

Child Law Project

Observations on the Heads and General Scheme of the Child Care (Amendment) Bill 2023

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Introduction

On 19 April 2023, the Minister for Children, Equality, Disability, Integration and Youth published the Heads and General Scheme of the Child Care (Amendment) Bill 2023, which proposes amendments to the Child Care Act 1991. The Child Law Project welcomes this publication and the objectives set out in the General Scheme. We are particularly heartened to see that many of the amendments address issues of concern identified by the Child Law Project.

We appreciate this opportunity to submit observations on the General Scheme to the Joint Committee on Children, Equality, Disability, Integration and Youth. Our observations are based on our experience of attending child care (protection) proceedings across the country. Through this work we observe how the provisions of the Child Care Act 1991 are operating in practice.

We have confined our observations to the Heads of most relevance to our work. Given the tight timeline, we have confined our observations to the published Heads. There are, however, several other reforms that we have identified as necessary to address difficulties in the hearing of child care proceedings and to bring the law into line with international human rights law.

Head 7 Amendment to section 4 – Voluntary Care Agreement

Head 7 amends section 4 of the Child Care Act 1991 which relates to voluntary care agreements.

- **Overall Observation:** We welcome the reforms set out in Head 7 which if enacted would be a vast improvement on the law as it stands. However, we believe the Head could be further strengthened. The Explanatory Note states that the policy intent of Head 7 is to restrict section 4 to circumstances where informed parental consent can be secured. We welcome this approach. 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. We discuss this matter further under Head 15.

Purpose of Voluntary Care: Head 7(1)(a) restates section 4(1) that the Child and Family Agency (CFA) has a duty to take a child into care under a voluntary care agreement where it appears to the CFA that “a child requires care or protection that he or she is unlikely to receive unless he or she is taken into its care”. Subhead &(1)(b) adds an additional requirement that such an arrangement can only be made where “the Agency has a reasonable expectation that the parents of the child, or a person acting in *loco parentis*, will be able to resume care of the child within a reasonable period of time”.

- **Observation:** Head 7(1) restricts the use of voluntary care agreements to circumstances where family reunification is a realistic prospect with a reasonable timeframe. We welcome the refocusing of the objective of voluntary care as a temporary family support measure.

Right to Information: Head 7(2) replaces section 4(2). Head 7(2)(a) places a duty on the CFA 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 (including its purpose; duration; monitoring and review obligations; and procedures for withdrawing consent).

- **Observation:** We welcome this subhead. However, we urge consideration of providing parents with a right to access independent legal advice.

Whose Consent is Required: Head 7(2)(b) places a duty on the CFA to “obtain the explicit and informed consent of the parent having custody of the child or of any person acting *in loco parentis*, prior to taking the child into its care.”

- **Observation:** Head 7(2)(b) and (4) replicate the language used in section 4 that consent must be provided for from either the parent with custody of the child or a person acting *in loco parentis*. 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.¹ This Bill may also be an opportunity to provide a statutory definition of the phrase “any person acting in loco parentis”.²

Withdrawal Arrangements: Head 7(4) is a new provision. It empowers the CFA to maintain a child in care under a voluntary care arrangement “for a period not exceeding 3 working days” in circumstances where a parent withdraws their consent. Head 7(5) provides that the CFA may specify the form a withdrawal notification may take.

- **Observation:** We welcome this subhead.

Length of Agreement & Review: Section 4(3) is retained. It provides that where the CFA has taken a child into its care under this section, it shall be the duty of the CFA to (a) “to maintain the child in its care so long as his welfare appears to the Agency to require it and while he remains a child” and (b) to have regard to the wishes of a parent in the provision of care to the child. The Explanatory Note states that placing a limit on the length of a voluntary care arrangement was omitted to allow “sufficient flexibility” to the CFA. It

1 *O’H v Health Service Executive* [2007] IEHC 175.

2 In *Hollywood v Cork Harbour Commissioners* [1992] 1 I.R. 457 at 465, the High Court interpreted the phrase to mean “any situation where one person assumes the moral responsibility, not binding in law, to provide for the material needs of another”.

continues that to address concerns that some children may drift in voluntary care, Head 7(3) requires the CFA to periodically review the operation of a voluntary care arrangement.

Head 7(3) places a duty on the CFA to review the operation of, and necessity for, a voluntary care arrangement at regular intervals which are no less often than every six months and to assess whether the welfare of the child requires that the arrangement should either continue, the child be reunified with family, or an application be made for a care or supervision order.

- **Observation:** The provision of a statutory duty on the CFA to periodically review a child in care under a voluntary agreement for the purpose of determining if the arrangement should continue is to be welcomed. However, we urge consideration be given to providing independent oversight of such reviews.

In addition, we urge 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 1991 Act. 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.³

We urge that consideration be given to provide in the Bill for an upper time limit on the length of a voluntary care arrangement. The Child Law Project has observed poor practice in this area. See for example a case report published in January 2023: <https://www.childlawproject.ie/publications/care-orders-for-two-children-in-voluntary-care-for-10-years/>

Lost or Abandoned Child: Head 7(6) deletes section 4(4), we discuss this under Head 15.

³ S.I. No. 259/1995 - Child Care (Placement of Children in Residential Care) Regulations, 1995, reg 25 and S.I. No. 260/1995 - Child Care (Placement of Children in Foster Care) Regulations, 1995, reg 18.

Head 15 Amendment of section 16 – Initiation of Proceeding

Head 15 amends section 16 which places a duty on the CFA to initiate proceedings for a care or supervision order where it appear to the Agency that “a child requires care or protection which he is unlikely to receive” unless a court makes such an order.

Head 15(1) inserts references to “an interim care order” into the existing section 16 thereby addressing a current anomaly in this section.

- **Observation:** We welcome this subhead.

Head 15(2) reiterates section 4(4) (with some minor editorial changes) and relocates it to section 16. Head 15(2) reads: “Without prejudice to the provisions of Part II, IV and VI, where the Child and Family Agency takes a child into its care because it appears that he or she is lost, or that a parent having custody of the child is missing, or that the child has been deserted or abandoned, the Agency shall endeavour to reunite him or her with that parent where it appears that his or her welfare requires it.”

- **Observation:** As noted under Head 7, certain cohorts of children who are in not in the care of a parent will no longer be eligible to be admitted to care under section 4. This may include a child whose parent is missing, a child who appears lost or abandoned and an unaccompanied minors or separated children seeking international protection. Under the new model, the admission of such children to care must be by way of a judicial order. This is appropriate.

Head 15(2) reiterates the duty placed on the CFA (under section 4(4)) to endeavour to reunite children who are separated from their parents with those parents. Clarity is needed as to why this subhead is necessary. The identification of a possible family members who could provide care to the child will be explored during the proceedings to grant a care order. In addition, the issue of reunifying with a parent should be a key element of each child’s periodic ‘child in care’ review.

Head 8 Amendment to section 5 – Homeless Accommodation

Head 8 replaces section 5 and includes a new title. Section 5 places a duty on the CFA to make available suitable temporary accommodation for that child in circumstances where the child is not in care and the CFA is satisfied that there is no accommodation the child can reasonably occupy. A child being provided with accommodation under section 5 is not in the care of the CFA, legal responsibility for the child remains with their parent.

- **Overall Observation:** Head 8 does little to strengthen the current legal protections offered to a child who is homeless.

Review: Head 8(4) places a statutory duty on the CFA to review the “provision of temporary accommodation for a child [...] at regular intervals which are no less often than every six months”.

- **Observation:** We warmly welcome the introduction of a statutory duty on the CFA to periodically review the situation of a child in homeless accommodation. However, Head 8 envisages that children will remain in homeless accommodation for longer than six months. This is not appropriate. We urge consideration be given to aligning the timeline with that of the existing CFA policy on section 5.⁴ Current CFA policy states that a child being accommodated under section 5 is entitled to a placement plan and that:

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.*
- iv. A critical change in the young person’s circumstances will warrant a review of the assessment and plan.⁵*

⁴ Tusla, Child and Family Agency (2012) *National Policy & Procedure on the use of Section 5 of the Child Care Act 1991*.

⁵ *ibid*, 6.

Regulation and Safeguards: Head 8(5) provides that the Minister may make regulations in respect of the operation of section 5 which may specify the minimum age at which it is appropriate for the CFA to apply the provisions of this section and the maximum length of time a child may be placed in temporary accommodation.

- **Observation:** We welcome the provision to enable the Minister to make regulations. However, consideration should be given to making this provision mandatory in line with the format adopted under sections 39 to 42 of the 1991 Act. It is disappointing that Head 8 did not set out safeguards on the use of this section. Consideration should be given to amending section 5 to restrict its application to children aged 16 and 17 year. This would bring it in line with the current CFA 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 1991.⁶

6 Tusla, Child and Family Agency (2012) *National Policy & Procedure on the use of Section 5 of the Child Care Act 1991*, 3.

Head 13 Amendment of section 12 – Emergency Powers of the Gardai

Head 13 amends section 12 which empowers an Garda Síochána to take a child to safety where a member of an Garda Síochána has reasonable grounds for believing that there is an immediate and serious risk to the health or welfare of a child, and it would not be sufficient to await the making of an application for an emergency care order or the effecting of a search warrant.

Under section 12(3), once a child has been taken to a place of safety by a member of an Garda Síochána, the Garda must deliver up the child as soon as possible to the custody of the CFA. Head 13(1) provides the Gardaí with an additional option. Following consultation with the CFA, if the child is known to the CFA the Agency may direct the Garda to deliver the child into the custody of a named person in the child’s family.

- **Observation:** We welcome this subhead.

Head 13(2) and (3) amend the timeline set in section 12(4) by which the CFA must make an application for an Emergency Care Order (unless the child is returned to their parent). Under section 12(4) the application must be made “within three days of the date on which the child is delivered” into the custody of the CFA. Head 13 amends this to read within three days or two working days, whichever is longer’. It defines “working day” to mean days other than Saturdays, Sundays or public holidays.

- **Observation:** Head 13(2) extends the length of time a child can be held by the CFA under section 12 emergency powers prior to a hearing for an emergency care order. The Explanatory Note 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 on the difficulties being experienced given social workers and judges are available on weekends to address emergencies.

Head 14 Amendment of section 13 – Emergency Care Order

Section 13 provides for the granting of an emergency care order for a maximum period of eight days. In recognition of the urgency of the situation and the short-term nature of the order, usual procedural safeguards may be dispensed with, including that an order may be granted *ex parte* (section 13(4)(c)) and a judge can direct that the location of the child be withheld from the parents (section 13(7)(i)).

Head 14(1) proposes to extend the duration of the emergency care order to “a period not exceeding 15 days.”

- **Observation:** We urge consideration be given to deleting this subhead. The Explanatory Note states 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.” Further information is needed 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 CFA with an option to apply to the court for an interim care order, which in our experience are rarely refused.

Head 17 Amendment to section 17 – Interim Care Order

Head 17 amends Section 17 which provides for the granting of an interim care order for a period of not exceeding 29 days. There is no limit to the number of times an interim care order can be renewed.

Purpose: Head 17(1) amends section 17(1)(a) and (b) to clarify that an interim care order can be applied for and granted in circumstances where the CFA is applying for a care order but also where it is deciding whether or not it shall make a care order application.

- **Observation:** We welcome this subhead.

One year order on consent: Head 17(3) amends section 17(2)(b) to provide that an interim care order may be granted on consent for a period up to 12 months.

- **Observation:** We welcome the principle of this subhead in that it places an upper time limit on the granting of an interim care order on consent. However, we urge consideration be given to reducing the timeframe specified to perhaps three or six months.

One year limit for renewals: Head 19(4)(2A) provides that the court may continue to grant extension of interim care orders (on consent or otherwise) for periods not exceeding twenty-nine days but the period “shall not exceed 12 months.” Head 19(4)(2D) provides that where a child is under an interim care order for a period which exceeds twelve months and an extension is sought by the CFA or other party, the CFA “shall be required to furnish to the court a report that informs the court of the progress made in relation to the application for a care order under section 18, and the court shall have regard to this report before deciding whether to grant such an application.”

- **Observation:** We welcome this subhead.

Assessment Order: Head 19(4)(2B) provides that the court may on its own motion or upon the application of the CFA, grant an extension of up to 90 days if any assessment into the welfare of the child has commenced or is due to commence, and the court is satisfied that it would be unreasonable to expect such an assessment to be concluded within twenty-nine days. Head 19(4)(2C) defines the types of assessment.

- **Observation:** We welcome this subhead.

Supervision order: Head 17(5) provides for the insertion of a new subsection which clarifies that the court on its own motion may make a supervision order when deciding not to grant an interim care order or an extension of an interim care order.

- **Observation:** We welcome this subhead.

Head 18 Amendment to section 18 – Care Order

Grounds: Under the 1991 Act, the threshold to justify granting an interim care order, care order and supervision order rests on any one of three conditions being met. The three grounds are:

- 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.*

Heads 17(1), 18(1) and 19(1) amend the grounds for the granting of an interim care order, care order and supervision order by merging (c) with (a).

- **Observation:** We urge consideration be given to revisiting this subhead. Clarity is needed on whether the intention is to delete ground (c) under both sections 18 and 19. Clarity is needed on the rationale for this change.

In (a) and (b), the use of the phrase “has been” relates to something that occurred in the past and the phrase “is being” relates to something that is occurring at present. The evidence required for establishing each of the three grounds differs. Evidence under (a) of assault, ill-treatment, neglect and sexual abuse will be based on the condition of the child and his or her home, whether there are injuries, evidence of sexual abuse etc. These are facts. Evidence under (b) of the impairment of a child’s health, development or welfare will also be demonstrable factually, through assessments of the child’s development, medical reports etc.

The nature of the evidence under (c) is that the child’s health, development or welfare is likely to be avoidably impaired or neglected. The likelihood of such impairment in the future cannot be based on any fact, other than on the treatment of this or another child of the family in the past. 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 against 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.

Short care order: Head 18(2) restates the provisions of section 18(2) and 18(3) with minor editorial amendments and specifies that the CFA may make an application for a care order for a period less than 18 years.

- **Observation:** We welcome this subhead.

Written reasons: Head 18(4) amends section 18(2)(b) to provide 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 CFA, the court shall set out the reasons for this decision in writing.”

- **Observation:** We welcome this subhead. We urge consideration be given to extend the duty to provide a written decision to all care orders, setting out the reason the order was made.

Head 19 amends section 19 which provides for the granting of a supervision order.

Head 19(1) and (2) provides that the court may grant a supervision on its own motion including on the expiration of an emergency care order, interim care order and care order.

- **Observation:** We welcome this subhead.

Powers: Head 19(3) amends section 19(2) which clarifies the power of the CFA when visiting a child under a supervision order. This subhead empowers the CFA to visit the child at home, school or other settings and broadens the focus from not just the “welfare” of the child but also the child’s “development”. It empowers the CFA to consult relevant people others and to “ascertain the views of the child without the presence of any parent or person acting in *loco parentis*”. It also extends the role of the CFA to not only “give any necessary advice” but to also “make recommendations” as to the care of the child to the parents.

- **Observation:** We welcome this subhead.

Directions: Head 19(4) replaces section 19(4). It restates the provision that on application of the CFA the court may give directions as to the care of the child to the parent and that these directions may include causing the child to “attend for medical or psychiatric examination, treatment or assessment”. It adds new directions which include 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).

- **Observation:** We welcome this subhead. 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.

Head 19(5) provides for the inclusion of a new subsection which obliges the CFA to consider, during the lifetime of a supervision order, whether the threshold for another type of order has been reached or whether it would be appropriate to apply to have the order discharged.

- **Observation:** We welcome this subhead.

Section 19(3), (5), (6), (7) and (8) are retained. Section 19(5) provides that any person who fails to comply with the terms of a supervision order will be guilty of an offence.

- **Observation:** Consideration should be given to deleting section 19(5). We are not aware of this provision being used.

Other Heads

We welcome the following Heads and provide some initial observations on some.

Head 4 (Guiding Principles): Provides for a set of guiding principles.

- **Observation:** We urge consideration be given to including a reference to the principle from constitutional and European human rights law that intervention in family life must be proportionate.

Head 5 (Guidelines): Enables the Minister to issue and publish guidelines to the CFA to guide the implementation of the 1991 and 2013 Acts.

Head 9 (Amendment of section 7): Places Children and Young People's Services Committees (CYPSC) on a statutory footing.

Head 10 (Duty on relevant bodies to cooperate): Places a duty on relevant bodies to cooperate.

- **Observation:** This provision only places a duty on a body to respond to an information request. We urge consideration be given to strengthening the provision by placing a duty on relevant bodies to collaborate on the planning, delivery and funding of services and activities.

Head 11 (National Child Care Act Advisory Committee): Establishes a high-level National Child Care Act Advisory Committee with a problem-solving focus.

- **Observation:** When developing the terms of reference for this Committee, it would be valuable to identify a referral pathway to allow concerning individuals bodies to identify issues for consideration by this Committee.

Head 16 (Provision of general information by Agency): Places a duty on the CFA to prepare and publish general information in relation to its role and responsibilities with regard to

child care proceedings and to provide information to parents/person acting in *loco parentis* where an application is being made for a care or supervision order.

Head 21 Amendment of Section 25 of Principal Act: Lower the threshold by which a child may be made a party to proceedings.

Head 22 (Assistance to court): Provides that the Court may request the Health Service Executive or other relevant body to be represented in child care proceedings where they may be of assistance to the court in dealing with the case.

Head 23 (Admissibility of hearsay evidence): The Department has indicated its intention to bring a separate Head to Government for approval in relation to admissibility of hearsay evidence from children.

- **Observation:** We welcome this provision. We explored this matter in a 2019 report we authored on Irish and international practice for the then Department of Children and Youth Affairs <https://bit.ly/2ZASpy2> (Theme 5).

Child Law Project

Established in 2012, the Child Law Project examines and researches judicial child care proceedings. We attend and report on District Court child care and High Court special care hearings, relevant Judicial Reviews and wardship cases involving children and young adults who have previously been in care. We operate under a protocol to protect the anonymity of the children and their families subject to proceedings. The Protocol is available on our website at: <https://www.childlawproject.ie/protocol/>

We use information from the cases we attend to identify emerging trends. We also conduct legal and policy analysis and research to identify possible reforms to address the difficulties raised in our court reporting work. We provide information to the public on the operation of the child care system in the courts with the aim of promoting transparency and accountability.

Remit: Our remit is set and limited by section 3 of the Child Care (Amendment) Act 2007 and Regulation No 467 of 2012 which allows organisations named in the legislation to nominate people to attend and report on child care proceedings. Section 6 of the Child Care (Amendment) Act 2022 provides a definition of “relevant documents” which enables us to access documents as part of our reporting work.

Governance and Funding: In 2018, the CCLRP was established as a company limited by guarantee and is governed by a Board of Directors. The CCLRP trades as the ‘Child Law Project’ and prior to 2022 was known as the ‘Child Care Law Reporting Project’. The Child Law Project is funded by the Department of Children, Equality, Disability, Integration and Youth.

Publications: To date, we have published over 859 case reports from our attendance at child care proceedings. We have also published numerous analytical reports drawing on the information in these reports and observations on proposed legislative proposals. All our publications are available on our website <www.childlawproject.ie>

Latest case report: <https://www.childlawproject.ie/publications/>

- CCLRP Ripe for Reform Report October 2021
- CCLRP Observations on Child Care Amendment Bill 2019
- District Court Child Care Proceedings: A National Overview
- An Examination of Lengthy, Contested And Complex Child Protection Cases In the District Court, By Carol Coulter, March 2018
- Final Report, Child Care Law Reporting Project by Dr Carol Coulter November 2015
- Child Care Proceedings: A Thematic Review of Irish and International Practice (Maria Corbett and Carol Coulter, commissioned by DCYA) <https://bit.ly/2ZASpy2>

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