EPIC Submission regarding the General Scheme of the Child Care (Amendment) Bill 2023

Introduction

EPIC, Empowering People in Care, welcomes the opportunity to contribute to the Joint Committee on Children, Equality, Disability, Integration and Youth in their pre-legislative scrutiny of the General Scheme of the Child Care (Amendment) Bill 2023.

This long-awaited review and update to the Child Care Act, 1991 provides an opportunity to ensure that policy and practice relating to the protection and welfare of children in Ireland is robust, child-centred, and in line with Ireland's human rights obligations.

EPIC is an independent children's rights organisation which works with and for, children in state care, and young care leavers. A central part of EPIC's work is the provision of an independent, human rights advocacy service to this cohort. The policy development undertaken by EPIC seeks to create positive change in the care system at a systemic level, using the evidence base from our advocacy service caseload.

All of EPIC's work is grounded in the UN Convention of the Rights of the Child (UNCRC), particularly Article 12, which provides for the child's right to be heard and to participate in decision-making in all matters relating to their care, either directly or through a representative or an appropriate body. The establishment in the draft bill of the principle that children should be able to participate in decision-making in all matters affecting them upholds Ireland's obligations under Article 12 of the UNCRC and Article 42A of Bunreacht na hÉireann.

EPIC acknowledges the progress made by the Oireachtas to date in enhancing the rights of children and young people in care or with care experience. EPIC believes that the General Scheme of the Child Care (Amendment) Bill 2023 offers the Oireachtas a real opportunity to ensure that the lives and wellbeing of children in its care are prioritised, and to ensure that provisions are made for these children to transition to adulthood in a manner where they are supported to thrive and achieve the best possible outcomes.

In our submission, EPIC outlines some of the key issues we believe would enhance the legislation to promote the protection and welfare of children in state care and after care. The issues covered in this submission are as follows:

- Guiding principles and Guidelines [Heads 4 and 5]
    - The Right to Independent Advocacy
- Voluntary Care [Head 7]
- Duty of relevant bodies to cooperate [Head 10]
- Support for children temporarily out of home [Head 8]
- Emergency Care Orders [Head 14]
- Interim Care Orders [Head 17]
- Significant issues not currently addressed by the General Scheme of the Child Care (Amendment) Bill 2023
    - Aftercare Eligibility Criteria (section 45)
    - Unaccompanied Minors
    - The In Camera Rule (section 31)

Guiding principles and Guidelines [*Heads 4 and 5*]

EPIC strongly welcomes an explicit focus on centring the best interests of the child and the voice of the child in any decision-making process about their care and in service provision.

In EPIC's experience, successful care journeys are contingent on the child's views being sought and considered, where efforts are made to gain a clear picture of their wishes, thoughts, and feelings and when they are viewed with agency and as rights-holders.

At a fundamental level, there are areas where the participation of the child in care or young person in aftercare services is essential and can often be crucial for their personal health and well-being, as well as for their development.

This was acknowledged in the passing of the Child Care (Amendment) Act 2022, which was significant legislation in providing for the child's right to be heard for the duration of court proceedings related to the child. A notable achievement of the 2022 Act was the placing the right to a Guardian *ad Litem* on a legislative footing.

While this development is welcome, the UNCRC is explicit in stating that the child's right to be heard should be facilitated not only in judicial settings but in all matters affecting the child, including in administrative proceedings. It is therefore EPIC's position that the views of the child must be sought and considered when key decisions beyond a care order and related proceedings are made.

Many of the critical decisions in relation to the care of a child (such as child in care reviews, care planning, aftercare assessments etc.) happen after a care order has been made and is situations where a GAL is not appointed. It is also notable that children who are in voluntary care arrangements, who make up 54% of those in care, are not currently afforded a legal right to a Guardian Ad Litem.

In conclusion, we welcome the provisions outlined in Head 5, where the Minister may issue practical guidance on how these Guiding Principles may be implemented. This has the potential to be a vital resource in upholding the fundamental rights of children in care.

EPIC recommends that these guidelines should be unambiguous in outlining when and how a child's views shall be sought. We recommend that the implementation guidelines should have the legal status of a statutory instrument such as a regulation if the state's obligations under Article 12 of the UNCRC Article 12 and Article 42A of Bunreacht na hÉireann are to be upheld.

The Right to Independent Advocacy

Independent advocacy is a process of helping children and young people to express themselves, empowering them to have a say and be heard on issues that affect their life, and to bring about positive change through the support of an independent professional, known as an Advocate.

Children in care and young people with care experience are often expected to contend with a complex array of systems and processes, as well as to engage with a range of professionals and state agencies that most adults would find difficult to navigate. Therefore, their ability to ensure their wishes and feelings are heard, understood, and taken seriously is often impeded.

Independent Advocates are focused solely on the child's views, and they can take all necessary lawful action to assist the child, including supporting them to seek legal advice and representation.

Independence is essential for an Advocate to be able to act on behalf of the child or young person. Effective advocacy is often only possible where children and young people are confident that Advocates are acting exclusively on their behalf and do not have apparent conflicting interests i.e., where they are simultaneously acting on behalf of the state (or another interest).

A child in care or young person with care experience will often seek independent advocacy when their care journey is at a critical juncture where an Advocate can often bring clarity and understanding of the child's perspective, ensuring the child remains the focus throughout their care journey, and supporting child-centred practice.

An Independent Advocate works to uphold a child's right to be heard and ensures that their views are given consideration in their care arrangement, where it is essential to gain a clear picture of their wishes, thoughts, and feelings to ensure success of their placement.

Children have a right to an Advocate to speak on their behalf in their dealings with the care system. This is recognised in UN conventions (such as the UN Convention on the Rights of the Child) and recommended in state inquiries such as the Report of the Commission to Inquire into Child Abuse (better known as the Ryan Report)). [1] [2] Other countries have implemented this right in national law, for example, the United Kingdom enshrined the right to an Independent Advocacy for Children in Care in 1989. [3]

Independent advocacy services already exist in Ireland and have proven beneficial for other marginalised groups. For example, 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 (NAS). [4]
However, the right to independent advocacy for a child in care or young person with care experience has yet to be enshrined in law. Given that the General Scheme of the Child Care (Amendment) Bill 2023 has vindicated the right of a child to be heard in matters that affect them, EPIC believe that role of the Independent Advocate upholds this right and would further the protection and wellbeing of children in care significantly.

Please see our accompanying position paper: Amplifying Voices - Enshrining the Right to Independent Advocacy for Children in Care and Care-Experienced Young people in legislation for more information.

Recommendations:

- Ensure the right of children and young people to express their views and to have them taken into account in **all** decisions affecting them is explicit by referencing all instances where their views should be sought in the Guidelines proposed in *Head 5*.
- Given the legal status of the rights of the child proposed in *Head 4*, the Guidelines in *Head 5* should be subject to law via a statutory instrument.
- Independent advocacy should be recognised in the bill as a means of providing for a child's right to be heard in matters that affect them relating to their care.
    - The development of a statutory framework for advocacy provision should be prioritised, including National Standards and statutory guidance, to improve access to quality independent advocacy services for children and young people in the care system.
    - The commissioning of advocacy services should consider the full range of legislation and regulation, and services should be commissioned on a minimum three-year basis.
    - Statutory authorities should work to make children and young people in the care system, and the professionals and other adults involved in their lives, better aware of independent advocacy services and the benefits these services can bring.

[1] 1 UN Committee on the Rights of the Child (CRC), General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12, available at: https://www.refworld.org/docid/4ae562c52.html [accessed 3 February 2023]
[2] Commission to Inquire into Child Abuse Report, Vol. IV, Dublin, 2009, p.463.
[3] The Children Act 1989[UK]
[4] NAS has a particular remit to work with people with disabilities over the age of eighteen who are in particularly vulnerable situations.

Voluntary Care [*Head 7*]

EPIC welcomes the reviewed proposals regarding Voluntary Care. For a long time, EPIC have highlighted situations whereby children are subject to voluntary care arrangements for prolonged periods that result in precarious care arrangements which are not subject to the same level of scrutiny as other care placements. Children in care require stability, certainty, and clarity and this can be sometimes absent in extended voluntary arrangements. Voluntary care also poses a Constitutional difficulty, where a friction can exist between safeguarding a child and protecting the right to family life.

According to Tusla reports, voluntary care remains the main means of "admission to care" for children, representing 54% of all admissions. [5] While voluntary care can serve a positive function in facilitating non-acrimonious admissions to care, the lack of court oversight and associated absence of mechanisms to facilitate the child's voice has created precarious care arrangements for many of these children, and a 'two-tier' care system.

EPIC welcome measures proposed to address the sometimes-over-extended nature of voluntary care arrangements, particularly subhead [3], which proposes that the Child and Family Agency review the continuation of a voluntary care arrangement no less than every six months.

However, in EPIC's view, these proposals still represent a failure to extend the same rights to children in voluntary care arrangements as are enjoyed by those in other types of care through the option of judicial review, i.e. 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 Guardian *ad litem*.

EPIC believe that many of the inequalities between voluntary care and other care arrangements would be addressed if there were a maximum period allowed in a voluntary care arrangement before judicial proceedings are automatically commenced.

This would allow for independent oversight of the care arrangement, where all assessments detailed in subhead [3] could be reviewed regarding continuation of the care arrangement, yet still retain the flexibility required for voluntary care arrangements to continue, if necessary.

EPIC further welcome provisions in subhead [1] which underline that voluntary care arrangements should be a temporary measure until family reunification can be achieved. However, EPIC has previously highlighted situations whereby unaccompanied minors or separated children who are in circumstances where there is no possibility of reunification can be subject to voluntary care arrangements. In such instances, it should be clarified what order should be sought.

Recommendations:

- Voluntary Care Arrangements should have a maximum period before judicial proceedings are automatically commenced to review the continuation of the arrangement.
- Clarification is required as to the type of care order that should be sought where there is no possibility of reunification.

Duty of relevant bodies to cooperate [*Head 10*]

EPIC welcomes the proposals requiring relevant bodies to cooperate in relation to the development, welfare and protection of a child in care or in relation to young people in aftercare services.

[5] Tusla; *Review of Adequacy Report 2021,* pg. 62.
https://www.tusla.ie/uploads/content/Review_of_Adequacy_Report_2021_Final.pdf

EPIC have long upheld that when the state is acting in loco parentis, there is a duty of care across all relevant Departments and state agencies. However, we observe that the Department of Children, Equality, Disability, Integration and Youth (DCEDIY) and the Child and Family Agency are too often left with responsibility for matters that are better served by Departments and bodies that have the capacity and statutory obligation to do so, such as the Department of Housing and Local Government, the Department of Health, the HSE and others. The impact of this can result in children in care and young people leaving care being left without entitlements critical to their development, welfare and protection.

The new legislation must seek to resolve negative outcomes for children and young adults which occur because of poor inter agency collaboration, or children will continue to be failed by a lack of guidance and the clear, unambiguous delegation of duty which is required to meet their needs.

Recommendations:

- The Ministerial Orders that come from this section should seek to leave no ambiguity in relation to responsibility for a child or young person's care.
- Issues arising particularly in relation to health and housing supports for children and young people with care experience highlight a need for intervention. The Government should prioritise orders to address these significant issues.
- The lack of disaggregated data that reflects outcomes of those who seek these supports is of concern. All orders should outline requirements to publish performance indicators that are publicly accessible so that they may provide evidence for further legislation and policies.
- Children and young people should consistently be consulted throughout the making of orders and their performance.

Support for children temporarily out of home [*Head 8*]

EPIC welcomes the proposals to replace what is currently section 5 of the 1991 Act. In our submission to the review of the 1991 Act, we underlined that section 5 has been used in instances where a child required welfare and protection beyond their immediate need of accommodation which was not forthcoming.

EPIC still question the need for section 5, when an appropriate care placement may be the required and necessary response to the child's circumstances. However, if the Government wish to continue with this policy, it should be subject to strict limitations and cannot be a substitute for timely and effective child protection or welfare intervention.

There is an element of bridging between section 5 and rest of the care system via subhead [4] which should be welcomed, whereby the arrangement will be reviewed every six months and a care arrangement will be considered as an option. However, for children who are 'out of home,' and often in a vulnerable and insecure place, an assessment taking place after six months is too long a period in our view. The section should further underline the requirement for an initial needs assessment to determine whether they are brought into care or temporarily housed.

Due to misalignment between section 5 and the rest of the 1991 Act, those classified under this section are not technically 'in care' and as a result, the child cannot avail of section 45 of the Act (aftercare) as s/he will not meet the criteria. Given the vulnerability that can often come from being homeless during childhood and the subsequent need they may have, EPIC strongly recommend that a child who is deemed homeless and accommodated under section 5, should have this duration considered for the purposes of aftercare eligibility.

Furthermore, this misalignment has also resulted in those being classified under this section not being able to access judicial oversight of their case should this be required. Section 47 of the 1991

Act allows that the District Court may, of its own motion or on the application of any person, give such directions and make such order on any question affecting the welfare of the child as it thinks proper, and may vary or discharge any such direction or order. This section is currently only open to those in care placements, and EPIC recommend that it also be extended to those classed under section 5 so that a child may apply themselves to be brought into care.

EPIC would further recommend the addition of "where possible" to subhead [3] that recognises the complexity of some cases and reflects that it may not be within the bests interests of the child to be returned to their family home in certain circumstances.

We should further note that there is confusion in the Department's notes in both subhead [3] and subhead [5] on whether the state is in acting in loco parentis and if the child is 'in care'. Clarity is needed in this section before enactment.

Recommendations:

- 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.
- A social worker should be appointed for these children and this should be explicit in the section.
- Clarity is needed to identify whether the state is acting in loco parentis in this section, and what duties they assume as a result.
- Section 45 should be amended to reflect that the duration of time spent under section 5 should be considered in the eligibility criteria for aftercare.
- Section 47 should be extended to those classified under this section to apply for directions that may be brought 'into care' if they so wish.

Emergency Care Orders [*Head 14*]

EPIC note the amendments proposed to section 13 of the 1991 Act. This proposal allows for an Emergency Care Order, which currently lasts 7 days, to be extended for a maximum further period of 15 days, replacing the current maximum extension period of 8 days.

It is noted in the General Scheme that the rationale behind this proposal is that eight days may not give the Agency sufficient time to carry out an assessment of the child's circumstances, and that in a particularly complex situation, additional time may be required.

EPIC appreciates the reasoning provided and agree that it takes time to ascertain the complexity of specific situations. However, EPIC also notes that the child can be subject to a stressful, vulnerable situation by virtue of being placed in care and on balance, we must consider the difficulty that an over-extended period may cause a child and if their best interests are being upheld, by virtue of this extension.

EPIC believes this amendment requires further discussion and debate with stakeholders in this space via public consultation.

Recommendation:

This proposal should be subject to further stakeholder consultation prior to being proposed in legislation to examine it more closely.

Interim Care Orders [*Head 17*]

EPIC note the new provision outlined in subhead [3] that allows for Interim Care Orders to be extended to a maximum period of 12 months, with consent.

While this is a welcome move from the current model of consecutive 29-day-extensions, particularly in cases where issues detailed in parental capacity assessments may take a long time to address, 12 months may be too onerous without further judicial oversight during that period and does not allow for consistent validation of the views of the child. EPIC recommend that 6 months may be a more appropriate timeframe.

Recommendation:

While EPIC welcome this amendment, 6 months may be a more appropriate maximum period to allow for a better balancing of the arrangement with the views and best interests of the child.

Significant issues not currently addressed by the General Scheme of the Child Care (Amendment) Bill 2023

Aftercare Eligibility Criteria (section 45)

EPIC are disappointed to see that there have been no provisions relating to the eligibility criteria for aftercare in the proposed legislation. While this may be due to the forthcoming review by Tusla of their *National Aftercare Policy for Alternative Care*, the policies of Tusla, as a state agency, will always be aligned to the provisions of the 1991 Act and therefore, current difficulties within the existing laws cannot be overcome by the policies of a state agency.

The 12-month rule

The Child Care Act, 1991 (as amended) provides criteria which governs the eligibility of a child for an aftercare plan and an aftercare service, outlining as "eligible child" as:

(a) "in the care of the Child and Family Agency and has been in the care of the Agency for a period of not less than 12 months since attaining the age of 13 years", or
(b) "was in the care of the Child and Family Agency for a period of not less than 12 months since attaining the age of 13 years but is no longer in the care of the Agency"; [6]

It is EPIC's view that the criteria that a young person must have spent more than 12 months in care between the ages of 13 and 18 does not reflect the complexity of many children's circumstances.

For example, those that enter care at the age of 17 who account for 9% of the children in Tusla's care are not eligible for aftercare, despite the situation of heightened vulnerability and precarious circumstances that often necessitate their being taken into care at this age, particularly where they have been known to child protection or welfare services previously.

Additionally, unaccompanied minors and those under the Temporary Protection Directive are more often in the upper-teenage range. Based on recent Tusla statistics, almost half of all unaccompanied minors (47%) were 17 years of age on entry into care. [7] This means that many unaccompanied minors fall into ineligibility based on having spent less than 12 months in care.

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[6] Child Care Act, 1991 s (2)
[7] Tusla; *Review of Adequacy Report 2021,* pg. 101.
https://www.tusla.ie/uploads/content/Review_of_Adequacy_Report_2021_Final.pdf

It is EPIC's view that the time spent in the care system is not an appropriate metric for measuring the support a young person may need when leaving care. Duration in the care system should be part of a wider consideration. Currently, a statutory assessment of need can only be conducted on those who are eligible for aftercare services and therefore review of the criteria is timely and necessary.

The Full-time Education Requirement

Section 45 of the Child Care Act 1991 stipulates that a person may be eligible up until the age of 21 or this may be extended up to 23 years of age if their education/training course is not completed by their 21st birthday. [8]

It is welcome that there is acknowledgment for the need for flexibility with regard to supporting a young person beyond the age of 21. However, it is EPIC's view that the requirement that a young person be in education is built upon an unhelpful presumption that education is equally accessible amongst all of those with care experience.

It is our view that aftercare services should aim to be responsive, inclusive, and relevant to each young person's circumstances. While education should be incentivised, it should not dictate eligibility for an aftercare service, and there are other means to support access and retention in further and higher education and training.

Broader Reforms to Aftercare

EPIC have consistently held that Aftercare supports are extended to 26 years of age based on an assessment of need.

The 2022 Eurostat statistics found that the average age for young people to leave their parental home in the EU was 26.4 years. [9] While in Ireland, the average age for young people to leave home was almost 26.9 years of age due to a range of factors including the lack of available and affordable accommodation. This is further cause to reassess the upper limit for aftercare provision given care-experienced young people are made independent at 18 and often lack family and community supports in relation to housing.

The Ombudsperson for Children has also recommended that eligibility criteria should be expanded to include young people beyond the age of 24 where appropriate, regardless of whether the young person is in full-time education. [10] [11]

Recommendations:

EPIC recommends that Aftercare eligibility be brought within the scope of the Child Care (Amendment) Bill 2023 and the following the legislative barriers should be addressed to appropriate and adequate aftercare provision and 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 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 the waiving of the criteria requiring a young person to have spent 12 cumulative months in care.

Unaccompanied Minors

It is the view of EPIC that the link between unaccompanied minors (or separated children) and the Child Care Act, 1991 is underdeveloped and as such, these children do not fit seamlessly into existing mainstream care arrangements and policies.

EPIC have identified some of the following issues that need to be examined, in a dedicated section:

- Unaccompanied minors are often subjected to voluntary care arrangement rather than a full care order [12], which means in practice that they do not have judicial oversight of their arrangement which would allow for them to have their voice heard, and their views considered regarding their care arrangement, and a Guardian *ad litem* appointed. While this may be subject to change due to proposed amendments to section 4, it remains unclear how unaccompanied minors are supported in legislation.
- Unaccompanied minors are currently not afforded the same aftercare support as any other child in care, until such time as the unaccompanied minor's immigration status has been determined. If an unaccompanied minor turns eighteen years of age while their immigration or protection status remains undetermined by their eighteenth birthday, they can be placed in Direct Provision and subject to the support granted to international protection applicants rather than aftercare supports (Currently basic allowance of €38.80 p/w, instead of €300 p/w).

Recommendations:

- To address the confusion of the status of unaccompanied minors in the care system and the overlap between their status as care leavers and international protection applicants, unaccompanied minors should have a dedicated section within the Child Care Act, 1991.
- This should include provisions that address the following:
    - 'Unaccompanied minor' should be defined within the Child Care Act, 1991.
    - Unaccompanied minors should not be brought into care under section 4 of the Child Care Act 1991, other arrangement should be outlined such as when a full care order is appropriate.
    - Unaccompanied minors should be afforded the same aftercare support as any other child in care. No unaccompanied minor should be moved from care to a direct provision centre whilst their immigration status is still pending.

The In Camera Rule (section 31)

Due to the sensitive nature of child care proceedings and the vulnerability of the parties involved, such proceedings are held in camera to protect the privacy of the parties involved under section 29.1.

It is also an offence to publish or broadcast any material which may lead to members of the public being able to identify the children who are the subject to child care proceedings, under section 31. However, with the widespread use of social media as a basic communication tool, particularly by children and young people, this provision is causing increased difficulty for many children in care in relation to their identity. Furthermore, there seems to be a lack of understanding and over reliance on this section as a means of limiting children's ability to have pictures of themselves taken and

[12] Social Work & Society; Arnold, S.; Ní Raghallaigh, M.: Unaccompanied minors in Ireland: Current Law, Policy and Practice; Volume 15, Issue 1, 2017 ISSN 1613-8953;

used, even when they are not identified as being in care. Section 31 in its current form is far too onerous and does not cover the scope of social media as used daily by children, through WhatsApp, Twitter, Snapchat, TikTok, Instagram, YouTube etc. The need to protect the identity of children needs to be balanced against their right to have a voice, to be able to express themselves, to be heard, and to be listened to, to identify themselves and to express their identity in the same way as children who are not in care, under Article 12 and 13 of the UN Convention on the Rights of the Child.

Recommendation:

A new provision should be inserted into the Child Care (Amendment) Bill 2023 that allows for a review of the in camera rule within a reasonable timeframe 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.