during the meeting of 16 May 2023.
[58] For accounts of this see for example Jump in hate crime incidents with 582 recorded in 2022 (breakingnews.ie) and recent hearings this Committee had on 21 February 2023 and 28 February 2023
[59] The Department during the meeting of 9 May 2023.

"*Our government needs to mainstream children's rights into their thinking, you do that through legislation*." [60]

In the report from the UN Committee on the Rights of the Child the following recommendations were made:

"*Noting with deep concern the barriers faced by some groups of children in accessing birth registration and the restrictive legislative framework for obtaining Irish nationality, the Committee recommends that the State party:*

(a) Ensure the right of all children, without exception, to be registered at birth, including by simplifying documentation requirements for children of minority groups, asylum-seeking and migrant children, and children without regular residence status;

(b) Adopt legislative amendments to the courts and civil law (miscellaneous provisions) bill to reduce residency requirements for acquiring nationality;

(c) Remove legal barriers and strengthen legal pathways for all children to acquire a nationality, such as by:

(i) Excluding children from the application of the "good character" ground; (ii) Preventing the deprivation of nationality to children born through surrogacy arrangements;

(iii) Allowing naturalization applications to be submitted by Tusla (The Child and Family Agency) on behalf of children in care and by children themselves;

(d) Ensure the timely submission by the Child and Family Agency of applications for international protection or residence permission, as appropriate, on behalf of separated children in care, in order to prevent delays in acquiring nationality;

(e) Develop a procedure to determine the stateless status of children in order to properly identify and protect stateless children."[61]

[60] Ombudsman says children must be at the centre of Government thinking (irishexaminer.com)
[61] Committee on the Rights of the Child: Concluding observations – Ireland

On the equity of care principle, the right to non-discrimination is not the right to be treated the same as everybody else. It provides that, while we are all different, children in certain circumstances require special measures. On this, the OCO said:

> "*The whole point is that certain children, including unaccompanied minors, have special vulnerabilities and are in different circumstances so they cannot be treated the same within a framework. They have to be looked at differently. That is the consideration we want given in the general scheme around this*."[62]

The Committee disagrees with the Department's statement that the equity of care principle means that this cohort should get exactly the same level of care and be taken into care under the same thresholds as Irish-resident children. The Committee instead recommends that special provisions be made for this cohort, given their particular vulnerabilities.

The Committee recommends that:

87. The General Scheme should include specific provisions for protecting unaccompanied minors.

88. The status of a child as an unaccompanied minor itself should be enough to enable him or her to go into care.

89. Upon leaving care, their status as care leavers should override their status as international protection applicants for the purposes of eligibility for aftercare.

5. Regulation of the provision of early learning services

The 1991 Act provides for the supervision of early years services (pre-school services). It defines the providers of 'early years service' and empowers the Minister (after consulting the Minister for Education) to regulate providers for the purpose of securing the health, safety and welfare and promoting the development of children attending. Under this part of the Act, the Child and Family Agency must oversee a process of registration, while registered providers are obliged to take "*all reasonable*

[62] OCO during the meeting of 9 May 2023.

measures to safeguard the health, safety and welfare of children attending" and to comply with regulations. An inspection process is provided for through the Child and Family Agency's Early Years Inspectorate.

Problems have been identified with the adequacy of these provisions. Specifically, concerns exist that practices in early years services that may place children at risk of harm may not be detected during inspection visits. A 2019 RTÉ programme, along with other coverage of these issues by media and in the Houses of the Oireachtas, highlighted this issue.[63] A report presenting the findings from a public consultation on the review of the Regulations governing early learning and care that took place in 2022 was published in 2023. Some of the ways the General Scheme seeks to address issues identified in the last five years are as follows:

Head 29 enables the Minister to issue regulations on assessments of the suitability of a person seeking to provide an early years service (a new condition for registration, often referred to as 'fit person regulations').

Head 31 enables the Agency to suspend a registered provider for grave and/or immediate risk and to apply for a closure order if it operates while suspended. It also provides that the registered provider must bring the decision to the attention of all those affected including parents and guardians of children and staff employed and, if the provider fails to do so it must give the Agency contact details so that it can do so.

Heads 35, 36 and 37 provide tools for the Child and Family Agency in relation to inspections and closures and further enable the Child and Family Agency to bring some matters to the attention of parents/guardians.

The proposals on early years services were largely welcomed during pre-legislative scrutiny. Some concerns did arise though, in relation to the need to distinguish

[63] RTE,1 August 2019. For more on this see: Oireachtas Committee to discuss crèches concerns (rte.ie) & The Journal.ie, 31 July 2019: The Child and Family Agency identifies 'critical' level of risk at 37 childcare facilities across the country (thejournal.ie)

between services, the regulatory and administration burden facing providers and the vetting involved in 'fit person' regulations. These are explored here.

The need to distinguish between early years and school age care services

Head 30 proposes to clarify that there is a single register for services comprising prescribed pre-school services, school-age services, and combined pre-school and school-age services. Early Childhood Ireland told the Committee that:

> "*While we understand that a single register for EY and SAC services is needed for ease of regulation and administration, we stress that these services are quite different as they cater for children of different age groups and needs. This must be recognised by the Child and Family Agency when inspecting each service type and we fully expect that it will be….One size does not fit all. For example, the current regulations relating to full day care services are not wholly appropriate for sessional or part-time services. We, therefore, ask the committee and policy makers to ensure that any new regulations are streamlined and service-appropriate to reduce the administrative burden for early years and school age service providers*."[64]

Regulatory and administrative burden

During pre-legislative scrutiny, Early Childhood Ireland explained some of the difficulties involved in current regulatory and administrative obligations providers face. Their Members, the Committee was told, have to report into seven agencies and a Government Department and deal with two inspectorates, namely, the Department of Children, Equality, Disability, Integration and Youth and the Department of Education. This they said, is compounded by the wide range of service that operate in Ireland, from preschools with breakfast clubs, to pure preschool care to those that provide school age care within day care. The regulations, when developed, must reflect the range and complexity of services. As Early Childhood Ireland said:

> "*The ages of children and what is being delivered, to shorthand the matter for the sake of the conversation, and the nature of service delivery, need to be*

[64] Early Childhood Ireland during meeting of 16 May 2023.

recognised when the time comes for developing regulations and implementing them."[65]

The Committee recommends that regulations are streamlined and service-appropriate to reduce the administrative burden for early years and school age service providers, and that providers continue to be involved in their development.

Fit Person Regulations

Head 29 allows for the making of 'fit person' regulations. Under the current legislation, a registered provider must submit a vetting disclosure to the Child and Family Agency in order to be registered and previous convictions are the sole consideration available to the Child and Family Agency in determining whether a person is a fit or competent person to operate an early years or school age service. The explanatory Note for this Head states that:

"*The Child and Family Agency has advised that it cannot refuse a registration even if there is a history of serious ongoing non-compliance with a registered provider. There have also been cases in which the Child and Family Agency reports that it has received applications from persons it deems unsuitable but it had no grounds to refuse the applications. Additional criteria for the Child and Family Agency to assess the suitability of a person to become a registered provider, or of any person involved in the management of a service (particularly the 'person in charge' as defined in the Child Care Act 1991 (Early Years Services) Regulations 2016), would allow it to make a more comprehensive assessment on the applicant and bring its powers into line with other social care regulators e.g. HIQA in relation to regulation of designated centres for older people*."[66]

Early Childhood Ireland welcome the introduction of 'fit person' regulations, but suggested that the regulations, when published, should be similar to HIQA regulations, whereby fitness is not a once-off assessment but is considered on an ongoing basis.

[65] Early Childhood Ireland during meeting of 16 May 2023.
[66] Explanatory Note, Head 29, General Scheme.

This seems like a good suggestion. In other sectors or professions, professional accreditations and safety standards are subject to updating training and re-registering. Childcare settings should be no different.

There was some concern during pre-legislative scrutiny that the regulations may disproportionately affect those from working-class communities that have potentially been over-policed and therefore have a higher instance of past convictions. This was discussed in relation to childminding as well. The regulations for various service providers, including childminders, should contain some discretion in relation to past convictions to prevent them from inadvertently penalising certain communities and further decreasing the pool of available workers in the childcare sector.

The importance of facilitating early learning and care for children with disabilities or additional needs was acknowledged during pre-legislative scrutiny. The access and inclusion model (AIM) programme has helped a large number of children with disabilities access ECCE. The Committee has long advocated for early interventions and tailored supports for children. The Department informed the Committee that there is a pilot under way with the HSE involving the extension of some of the HSE's home care or healthcare assistance arrangements to support children in attending preschool services. This is welcome. However, the Committee would welcome the expansion of the AIM programme.

The Committee recommends that:

90. Constructive consultation with early learning and school age care providers should continue, including in the development of forthcoming regulations. Input from providers should be sought to increase workability.

91. The regulatory and administrative burden on providers should be reduced insofar as possible, without compromising safety and safeguarding. Again, input from providers should be sought to increase workability and learn from what works well as far as providers are concerned.

92. The regulations for various service providers, including childminders, should contain some discretion in relation to past convictions to prevent them from

inadvertently penalising certain communities and further decreasing the pool of available workers in the childcare sector.

93. The AIM programme should be expanded, along with other initiatives to support children with disabilities or additional needs to access early learning and childcare.

6. Regulation of non-relative childminders

At present public investment in childcare is in the form of:

- a universal benefit for 15 hours a week for all children aged 3-5 in the Early Childhood Care and Education scheme

- the National Childcare Scheme which includes a universal subsidy for children from age 24 weeks up until families can avail of the ECCE and a means-tested subsidy for children from age 24 to 15 years.[67]

Alongside this formal, registered and mainly privately-run system of care, it is estimated that up to 82,000 children are cared for by childminders, nannies or au pairs, 75% of whom are minded in the childminder's home.[68] Between 15,000 and 19,000 childminders care for children in their own home, according to the most recent estimates, and they care for approximately 10% of children from infancy to 12 years of age.[69]

As such, childminders meet a signification proportion of the demand for childcare; but childminders are for the most part outside of the regulated formal early years services which has developed since the 1990s. The registration of childminders is common practice in other close-to-home jurisdictions such as Northern Ireland, France and Scotland where these services are registered and inspected. Those who engaged with the Committee during pre-legislative welcomed that Ireland is moving in the same direction. The completion of the guidelines that will apply to childminders should be

[67] See Oireachtas Library and Research Service, 2020: Public Provision of early childhood education: an overview of the international evidence for comparison of Ireland's public provision to other states (bearing in mind that this is prior to full implementation of the National Childcare Scheme).
[68] DCEDIY (2021) National Action Plan for Childminding p.30.
[69] (See DCEDIY, National Action Plan p.29-30 and O'Regan, Halpenny and Hayes, 2022, p.2 'Childminding professionalism and professionalism and professionalisation in Ireland: A different story'

completed as a priority, so that minders and parents have time to plan and establish how they will be impacted.

The proposal to bring childminders under regulation in the same way as other aspects of early learning and care and school-age childcare are, comes with a three-year transitional period, during which it will be optional for providers to opt in and register with the Child and Family Agency. If they do, the parents who use those childminders will be able to avail of subsidies under the national childcare scheme. Members referenced some concerns during pre-legislative scrutiny that childminders may be nervous of the impacts of registering. The Department responded as follows:

> "*The Deputy alluded to the concerns or fears of many childminders in respect of whether the regulations will be proportionate and appropriate to childminders in the home. The national action plan is clear that the intention is to introduce childminder-specific regulations and that are proportionate and appropriate to the home environment. Under the action plan, an advisory group is in place and currently working to develop ideas for those regulations. Childminders are represented on that advisory group, as is Childminding Ireland, and they are working with us to ensure the regulations are proportionate and appropriate. The regulations will not be the same as those that apply to centre-based services*."[70]

The Child and Family Agency clarified that the definition of childminding proposed to be introduced in the Child Care Act is specifically related to childminders working in childminders' homes rather than in parents' homes.

As with other services, including early years and school age provides, childminders have expressed concern about the regulations that will apply, seeking regulations that are proportionate, appropriate, and specific to the setting of childminding.[71] This will be key to the roll-out of these provisions.

[70] Early Childhood Ireland during meeting of 16 May 2023.
[71] Draft Childminding Action Plan: Report on the findings of the consultation process

Childminders as relevant bodies

The General Scheme designates childminders and operators of early years settings as relevant bodies. It follows that they will have more obligations and opportunities arising from this. They may have a greater role to play in reporting into and consulting and liaising with the Child and Family Agency, for example. All of this will have resource implications. This will need to be accounted for through supports. Early Childhood Ireland gave the following example of where there is already a disparity in resourcing as follows:

> "*We hear from our members who already participate in meitheal arrangements or case conferences that they find themselves at those day-long events and are probably the only person in the room not being paid to be there. It has resource implications, and we wish the committee to be alert to that*".[72]

These resource issues will likely intensify under the new regime, so it is imperative that providers are supported and resourced accordingly.

The Committee recommends that:

94. The drafting of the guidelines that will apply to childminders should be completed as a priority, so that minders and parents have time to plan and establish how they will be impacted.

95. Providers designated as relevant bodies must be supported and resourced in order to meet any new roles and responsibilities they have arising out of the new provisions and regulations.

96. The regulations that are developed for childminders should be proportionate, appropriate, and specific to the setting of childminding. The childminding sector should continue to be involved in their development.

[72] Early Childhood Ireland during meeting of 16 May 2023.

APPENDIX 1 – TRANSCRIPTS AND SUBMISSIONS

Transcripts

9 May 2023

16 May 2023

Submissions

Ombudsman for Children's Office

The Child Law Project

The Irish Association of Social Workers

EPIC on Advocacy

EPIC on the General Scheme

The Legal Aid Board

Special Rapporteur on Child Protection

ByrneWallace LLP

APPENDIX 2 – TERMS OF REFERENCE FOR COMMITTEES

This report is produced by the Joint Committee Children, Equality, Disability, Integration and Youth under its Terms of Reference (available here) as agreed by Dáil and Seanad Éireann. Any Conclusions or Recommendations arrived at have been agreed by the Committee. They do not represent the views of either House of the Oireachtas unless these have formally endorsed the report. It is important to note that the report is the agreed collective view of members of the Committee. However, individual members may not agree with all Conclusions or Recommendations arrived at.

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