CEDIY-R-584-23

General Scheme of the Child Care (Amendment) Bill 2023

Observations by the

Ombudsman for Children's Office

June 2023

1. Introduction

The Ombudsman for Children's Office (OCO) is an independent statutory body, which was established in 2004 under the Ombudsman for Children Act 2002 (2002 Act). Under the 2002 Act, the OCO has two core statutory functions:

- to promote the rights and welfare of children up to 18 years of age; and
- to examine and investigate complaints made by or for children about the administrative actions of public bodies, schools and voluntary hospitals that have, or may have, adversely affected a child.

Following publication of the General Scheme of the Child Care (Amendment) Bill 2023 (General Scheme) in April 2023, the OCO welcomed the opportunity to discuss proposals set out in the General Scheme with the Joint Committee on Children, Equality, Disability, Integration and Youth (Joint Committee) during a meeting held on 9 May 2023 as part of the pre-legislative scrutiny process.

These current written observations are by way of follow-up to a number of matters that the OCO raised during our meeting with the Joint Committee on 9 May. We have prepared these observations pursuant to Section 7(4) of the 2002 Act, which provides for the Ombudsman for Children to advise on any matter concerning the rights and welfare of children, including proposals for legislation. The main purpose of these observations is to highlight a number of proposals set out in the General Scheme that are of concern to the OCO and that we therefore believe require further attention.[1]

We hope that these observations may be of assistance to the Joint Committee in its work to complete pre-legislative scrutiny of the General Scheme. In this regard, the Joint Committee may wish to consider these observations alongside the OCO's initial written submission on the review of the Child Care Act 1991 (1991 Act) to the former Department of Children and Youth Affairs in 2018; our follow-up written submission to the Department of Children, Equality, Disability, Integration and Youth (DCEDIY) in 2020; as well as our opening statement for, and contributions to, the meeting of the Joint Committee on 9 May.

[1] The Joint Committee may wish to consider recommendations relating to alternative care that were made by the UN Committee on the Rights of the Child in its Concluding Observations for Ireland published in February 2023. While the recommendations do not explicitly address legislative reform in this area, a number of the recommendations are relevant to issues arising within the General Scheme. UN Committee on the Rights of the Child (2023), Concluding observations on the combined fifth and sixth periodic reports of Ireland, paras. 10(c), 24(b) and (d) and 27 (a) to (i).

2. Areas of concern in the General Scheme

2.1. Proposals under Head 4 in relation to guiding principles

The OCO broadly welcomes the proposal to include a new section on guiding principles in the revised Act. We also welcome the explicit focus under Head 4 on a number of key matters, including treatment of the best interests of the child as the paramount consideration and the right of the child to be heard.

However, we are concerned that two additional core children's rights principles under the UN Convention on the Rights of the Child (CRC) are not reflected under Head 4, namely children's right to non-discrimination (Article 2, CRC) and children's right to life, survival and development (Article 6, CRC). The OCO made recommendations in this regard in our aforementioned submissions in 2018 and 2020. In this regard, we understand that the DCEDIY has given no consideration at all to including the principle of non-discrimination under Head 4. It would also appear that no detailed consideration has been given to more fully incorporating the principle of children's right to life, survival and development under Head 4. We are of the view that further attention needs to be given to the appropriate integration of these two principles in the interests of ensuring that Head 4 provides for a sufficiently comprehensive child rights-based approach to decisions and actions that will be taken under the revised Act.

Based on the explanatory note under Head 4, we understand that the DCEDIY intends the principles of the best interests of the child and the views of the child to be at the centre of any decision-making process or service provision made under the revised Act. It is important to note that the UN Committee on the Rights of the Child underlines that, in addition to being fundamental legal principles, the child's best interests and the views of the child constitute rules of procedure that must be taken into consideration in any decision that will affect a specific child.[2] In this regard, we note that additional references to the child's best interests and/or the views of the child are subsequently made under some, but not all, relevant Heads of the General Scheme and that there are inconsistencies in the use of terminology. In the interests of clarity, consistency and completeness, and for the purposes of ensuring that these core principles and rules of procedure are applied appropriately in all decisions and actions taken under the revised 1991 Act, we encourage specific attention to be given during drafting of the Bill to their full and accurate integration.

As regards giving effect to children's right to be heard, and taking into account children's evolving capacities as well as the sensitivity and complexity of matters that fall within the scope of this legislation, we also encourage further consideration to be given to integrating a right to independent advocacy under Head 4, with a view to ensuring that children can have access to an independent advocate in the context of decision-making relating to their care.

[2] UN Committee on the Rights of the Child, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, CRC/C/GC/14, para. 6 (c); UN Committee on the Rights of the Child, General Comment No. 12 (2009) on the right of the child to be heard, CRC/C/GC/12, para. 2.

2.2. Proposals under Head 7 in relation to voluntary care

The OCO welcomes the obligation provided for under subhead 2 as regards the Child and Family Agency (Tusla) providing information about the proposed nature of a voluntary care arrangement. However, we suggest that the proposals made could be strengthened in a number of ways:

- The provisions need to make it clear that information will be provided to children *and* their parent(s) *and* person(s) acting *in loco parentis*.
- Reference is made under subhead 2(a) to providing an *"information document"*. The wording merits refining for the purposes of clarifying that information must be provided in accessible language and formats and that information provided to children must be child-sensitive and aligned with children's needs and evolving capacities.
- Appropriate provision should be made for access to independent advocacy and legal advice, including for children.

With regard to consent, we welcome the provision made at subhead 2(b) as regards Tusla being required to obtain explicit and informed consent. We suggest that the word 'free' should be added given that a cornerstone of consent is that it is freely given. We further note that no reference is made to children themselves under subhead 2(b). Having regard to children's right to be heard, and taking into account that the best interests of the child are to be treated as the paramount consideration, we suggest that explicit provision should be made for the child to assent.[3]

As the OCO indicated to the Joint Committee during the meeting on 9 May, a key concern that we share with many stakeholders relates to the well-documented risk of drift in voluntary care placements. While we note the DCEDIY's rationale for not including a time limit on the use of a voluntary care arrangement and appreciate that the need for a voluntary care placement may arise in a variety of circumstances, we are concerned that the absence of any provision for a time limit on the use of voluntary care arrangements does nothing to mitigate the risk of drift. In this regard, it is notable that the UN Committee on the Rights of the Child recommended in its Concluding Observations for Ireland in February 2023 that the State should *"establish a maximum duration for the placement or continued placement of children in "voluntary" care."*[4] In our written submission to the DCEDIY in 2020, we proposed that a time limit of 12 months be placed on voluntary care arrangements. We did so on the basis that Tusla should be able to satisfy itself at the conclusion of a 12-month period of voluntary care whether or not it is appropriate to return a child to the care of his/her parent(s) or to place the child in the care of the State. We understand that there may be circumstances where it would serve the child's best interests to extend a voluntary care placement beyond 12 months. However, we do not believe that excluding a time limit on the use of voluntary care from the legislation is an optimal approach to accommodating such circumstances. We suggest that an alternative approach could be to provide both for a time limit *and* for this time limit to be extended in exceptional circumstances where such an extension is in the best interests of the child.

[3] For further information and discussion in relation to this matter, see R. Brennan, C. O'Mahony and K. Burns (2021), 'The rights of the child in voluntary care in Ireland: a call for reform in law, policy and practice', in Children and Youth Services Review 125 105989.

[4] UN Committee on the Rights of the Child (2023), Concluding observations on the combined fifth and sixth periodic reports of Ireland, CRC/C/IRL/CO/5-6, para. 27(b).

As we also noted during the meeting with the Joint Committee on 9 May, an additional concern relates to the provisions made under subhead 3 for the review of voluntary care arrangements. The OCO is firmly of the view that it is not appropriate for Tusla to review itself in these circumstances and, as such, that provision needs to be made for the independent review of voluntary care arrangements. Consideration should also be given to providing for children to have access to an independent advocate or a guardian *ad litem* to support their participation in the review process. Furthermore, and having regard to existing regulations for residential care and foster care placements, we suggest that consideration should also be given to providing for the review of a voluntary care arrangement sooner and more frequently, where an initial independent review would take place within two months of the arrangement first being put in place.[5]

2.3. Proposals under Head 8 regarding children who are 'temporarily out of home'

The OCO is very concerned about several of the proposals set out under Head 8 in relation to children who are *"temporarily out of home"* and urges that serious consideration is given to amending what is provided for.

Subhead 1 obliges Tusla to *"enquire into the child's circumstances."* We suggest that this requirement is insufficient and that consideration should be given to requiring Tusla to undertake an assessment of the child's circumstances, where the details of such an assessment could be set out in the Ministerial regulations proposed under subhead 5.

Subhead 2 refers to *"suitable temporary accommodation"* being made available to a child who has no accommodation. However, Head 8 provides no indicative information about what constitutes *"suitable"* accommodation and subhead 5 does not include any explicit reference to the suitability of accommodation as a matter to be dealt with under the proposed Ministerial regulations. Furthermore, no provision is made under Head 8 for the independent inspection of such accommodation.

While subhead 3 references Tusla supporting children, Head 8 is silent on what specific care and welfare supports, other than accommodation, Tusla will be required to provide to children who are *"temporarily out of home."* We further note that Head 8 is also silent on the matter of children in the care of the State who are temporarily out of home – for example, due to a breakdown in their care placement - and about the supports that will be provided to them while they are placed in temporary accommodation. In this regard, we suggest robust needs assessment, placement planning and placement reviews are essential for all children and that specific attention needs to be given to

[5] See S.I. No. 259/1995 - Child Care (Placement of Children in Residential Care) Regulations, 1995 at section 25 and S.I. No. 260/1995 - Child Care (Placement of Children in Foster Care) Regulations, 1995 at section 18.

the safeguards put in place for children in the care of the State given the State's legal obligations to these children.

The explanatory note in relation to Head 8 clarifies that "*a policy decision has been made not to specify a lower age limit"* for children who may be accommodated by Tusla under a revised section 5. Subhead 5 indicates that Ministerial regulations *"may"* be made in respect of the operation of a revised section 5 and that such regulations *"may"* specify the minimum age at which it is appropriate for Tusla to apply a revised section 5 to a child. The OCO is of the view that, given the vulnerability of children in these circumstances, it would be preferable to specify a minimum age within the legislation itself.

Similarly, Head 8 does not prescribe a maximum length of time that a child may be placed in temporary accommodation. While subhead 5 indicates that a time limit may be specified by Ministerial regulations, the discretionary nature of the language used does not offer a robust safeguard. It is very concerning that the provisions made under subhead 4 contemplate that a child could be placed in temporary accommodation for 6 months and that such an arrangement could continue for longer than 6 months. Given the vulnerability of children in these circumstances and the precarity of the circumstances themselves, it appears to the OCO that six months is a very long time for a child to be placed in temporary accommodation. Furthermore, reviews of such placements should be independent and should take place sooner and more frequently than at six-month intervals.

2.4. Proposals under Head 10 regarding a duty of relevant bodies to cooperate

Through our examination and investigation of complaints, we have seen, and continue to see, the serious adverse consequences that deficits in interagency coordination and collaboration can have on children whose needs and circumstances are such that they require supports from more than one State agency. In light of this, and taking into account that the UN Committee on the Rights of the Child has identified coordination as a key general measure for implementing children's rights,[6] the OCO has consistently recommended through our engagement with the review of the 1991 Act that the revised Act should establish a robust statutory duty for agencies with responsibilities for children and families under the 1991 Act to coordinate and collaborate with each other.

The OCO is aware that the DCEDIY has given considerable attention to this matter and we welcome the proposal under Head 10 to establish a statutory duty for relevant bodies to cooperate. However, we are concerned that the proposals under Head 10 are timid, insufficiently child-centred, and have the makings of a missed opportunity. In this regard, we appreciate that Head 10 should not be viewed in isolation from other relevant Heads under the General Scheme (Heads 9, Head 11 and Head 22). We also understand that establishing a statutory duty is not a panacea for addressing what the DCEDIY has characterised as the *"huge challenge"*[7] of interagency working. However, we

[6] UN Committee on the Rights of the Child, General Comment No. 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child, CRC/GC/2003/5, paras. 37-39.
[7] Houses of the Oireachtas, Joint Committee on Children, Equality, Disability, Integration and Youth, General Scheme of the Child Care (Amendment) Bill 2023: Discussion, 9 May 2023, p.33.

believe that the proposals under Head 10 do not adequately mobilise the potential that establishing a statutory duty in primary legislation has to catalyse change. Furthermore, the rationale for the current proposals provided by the DCEDIY during the meeting with the Joint Committee on 9 May lacks sufficient clarity. Firstly, in the absence of further information, it remains unclear why the obligations that some of the relevant bodies concerned have under their own legislation necessarily mitigate against providing for a more robust duty for these bodies to cooperate under Head 10 and, by extension, under the revised Act. Secondly, the DCEDIY suggested that the broad terms in which the duty to cooperate is framed under Head 10 make it *"quite difficult to say legally that somebody shall do something."*[8] It remains unclear why the DCEDIY has decided not to make more specific provisions under Head 10 about what the duty to cooperate will involve and, with that, why, based on its own account, it may be creating a barrier to establishing a more robust statutory duty.

Having regard to Head 10, the OCO is of the view that:

- consideration should be given to strengthening subhead 3, such that the enabling provision regarding cooperation *("may cooperate"*) is supplemented by a positive duty *("may and shall cooperate"* (underlining added));
- the focus on information sharing, while very important, is too narrow in scope and the attendant reference to *"assistance"* under subhead 6(b) is too vague;
- subhead 9 could be fortified by requiring the Minister to make guidelines (*"shall"* instead of *"may"*) and by explicitly requiring relevant bodies to comply with such guidelines, once made.

As we noted during our meeting with the Joint Committee on 9 May, we encourage further consideration to be given to alternative approaches to legislating for interagency coordination and collaboration in the interests of strengthening the statutory duty to cooperate under Head 10.[9] Among the examples that we referenced in this regard were:

- Section 118 of the Policing, Security and Community Safety Bill 2023 – This Bill is at a more advanced stage in the legislative process than the General Scheme. Section 118 falls under Part 3 of the Bill, which is about community safety. It appears to us that the provisions made under section 118, particularly under section 118(2), demonstrate more confidence about the scope that exists to legislate for a positive duty to cooperate.
- Section 60 of the Children and Young People Act (Scotland) 2014 – Section 60 falls under Part 9 of this Act, which focuses on corporate parenting. It is disappointing that the DCEDIY has decided not to pursue the concept of corporate parenting. Notwithstanding this being the case, we believe that section 60 merits attention as it provides a more detailed indicative list of what corporate parents may collaborate on, which is not limited to information sharing and which offers more clarity than the General Scheme's reference to *"assistance"* under subhead 6(b). In this regard, it is noteworthy that among the findings of recent research on implementing a statutory duty on interagency collaboration to ensure

[8] Ibid.

[9] C. Devaney, C. Kealy, J. Canavan and C. McGregor (2021), A review of international experiences in relation to the implementation of a statutory duty for interagency collaboration to ensure the protection and welfare of children (Galway: UNESCO Child and Family Research Centre, National University of Ireland Galway).

the protection and welfare of children is that *"a legislative basis for the duty to collaborate … requires specific wording to ensure clarity and consistency in its implementation*" (underlining added).[10]

2.5. Proposals under Head 44 in relation to Tusla's authority to assess reports

As the explanatory note under Head 44 indicates, this Head is intended to provide an express legal basis for Tusla to receive and assess reports from non-mandated persons and members of the public. Rather than setting out detailed procedures for the assessment and follow-up of reports of harm, it is envisaged that Tusla will be required to determine what procedures are appropriate with regard to the assessment and management of allegations of harm, and to issue guidelines in that regard. It is further intended that these provisions will place current practice, as set out in Tusla's Child Abuse Substantiation Procedure (CASP), on a statutory footing and that this approach will allow Tusla to retain the flexibility to adjust its procedures in line with the jurisprudence of the courts.

As the OCO indicated during the meeting with the Joint Committee on 9 May,[11] the need for robust legislation underpinning the investigation of child abuse has been clearly outlined in considerable detail by the former Special Rapporteur on Child Protection, Professor Conor O'Mahony, in his 2020 annual report. We urge the Joint Committee to give its attention to the recommendations made therein and as regards:

"1. Providing a robust statutory basis for the balance of rights between the person subject to an abuse allegation (PSAA), the complainant and other children who may be at risk of abuse;
2. Separating the investigative function (i.e. receiving and assessing the complaint) from the decision-making function (i.e. on whether it is necessary to share information with third parties such as employers or voluntary organisations);
3. Streamlining the process so as to make it more sensitive to the needs of complainants and to reduce the burden currently imposed on social workers, while maintaining protection for the constitutional rights of the PSAA;
4. Addressing data protection issues so as to provide a clear basis for refraining from notifying PSAAs that complaints have been made against them in cases where the complainant has no desire to engage and where making a notification may place that complainant's safety or well-being at risk." [12]

[10] Ibid, p.89.
[11] Houses of the Oireachtas, Joint Committee on Children, Equality, Disability, Integration and Youth, General Scheme of the Child Care (Amendment) Bill 2023: Discussion, 9 May 2023, p.16.
[12] C. O'Mahony, Annual Report of the Special Rapporteur on Child Protection 2020, pp.35-60.

3. Areas the OCO believes should be included in the General Scheme

3.1. Provision for unaccompanied children

The OCO is concerned that proposals set out in the DCEDIY's 2020 consultation paper regarding the inclusion of specific provisions in the revised Act governing the pathway into care of unaccompanied children have not carried over into the General Scheme.

Unaccompanied children are recognised by the UN Committee on the Rights of the Child as being in a particularly vulnerable situation as these children find themselves outside their country of origin, under traumatic circumstances (e.g. fleeing war, persecution), and having lost connection with their family, often on a long-term basis.

Currently, the only legal provision linking unaccompanied children to childcare legislation in Ireland is Section 14 of the International Protection Act 2015 (2015 Act). There is no additional legislation, which stipulates the nature of the care to be provided to these children. Section 14(2) of the 2015 Act provides that the 1991 Act *"shall apply"* to unaccompanied children in Ireland, but given their invisibility in the Act, decision-making on which part of the 1991 Act to apply rests with Tusla.[13] The current legislative proposals perpetuate this invisibility and do not offer any clarity on which sections of the revised Act are to apply to these children's particularly vulnerable situation. We share Tusla's concern, as expressed during the meeting with the Joint Committee on 9 May, that its legislative role and remit in how it cares for these children needs greater consideration within Ireland's core child care legislation.[14] In sum, we are of the view that these children's rights to protection and assistance need greater consideration within the General Scheme.

During the meeting with the Joint Committee on 9 May, the DCEDIY indicated that it did not make specific provision for unaccompanied children because it wants to protect the equity of care principle, whereby unaccompanied children get exactly the same level of care and are taken into care under the same thresholds as Irish-resident children.[15] However, it is important to recognise that the application of children's right to non-discrimination does not mean identical treatment.[16] Rather, the principle of non-discrimination requires States to actively identify individual children and groups of children the recognition and realisation of whose rights may demand special measures. The UN Committee on the Rights of the Child underscores that this principle does not prevent, but may indeed call for, differentiation on the basis of the different protection needs of unaccompanied children.[17]

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[13] S. Groarke and S. Arnold (2018), Approaches to unaccompanied minors following status determination in Ireland, ESRI Research Series 83; S. Arnold and M. Ní Raghallaigh (2017), Unaccompanied minors in Ireland: Current Law, Policy and Practice, Social Work and Society International Online Journal.
[14] Joint Committee on Children, Equality, Disability, Integration and Youth, General Scheme of the Child Care (Amendment) Bill 2023: Discussion, 9 May 2023, p.6.
[15] Ibid, p. 17.
[16] UN Committee on the Rights of the Child, General Comment No. 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child.
[17] UN Committee on the Rights of the Child, General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin.

Until now, unaccompanied children have typically been taken into care under section 4 of the 1991 Act and, to a lesser extent, under a full care order.[18] Furthermore, Section 5 has been used extensively to accommodate this cohort of children, which means that technically they are not in care. As of 6 June 2023, 244 unaccompanied children are under the care of Tusla; 70 of these children are from Ukraine and the remaining 174 are from other countries. The OCO contacted Tusla in May and June to request information about the section of the 1991 Act under which these unaccompanied children have been taken into care or accommodated by Tusla. However, as of 15 June, we have not received a reply. Tusla informed us earlier in 2023 that, as of 28 February 2023, the 74 unaccompanied children under their care from Ukraine at the time had all been accommodated under section 5 of the 1991 Act.

With the proposed amendments to section 4 set out under Head 7 of the General Scheme, unless Tusla is able to contact the parent of an unaccompanied child (who is often unreachable) to obtain explicit and informed parental consent for a voluntary care arrangement, these children will no longer be placed in voluntary care in future. This is a positive development, as the use of voluntary care for unaccompanied children does not provide for a legal guardian or clear judicial oversight.

However, through our engagement with DCEDIY, our understanding is that Tusla will continue, under the current legislative proposals, to be able to use section 5 to accommodate unaccompanied children. Head 8 of the General Scheme continues to be an interim measure that is designed to provide short-term support for young people through the provision of temporary accommodation. Unaccompanied children are not, in their majority, *"temporarily out of home"*; they find themselves in a foreign country, alone, and often on a long-term basis. Head 8, as currently drafted, does not cater for the complex needs of this cohort of children. Having regard to the DCEDIY's previous intentions, as set out in its 2020 consultation paper, the OCO recommends that further consideration be given to including explicit provisions in the revised Act in relation to the care of unaccompanied children.

3.2. Additional issues

In the OCO's written statement for, and during our meeting with, the Joint Committee on 9 May, we suggested that consideration be given to mobilising the 2023 General Scheme to address a number of other issues. In addition to proposing that consideration could usefully be given to clarifying Tusla's role in relation to children in informal kinship care and in private foster care arrangements, we proposed:

- Prohibiting the placement of children in unregulated accommodation and establishing a statutory duty for Tusla to ensure that there are sufficient appropriate placements within each administrative area, including for children in need of emergency accommodation.

[18] E. Quinn, C. Joyce and E. Gusciute (2014), Policies and Practices on Unaccompanied Minors in Ireland, ESRI Research Series 38, pp. 42-43; Groarke, S. and S. Arnold (2018), Approaches to unaccompanied minors following status determination in Ireland, ESRI Research Series 83, p. 51.

We are deeply concerned about reports of the placement of children in *ad hoc* accommodation such as hotels, Airbnb accommodation, holiday homes and other such accommodation due to there being insufficient care placements available for children. We encourage further consideration to be given to providing for a legislative prohibition on the placement of children in unregulated settings. By unregulated, we refer to settings that are not subject to inspection by HIQA or Tusla. While we recognise that it may be appropriate for some children aged 16 and over to live in semi-independent accommodation that may not be inspected by either agency, we believe that the revised Act should set out minimum standards as regards the type and nature of this accommodation to ensure the safety and welfare of children.

- Requiring that alternative care placements are in proximity to children's former homes and schools, facilitate the joint placement of siblings, and are suitable for additional needs that children may have.

  In Ireland, we know the devastating impact when a child is removed from their siblings, their school and their community. We need to minimise loss when a child is removed from the care of their parent(s). As members of the Joint Committee are aware, survivors of Ireland's industrial schools have provided stark details of their experiences of multiple losses in the Report of the Commission to Inquire into Child Abuse (The Ryan Report).[19] Work to revise the 1991 Act provides an opportunity to make appropriate legislative provision to protect children's relationships with their siblings and their connections to their community and school when they are taken into the care of the State. This type of legislative protection exists in many jurisdictions, with the proviso that any such action must be in the best interests of the child.

- Expressly requiring Tusla to have a system in place to identify and support teenagers at risk of being sexually or criminally exploited.

  We believe that consideration should be given to a system of protection for children who are at risk to themselves through their own actions. The Irish child protection system and associated legislation is rightly directed towards protecting children who may be at risk of harm from adults. We suggest that attention could usefully be given to how the revised Act might expressly and appropriately address the need to provide support to children who are at risk to themselves.

[19] Commission to Inquire into Child Abuse, (2009) Report of the Commission to inquire into child abuse (The Ryan Report), Volume III, Chapter 5 Family Contact. See also the Report's Executive Summary, pp. 13-14 and 25-26.