
**SUBMISSION TO THE
JOINT COMMITTEE ON CHILDREN, EQUALITY, DISABILITY, INTEGRATION AND YOUTH**

**CONCERNING
THE GENERAL SCHEME OF THE CHILD CARE (AMENDMENT) BILL 2023**

BY

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A. OVERVIEW

- 1.1 This brief written submission concerns the Heads and General Scheme of the Child Care (Amendment) Bill 2023, and it is made to the Joint Committee on Children, Equality, Disability, Integration and Youth (“**the Committee**”).
- 1.2 At the outset, I wish to express my thanks to the Committee for inviting me to participate in the pre-legislative scrutiny process. I was recently appointed by the Government as the Special Rapporteur on Child Protection, and my terms of reference include (a) reviewing and reporting on specific national and international developments for the protection of children, (b) examining the scope and application of specific existing or proposed legislative provisions, and making comments or recommendations as appropriate, and (c) preparing an annual report regarding these matters.¹ A key focus of my role is ensuring that children’s rights principles are embedded in legislative and policy frameworks in order to ensure that Ireland meets its obligations under the UN Convention on the Rights of the Child (“**UNCRC**”) and Article 42A.1 of the Constitution with respect to child protection.
- 1.3 The Child Care (Amendment) Bill 2023 is undoubtedly a significant and important step in reforming and revising the legal and policy framework concerning child welfare and child protection in Ireland. As the Committee is aware, the primary legislation regulating child care policy and processes dates from thirty years ago, the Child Care Act 1991 (“**the 1991 Act**”), much of which was implemented in 1995. The 1991 Act was “*a transformative piece of legislation*”, as Minister Roderic O’Gorman TD has rightly described it.² It fundamentally changed the legal and policy landscape for child care policy and child protection in Ireland, which had previously been governed by a patchwork of long outdated provisions, including the Children Act 1908 – itself a

¹ The full Terms of Reference are set out here: <https://www.gov.ie/en/press-release/5def2-minister-ogorman-welcomes-the-appointment-of-ms-caoilfhionn-gallagher-kc-as-special-rapporteur-on-child-protection/>

² See <https://www.gov.ie/en/press-release/d9872-landmark-review-of-the-child-care-act-1991-receives-approval-to-be-drafted/>

transformative piece of legislation at the time. However, there are multiple shortcomings and concerns regarding the 1991 Act, and it is in urgent need of revision and reform.

- 1.4 As the Committee is aware, these shortcomings and concerns have been the subject of substantial commentary by academics, civil society and others. My predecessor in the Special Rapporteur role, Professor Conor O'Mahony, made substantial criticisms of the 1991 Act in the Thirteenth Report of the Special Rapporteur, submitted in June 2020 and published in December 2020.³ He was particularly critical regarding section 3 of the 1991 Act and its inadequacy in respect of child sexual abuse; and regarding section 24, emphasising the vital importance to making ascertaining the views of children mandatory, rather than a matter of discretion. Since his report, the Child Care (Amendment) Act 2022 has of course been passed, and this is a matter which I will be addressing in my forthcoming annual report.
- 1.5 From my initial review of the Heads and General Scheme of the Child Care (Amendment) Bill 2023, I have some general and specific observations to draw to the Committee's attention. There is much to be welcomed in the Heads and General Scheme, and I support the Government's commitment to seek to ensure that the legislative framework is child-focused. I also have a number of specific observations at this stage, and a number of concerns and recommendations.
- 1.6 I am conscious that the Committee, and stakeholders contributing to the process, are operating under very significant time pressures, an issue noted by the Ombudsman for Children ("OCO") in his written opening statement of 9th May 2023⁴ and by An Cathaoirleach at the close of the meeting on 16th May 2023, referring to the "very tight timeframe". Given the long backdrop to reform of this area of law, and the imperative of avoiding patchwork, piecemeal reform, I support the OCO's point to the effect that,

³ Available at: <https://www.gov.ie/pdf/?file=https://assets.gov.ie/108822/caa4c294-0d99-4d35-8560-c7555588e1ac.pdf#page=null>

⁴ The OCO stated, "while we understand that there is a new protocol in place in relation to the timeframe for Oireachtas Committees to undertake pre-legislative scrutiny of legislative proposals, we are disappointed that this Committee has not been given more time to conduct its pre-legislative scrutiny of the 2023 General Scheme. It is over five years since the review of the 1991 Act started and, given the significance of this legislation for children and families affected by it, we believe the Committee should have been afforded more time to complete detailed scrutiny of the proposals": <https://www.oco.ie/library/opening-statement-by-the-ombudsman-for-childrens-office-to-the-oireachtas-joint-committee-on-children-equality-disability-integration-and-youth-9th-of-may-2023/>

ideally, the Committee would have been afforded more time to complete detailed scrutiny of the proposals. I am grateful to the Committee and staff for all their extensive work in the exacting timeframe to scrutinise the proposals as fully as possible.

B. HEADS AND GENERAL SCHEME

2.1 I welcome and support the Government’s commitment to reform child care and child protection law – reform which is long overdue - and to deliver more child-centred legislation. Children are full rights-holders, and at the heart of any reform should be a focus upon the best interests obligation under Article 3 of the UNCRC, and the rights of children to be heard under Article 12 of the UNCRC. I note that the Minister and the Department for Children, Equality, Disability, Integration and Youth (“**DCEDIY**”) have emphasised their desire to strengthen the voice of the child in decision-making concerning children, both in court settings and in other contexts,⁵ and I support and commend this general approach and commitment.

2.2 Two aspects of the proposals are particularly important, in my view:

2.2.1 First, the approach adopted under Head 4, proposing a new section on Guiding Principles, and the broad proposed approach to those Principles; and

2.2.2 The proposals to enshrine inter-agency communication and inter-agency co-operation in the legislative framework (Head 10).

2.3 Whilst the proposals are in need of further refinement, and much of the devil will be in the ultimate detail, these are, in principle, positive developments, and in keeping with Ireland’s obligations.

2.4 In respect of Head 4, I note that the proposed language, in broad terms, is designed to reflect the UNCRC’s requirements, particularly in respect of Article 3 (best interests) and

⁵ See, for example, the opening remarks of Ms Laura Hynes, DCEIY, at the meeting on 9th May 2023.

Article 12 (the right to be heard). I am of the view that it would be helpful to examine the proposed language in further detail in two respects.

2.5 First, the UN Committee on the Rights of the Child has published a number of helpful General Comments which provide further detail regarding compliance with the UNCRC's provisions. In particular, I highlight the General Comment regarding Article 3.1 of the UNCRC.⁶ It emphasises, at paragraph 6, that the child's best interests is a threefold concept:

- (a) A substantive right: The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general.
- (b) A fundamental, interpretative legal principle: If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen. The rights enshrined in the UNCRC and its Optional Protocols provide the framework for interpretation.
- (c) A rule of procedure: Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the Committee states that "*the justification of a decision must show that the right has been explicitly taken into account... States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's*

⁶ 'General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*,' available at www2.ohchr.org/english/bodies/crc/docs/gc/crc_c_gc_14_eng.pdf.

interests have been weighed against other considerations, be they broad issues of policy or individual cases.”

2.6 This gives rise to specific points which I draw to the Committee’s attention:

- (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 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.

These are important aspects of the Article 3.1 obligation, and small amendments to the proposed language would address these matters.

2.7 Second, I suggest that the standard caveat language of “*in so far as practicable*” in Head 4(1)(g) could be tightened and refined. It is important that the general scheme recognises that decisions may need to be made in urgent and time-pressured circumstances, but I am concerned that the current wording is very broad and open-ended, with a large caveat.

2.8 In principle, I support the aim of Head 10. I note that other stakeholders have expressed concerns regarding the particular proposals made in respect of Head 10, and I anticipate that the Committee will wish to pay particular attention to this during the pre-legislative scrutiny process. I note, also, that a broadly equivalent provision in the UK’s Children Act 2004, sections 10 and 11, have been the subject of criticism in practice. I would be

happy to assist further at a later stage in the process regarding this vital issue of inter-agency communication and co-operation, if of assistance to the Committee.

- 2.9 In respect of Head 5, I support the proposal for provision to be made for more detailed Guidelines to be issued by the Minister. I suggest that consideration should be given to whether a due regard obligation to these Guidelines should be included expressly, whether in Head 5 or elsewhere. Given the importance of these Guidelines, consideration should also be given to whether there should be an inbuilt requirement to consult prior to publication of the Guidelines.
- 2.10 In respect of Head 6, regarding the duty of the Agency, I am surprised to note that matters (a) – (e) do not include the best interests of the child as such. Reference is made to the Article 12 UNCRC obligation to take account of the child’s wishes (point (d)), and to have regard to the principle that it is generally in the best interest of a child to be brought up by their family (point (e)), but there is no equivalent of the general duty in respect of parents’ rights and duties in point (c). This should be amended, to include express reference to the obligation to “*have regard to the rights of children, whether under the Constitution or otherwise*”, or similar language.
- 2.11 A number of the proposals have scope for significant improvement and give rise to concerns. In particular, I have concerns in respect of Head 7 on voluntary care, and I note that a number of other stakeholders have expressed concerns in this regard and/ or made recommendations for amendment, including the OCO, EPIC, TIGALA and Barnardos. Whilst I welcome the proposed provision of information to parents and children regarding the purpose, duration, consent processes and obligations of the Child and Family Agency, I note the concerns raised regarding whether kinship care matters should be addressed under this head, whether there should be a maximum term applied to voluntary arrangements, and the oversight processes for a child in voluntary care. This aspect requires further attention and focus.

- 2.12 Similarly, I agree with other stakeholders regarding the need for further attention to be given to Head 8 and Head 44. I will continue to consider these matters and am likely to address them in my annual report.
- 2.13 Finally, I note that there are certain outstanding matters regarding reform of the 1991 Act not addressed in this General Scheme. I agree with the OCO's request that DCEDIY should provide timelines regarding when they intend to address matters not included in this General Scheme.
- 2.14 I hope that this brief submission is of assistance, and I remain available to discuss these issues further if required. I will continue to pay close attention to the proposals.

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