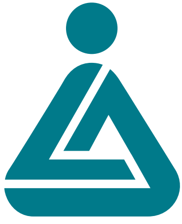

An Bord Um Chúnamh Dlíthiúil
Legal Aid Board
Providing access to justice since 1979

General Scheme of a Child Care (Amendment) Bill

Submission to the Oireachtas Joint Committee on Children, Equality, Disability, Integration and Youth

11th May 2023

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1. Introduction

Who we are

The Legal Aid Board was established by the Oireachtas under the Civil Legal Aid Act 1995[1] for the purposes of providing legal aid and advice to persons of insufficient means in civil cases and a family mediation service. The Board consists of a Chairperson and twelve members appointed by the Minister for Justice and employs approximately 535 staff based between its headquarters in Cahersiveen, Co Kerry, its Dublin support offices in Smithfield and Montague Street, and in 47 law centres and mediation offices throughout the State. Each year the Board legally assists approximately 18,000 new applicants for legal services either through its law centre network or via its panels of solicitors in private practice.

Role of the Legal Aid Board in care proceedings

Article 41.1 of the Constitution of Ireland 1937 provides that:

> *"1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.*
>
> *2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State."*

This of course is balanced against Article 42A.2.1° which provides that:

> *"In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child."*

While the best interests of the child are of course the paramount consideration (and Head 4 will enshrine this into the 1991 Act) it is right and proper, given the State's recognition of the family, that respondent parents are provided the opportunity to engage with proceedings under the 1991 Act. The effect of a making of a care order under the Act (?) is that a child will be taken from his or her parents (possibly until the age of eighteen) and placed in the care of Tusla. From the parents' perspective, this is a very drastic and intrusive order which has significant impact on the rights of parents and, indeed, on the lives of the parents and their child(ren).

In this context, the Legal Aid Board provides legal representation to respondent parents in proceedings under the Child Care Act 1991. Respondent parents seeking

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[1] Though originally established in 1979 under an administrative Scheme of Civil Legal Aid and Advice

legal services in connection with proceedings under the 1991 Act apply at law centres. They must be financially assessed and meet the financial eligibility criteria for civil legal aid services (i.e. have a disposable income of less than €18,000 per annum and disposable capital of less than €100,000 excluding the home in which they live). They do not need to pay a contribution. They must also meet the “reduced” merits criteria (the prospects of success and cost-benefit/reasonableness criteria do not apply and in practice virtually all financially eligible applicants in connection with child care proceedings are granted at least the services of a solicitor).

A significant number of respondent parents avail of the Board’s services each year. Table 1 illustrates the number of applications for legal services involving possible child care proceedings in the period 2018-2022. As can be seen, the number of applications has been about 700 per annum.

Table 1: Number of applications involving possible child care proceedings, 2018-2022

	2018	2019	2020	2021	2022*
No of financially eligible applications	748	755	685	719	719

Source: LAB Annual Reports 2018-2021
** 2022 figures provisional*

The majority of applicants in connection with public law child care matters are provided a service by a law centre. A significant minority of applicants are provided services by a panel of solicitors in private practice. This previously operated as a limited pilot in certain regions. From 1st October 2022 it was established on a permanent basis and extended nationwide. The table below illustrates the extent to which the Panel is utilised. It should be noted that, with the extension of the Panel to a nationwide footing, the numbers referred are likely to increase significantly.

Table 2: Referrals to the Boards (Pilot) Public Law Child Care Panel

	2018	2019	2020	2021	2022*
Referrals	94	71	46	54	88

Source: LAB Annual Report 2021
** 2022 figures provisional*

Why we are interested in the General Scheme
Given its significant role as a leading provider of legal services to respondent parents in care proceedings, the Legal Aid Board welcomes an opportunity to input into the

Committee's pre-legislative scrutiny of the General Scheme. The following pages offer some specific observations and recommendations into particular provisions of the General Scheme, having regard to the vast experience of law centre solicitors as practitioners in this area since the enactment of the 1991 Act.

2. Specific observations in relation to particular provisions of the General Scheme.

Note: in this section "Head" relates to a Head of a Bill contained in the General Scheme, and "Section" unless further qualified relates to a section of the Child Care Act 1991 (as amended or to be amended/inserted by a Bill which may be drafted on foot of the General Scheme)

Head 3 – Definition of Child

Amendment to section 2:
""*child*" means a person under the age of 18 years

The Board supports this amendment and notes that section 33 of the Family Law Act 1995, which permitted marriages of children with the consent of the Circuit Court, has been repealed since 1st January 2019 and at this point there are unlikely to be any legally valid marriages involving children.

The Board would observe that provision might be made for persons who have reached the age of eighteen and who have aged out of the child care system, to ensure that such persons do not become homeless and that appropriate aftercare is provided. It should also be considered whether, if a person leaving care becomes a relevant person for the purposes of the Assisted Decision Making (Capacity) Act 2015, a duty should be placed on Tusla to assist the child in entering into an appropriate assisted decision making arrangement, including the making of a Part 5 application in appropriate circumstances.

Head 4 – Guiding principles

New Section following section 2 [2A]

"The Principal Act is amended by the insertion of the following section after section 2
:
"Guiding principles
(1) A person, as defined under subhead [3], when performing a function under this Act, shall have regard to the following guiding principles:

(a) The best interests of the child are the paramount consideration;

(b)The Child and Family Agency, or an organisation with which the Agency has entered into an arrangement for the provision of services,

should have regard to the benefits of providing family support services, or other activities to support and encourage the effective functioning of families, as soon as reasonably practicable;

(c) Unless the safety and welfare of the child is likely to be prejudicially affected, it is generally in the best interests of a child to be brought up in his or her own family, where appropriate;

(d) Where a child is capable of forming his or her own views, the child shall participate in the decision making process by being -

(i) consulted in relation to decisions about their care and protection,

(ii) advised that he or she is entitled to express their views in relation to such decisions, and

(iii) facilitated in expressing any views that he or she wishes to make known;

(e) Due weight shall be given to such views as the child wishes to express, having regard to the age and maturity of the child;

(f)The parents of a child, or a person acting in loco parentis, shall be facilitated, where appropriate, and in so far as practicable, to participate in a decision making process concerning the care and protection of the child, and the person making the decision shall give due weight to any views that the parents or person acting in loco parentis wishes to express but shall not be bound by them;

(g) Decisions concerning the care and protection of the child, in so far as practicable, shall –

(i)support and promote the development, welfare and protection of children,

(ii) support and encourage the effective functioning of families,

(iii) be made expeditiously so as to avoid any unreasonable delay which may be contrary to the best interests of the child,

(iv) include consideration of -

(I) whether a care placement meets the needs of the child,

(II)the impact on the child of any decisions regarding a placement, and

(III) the benefits to that child of a stable care placement.

(h) Children should be provided with opportunities to participate in activities designed to promote their wellbeing, and if appropriate, a body under this Head should take such action as is reasonably practicable to assist children to –

(i) access such opportunities as it may provide;

(ii) make use of services, and access support, which it delivers, and

(iii) take such other action as it considers appropriate for the purposes of improving the way in which it exercises its functions in relation to children.

(2) In determining what is in the best interests of the child, a person referred to in subhead (1) shall have due regard to:

(a)the child’s age, maturity and any special characteristics of the child;

(b) the benefit to the child of having a meaningful relationship with his or her parents, siblings, and with any other relatives and persons who are involved in the child’s upbringing and, except where such contact is not in the child’s best interests, of having sufficient contact with them to maintain such relationships;

(c)the views of the child where h e or she is capable of forming, and has chosen to express, such views;

d) the physical, psychological and emotional needs of the child, taking into consideration the child’s age and stage of development and the likely effect on him or her of any change of circumstances;

(e) the history of the child’s upbringing and care, including the nature of the relationship between the child and each of his or her parents and the other relatives and persons referred to in paragraph (b);

(f)the social, intellectual and educational needs of the child;

(g) the religious, spiritual, cultural and linguistic upbringing and needs of the child, and

(h) any harm which the child has suffered or is at risk of suffering, including harm as a result of household violence, and the protection of the child’s safety and psychological well-being.

(3) A person under subhead (1) includes:

(a) the Child and Family Agency, and

(b)a service provider, statutory body or public body with which the Agency has entered into an arrangement for the provision of child and family services

.

(4)In this section:

‘household violence’ has the same meaning as it has in section 31(7) of the Guardianship of Infants Act 1964

.

‘service provider’ has the same meaning as it has in section 56(15) of the Child and Family Agency Act 2012

The Board welcomes the setting out of guiding principles in relation to the legislation. In light of the insertion of Article 42A of the Constitution (inserted by the Thirty-First Amendment of the Constitution Act 2015) it is right and proper that the spirit of the amendment is now being placed front and centre in relation to the 1991 Act. It is observed however, that in relation to the views of children and parents, that there is a statement that the views of parents are to be given due weight "but the court shall not be bound by them" whereas no such qualification is placed in respect of the views of the child (which are simply to be given due weight). It is not certain whether it is intended to suggest that the views of the child should be held to be superior to the views of the parents.

A question arises as to whether there should be a distinguishment, in terms of obtaining the voice of a child, between a child to whom a guardian *ad litem* has been appointed and a child who does not, on the basis that the part of the role of the guardian *ad litem* is to advise the court of the child's wishes and feelings.

Head 5 – Guidelines

New section following section 2 [2B]

"Guidelines
(1) The Minister may issue guidelines to the Agency for the purpose of providing practical guidance in respect of the implementation of the Principal Act. or under the Act of 2013.

(2) The Agency shall submit, when required by the Minister to do so, a report on the operation of specified sections of the Principal Act
for the purpose of –

(a) informing the development of guidance under subhead [1],] or

(b)monitoring and assessing how guidance issued under subhead [1] is being implemented.

(3) A report under subhead [2] shall be made in such form, and within such period as specified in the requirement from the Minister.

(4) Guidelines issued under subhead [1] may include general guidance
in relation to payments to any person by the Agency under this Act, or under the Act of 2013 , or otherwise

(5) The Minister shall publish guidelines under subhead [1] in such manner as he or she considers appropriate."

The Board welcomes this proposed provision and particular the provision for publication of such guidelines. It would also be welcome if Tusla were required to publish the reports furnished to the Minister.

It is noted that the court is often asked to make a direction to assist the provision of particular funding – this is arbitrary and if this is being done on a nationwide basis may provide for unfair use of state funds skewed in relation to judicial intervention rather than best practice by Tusla.

Head 7 – Voluntary care

Substitution of the existing section 4 for the following:

"4. (1) Where it appears to the Child and Family Agency that –

(a) a child requires care or protection that he or she is unlikely to receive unless he or she is taken into its care ,and

(b) 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,

the Agency shall take the child into its care under this section.

(2) Where the Agency proposes to take a child into care under this section it shall -

(a) provide an information document to the child, the parents of the child or the person acting in loco parentis which sets out the proposed nature of the voluntary care arrangement and includes information in relation to –

(i)the purpose and proposed duration of the proposed voluntary care arrangement

,

(ii)the obligations on the Agency to monitor and review such an arrangement, and

(iii) the procedure for withdrawing consent to such an arrangement, and

(b) 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

(3) The Child and Family Agency shall review the operation of, and necessity for, a voluntary care arrangement at regular intervals which are no less often than every six months and on foot of such a review, the Agency shall assess whether the welfare of the child requires that

(a) the voluntary care arrangement should continue ,

(b)the child should be returned to his or her parents or the person acting in loco parentis, or

(c) an application for an interim care order, a care order, or a supervision order in respect of the child pursuant to its obligations under section 16 of the

Principal Act is required.

(4) In circumstances where a parent, or a person acting in loco parentis, notifies the Agency of the withdrawal of their consent for a voluntary care arrangement made under this section, the Agency may maintain the child in its care for a period not exceeding 3 working days, from the receipt of such a notification

(5) A notification under subhead (4) shall be in such form as the Agency may specify."

This Head substitutes the existing section 4, relating to voluntary care, with updated provisions. The Board's primary concern here relates to the provision whereby Tusla may continue to maintain a child in voluntary care (new s4(4)) for up to three days following notification of the withdrawal of consent for the arrangement. While acknowledging that there are practicalities to arranging the return of the child, and that Tusla may require time to decide whether or not to apply for a care order, there must be questions as to whether a child can really be regarded as in "voluntary" care in circumstances where the parents have withdrawn consent to the arrangement. There is a possibility that this may be open to challenge or indeed that it would be open to a parent to make an Article 40 application in such circumstances.

It should be made clear to the parents, in advance of a voluntary care arrangement, the manner in which notification under s4(5) can be made.

Finally, it is noted that voluntary care arrangements may be made in circumstances where it is made clear to the parents that if a voluntary care arrangement is not acceded to the fall back will be to apply for a care order. This factor needs to be considered. A potential solution might be to place a duty on Tusla to allow the parents to obtain legal advice as to the nature and consequences of the arrangement before proceeding with it.

Head 8 – Support for children temporarily out of home

Substitution of the following for section 5

" (1) Where it appears to the Child and Family Agency that there is no accommodation available to a child that he or she can reasonably occupy, the Agency shall enquire into the child's circumstances.

(2) If following an enquiry into the child's circumstances under subhead [1] , the Agency is satisfied that there is no accommodation available to the child which he or she can reasonably occupy, unless the child is received into the care of the Agency under the provisions of this Act, and having due regard to the age and maturity of the child, the Agency shall take such steps as are reasonable to make available suitable temporary accommodation for that child while he or she remains a child
.

(3)Where the Agency is supporting a child under this subhead, it shall engage with the child and the child's family in an effort to support the child's return to the place where they ordinarily reside.

(4) The Agency shall review the provision of temporary accommodation
For a child under this section, at regular intervals which are no less often than every six months, and on foot of such a review the Agency shall assess whether to –

(a) continue with such an arrangement;

(b) return the child to his or her parents or the person acting in loco parentis ;

(c) place the child in a voluntary care arrangement under section 4,
or
(d)apply for an interim care order, a care order or a supervision order in respect of the child pursuant to its obligations under section 16 of the Principal Act.

(5)The Minister may make regulations in respect of the operation of this section and such regulations may -

(a) specify the minimum age at which it is appropriate for the Agency to apply the provisions of this section to a child;

(b) specify the maximum length of time a child may be placed in temporary accommodation, and

(c) make provision for such other matters as the Minister considers appropriate

The Board welcomes this provision but suggests that arrangements should be reviewed sooner than six months. It also suggests that temporary accommodation should cover a situation where it is dangerous for a child to remain in their home due to violence or other threatening behaviour where the safety of others is at risk. This should also cover a situation where the child is a danger to themselves.

Head 9 – Children and Young People's Services Committees

Substitution of the following for section 7

"(1) The Child and Family Agency may establish Children and Young People's Services Committees within a geographical area.

(2) A Children and Young People's Services Committee that was established on an administrative basis prior to the commencement of this section shall be deemed to have been established by the Agency in compliance with subhead (1) of this section.

(3) The functions of a Committee shall be to:

(a)support and facilitate co-ordination and collaboration between public bodies

and other organisations in the planning and delivery of services to children and young people in the Committee's functional area;

(b)undertake an assessment of the needs of children and young people in the Committee's functional area at least every 3 years, which shall include consultation with children and young people;

(c) prepare, adopt and publish a plan (to be referred to as a "Children and Young People's Services Plan ") every 6 years which shall outline the programme of measures taken or proposed to be taken by organisations participating in the Committee, individually or jointly, to meet the needs of children and young people within the Committee's functional area;

(d) undertake a review of the Plan, at intervals of not more than 3 years after the Plan is published and, if the Committee considers it necessary after any such review—

(i) amend the Plan, or

(ii) prepare and adopt new elements of the Plan;

(e) co-ordinate, manage and oversee the implementation of specific children and young people's programmes where the Committee has agreed to do so on behalf of a public body, voluntary, business or community group, and to ensure that any plans and strategies related to those programmes are implemented in accordance with the overall objectives of the Plan;

(f)not later than 31 March in each year, prepare, adopt and submit to the Agency a report in relation to the performance of its functions during the immediately preceding calendar year;

(g)provide information, other than the report prepared under subsection (c), in relation to the performance of its functions to the Agency, when requested to do so by the Agency.

(4) The membership of a Committee shall include one or more representatives from the following public bodies, or from a body under their remit:

(a) the Child and Family Agency;

(b)the local authority in whose administrative area the Committee is located;

(c) the Education and Training Board within the administrative area of the Committee;

(d) the Health Service Executive;

(e) the Garda Síochána;

(f) the Department of Tourism, Culture, Arts, Gaeltacht, Sport and Media;

(g) the Department of Education;

(h)the Department of Justice;

(i) the Department of Social Protection.

(5)At the discretion of the Committee, and subject to any guidance issued by the Minister under subhead [7] the membership of the Committee may also include representatives from:

(a) local community or voluntary bodies which provide services to children and young people within the area of the Committee.

(b) public bodies involved in the delivery of services to children and young people who are not listed in subhead (3) above.

(c) non-governmental organisations, community-based groups, youth organisations, cultural bodies, sporting bodies and social movements and networks.

(6)The co-ordinator of the Committee shall seek nominees to the Committee, from time to time, in accordance with subheads [4] and [5] and any guidelines issued by the Minister for that purpose.

(7)The Minister may issue guidelines relating to the performance by Committees of their functions under this Act, and, without prejudice to the generality of the foregoing, such guidelines may —

(a) address the resourcing and staffing of Committees by the Agency;

(b) address the operation of Committees and sub-committees;

(c) address the procedures that are to apply to the appointment of the Chairperson, Vice-Chairperson and ordinary members and their functions;

(d) address the format of Plans and annual reports prepared by Committees and their publication.

(8) In this subhead:
'children and young people' means persons under the age of 24;

'children and young people's programme' means any action, intervention, programme, scheme or any other support, financial or otherwise, which is concerned with promoting the interests of local children and young people;

'functional area of a Committee', in relation to a Committee, means the area to which the Committee relates"

The Board welcomes this section and suggests that it should be added to the list of bodies included in s4 who are entitled to nominate a member to a Committee.

Head 11 – National Child Care Act Advisory Committee

New section 7B

“ (1) As soon as may be after the commencement of this section, the Minister for Children, Equality, Disability, Integration and Youth shall establish a group to be known as the National Child Care Act Advisory Committee, referred to in this subhead as the “National Advisory Committee”.

(2) The Minister shall appoint a chairperson and deputy chairperson of the National Advisory Committee.

(3) The National Advisory Committee shall consist of the following ordinary members, each of whom shall be appointed by the Minister:

(a) an officer or officers of a Minister of the Government, nominated by the relevant Minister of the Government having charge of the Department of State concerned;

(b) a member of An Garda Síochána nominated by the Commissioner of An Garda Síochána;

(c)an employee or employees of the Child and Family Agency nominated by the Chief Executive Officer of the Agency;

(d) an employee or employees of the Health Service Executive nominated by the Director General of the Health Service Executive;

(e) such other persons as the Minister considers appropriate.

(4) The Minister, when appointing a member of the National Advisory Committee, shall specify such member’s term of membership of the Committee.

(5) The Minister in consultation with relevant Ministers, shall give a direction in writing to the National Advisory Committee that will set out its programme of work

(6)A direction by the Minister under subhead [5] shall be given at intervals Of not less than twelve months.

(7) A programme of work under subhead [5] shall identify the operation of a specific section or sections of the Principal Act for the National Advisory Committee to examine
.
(8) The Minister may amend, revoke or issue an additional direction to the National Advisory Committee under this Head.

(9)The National Advisory Committee shall comply with a direction given to it under

this Head.

(10)The National Advisory Committee shall have all such powers as are necessary or expedient for the performance of its functions.

(11) The functions of the National Advisory Committee
shall be to:

(a) examine matters identified by the Minister in the annual direction,

(b) identify any issues in relation to the implementation of the relevant provision of the Principal Act, and

(c)make recommendations to the relevant Ministers which are to be set out in the annual report to be prepared under subhead 14

(12) The Minister may make regulations concerning the operation and procedures of the National Advisory Committee and without prejudice to the generality of the foregoing regulations made under this section may-

(a) make provision for the procedures that are to apply to the appointment of the chairperson, deputy chairperson and ordinary members and their functions;

(b) specify the terms and conditions of office of the chairperson, deputy chairperson and ordinary members;

(c) prescribe the public service bodies from which representatives may be appointed to the National Advisory Committee;

(d) prescribe the experience, expertise or other criteria to apply in respect of persons who may be appointed to the National Advisory Committee;

(e) make provision in relation to the procedures to apply to the conduct of the business of the National Advisory Committee, and

(f) make provision in relation to the procedures to apply to subgroups of the National Advisory Committee, including in relation to the membership and terms of reference of such groups.

(13) The Ombudsman for Children shall review and advise on the recommendations to be prepared by the National Advisory Committee under subhead 11[c].

(14) The National Advisory Committee shall, not later than 4 months after the end of each calendar year, prepare and submit to the Minister a report on the performance of its functions during the preceding year or, in the case of the first such report, the performance of its functions since the date it was established up to and including 31 December of the preceding year.

(15) A report under subhead 14 shall be prepared in such form and contain such information as may be specified from time to time by the Minister.

(16) The Minister shall cause a copy of a report under subhead 14 to be laid before each House of the Oireachtas as soon as practicable after he or she receives it.

The Board welcomes the establishment of the National Advisory Committee and suggests that it should be included in the organisations which are entitled to be represented on the Committee.

Head 13 – Power of Garda Síochána to take a child to safety.

Amended section 12

“**12.**—(1) Where a member of the Garda Síochána has reasonable grounds for believing that—

(*a*) there is an immediate and serious risk to the health or welfare of a child, and

(*b*) it would not be sufficient for the protection of the child from such immediate and serious risk to await the making of an application for an emergency care order Child and Family Agency under *section 13*, an application for a warrant under *section 35*.

the member, accompanied by such other persons as may be necessary, may, without warrant, enter (if need be by force) any house or other place (including any building or part of a building, tent, caravan or other temporary or moveable structure, vehicle, vessel, aircraft or hovercraft) and remove the child to safety.

(2) The provisions of *subsection (1)* are without prejudice to any other powers exercisable by a member of the Garda Síochána.

(3) Where a child is removed by a member of the Garda Síochána in accordance with subsection (1), the member shall -
(a) deliver up the child as soon as possible to the custody of the Child and Family Agency, or

(b) consult with the Agency to determine whether the child is known to the Agency, and in such cases, the Agency may direct the member to deliver the child into the custody of a named person in the child’s family.

(4) Where a child is delivered up to the custody of the Child and Family Agency in accordance with *subsection (3*, (a), or a named person in accordance with subsection (3)(b) the Agency shall, unless it returns the child to the parent having custody of him or a person acting *in loco parentis* or an order referred to in *section 35* has been made in respect of the child, make application for an emergency care order at the next sitting of the District Court held in the same district court district or, in the event that the next such sitting is not due to be held within three days or two working days, whichever is longer of the date on which the child is delivered up to the custody of Agency at a sitting of the District Court, which has been specially

arranged under *section 13(4)*, held within the said three days or two working days, whichever is longer, and it shall be lawful for the Agency to retain custody of the child pending the hearing of that application.

(5) ‘In this section, working day means days other than Saturdays, Sundays or public holidays (within the meaning of the Organisation of Working Time Act 1997).

This provision makes amendments, some technical in nature to the existing s12. One new provision allows the Garda Síochána to consult with Tusla and if the child is known to Tusla they may direct that they be delivered into the custody of a named person in the child’s family. It is not clear what is intended by this provision nor what the status of the child, once left with a member of their family is.

Head 14 – Duration of emergency care orders

Amended section 13(2)

“(2) Where the District Court is of the opinion that there is reasonable cause to believe that any of the circumstances referred to in section 13(1)(a) and (b) continue to exist, the duration of the emergency care order may be extended to a period not exceeding 15 days”

This allows for an extension of an emergency care order for a period not extending 15 days. The necessity for this when the interim care order remedy is available is not clear. It is noted that an appeal of an emergency care order does not stay the operation of the order.

In relation to section 13(2) generally, it is suggested that where emergency care orders are sought in respect of newborn infants, there should be a presumption in favour of keeping the child with its mother in the maternity hospital setting for the normal period that they would be there, unless absolutely necessary and where all other options have been explored, and that this option should be available to the Court.

It also merits consideration as to whether Tusla should be able to apply for a care order in circumstances where it has reasonable suspicion that it is intended to remove the child from the jurisdiction for the purposes of forced marriage or female genital mutilation.

Head 15 – Lost or missing children

New section 16(2)

“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”

It is observed that the new s16(2) may require Tusla to endeavour to reunite a child with his or her parents in circumstances where the child has been deserted or abandoned and the rationale for this is questioned.

Head 17 – Interim care orders

Amended section 17

17.—(1) Where a judge of the District Court is satisfied on the application of the Child and Family Agency that—

(*a*) an application for a care order in respect of the child has been or is about to be made (whether or not an emergency care order is in force), or is under consideration by the Agency and

(b) there is reasonable cause to believe that any of the circumstances mentioned at paragraph (a), (b) or(c) of section 18(1) exists or has existed with respect to the child and that it is necessary for the protection of the child’s health or welfare that he or she be placed or maintained in the care of the Agency pending –

(i) the conclusion of the Agency’s consideration of whether to apply for a care order, or

(ii) the determination of the application for the care order,

the court may make an order to be known and in this Act referred to as an “interim care order”.

(2) An interim care order shall require that the child named in the order be placed or maintained in the care of the Child and Family Agency—

(*a*) for a period not exceeding twenty-nine days, and an extension or extensions of any such period may be granted (with the consent, where an extension is to exceed twenty-nine days, of the persons specified in paragraph (b)) on the application of any of the parties if the justice is satisfied that grounds for the making of an interim care order continue to exist with respect to the child, or

(*b*) where the Child and Family Agency and the parent having custody of the child or person acting *in loco parentis* consent, for a period exceeding twenty-

nine days and an extension or extensions of any such period may be granted (with the consent, where an extension is to exceed twenty-nine days, of the persons specified in *paragraph (b)*) on the application of any of the parties if the judge is satisfied that grounds for the making of an interim care order continue to exist with respect to the child.

(2A) Following an application from any of the parties for a renewal of the interim care order, and where the Court is satisfied that -

(a) an application under section 18 for a care order in respect of the child has been or is about to be made or is under consideration by the Agency, and

(b) grounds for the making of an interim care order continue to exist with respect to the child,

the court may grant an extension for a period not exceeding twenty-nine days, or where the Child and Family Agency and the parent having custody of the child or person acting in loco parentis consent, for a period which shall not exceed 12 months.

(2B)Notwithstanding subsection (2A), where the court is satisfied that –

(a) an application under section 18 for a care order in respect of the child has been or is about to be made or is under consideration by the Agency, and

(b)grounds for the making of an interim care order continue to exist with respect to the child, it may, upon its own motion or upon the application of the Agency, 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.

(2C) For the purposes of subsection [2B], an assessment includes:

(a)an assessment by the Child and Family Agency on whether a child who is the subject of an interim care order has been harmed, is being harmed, or is at risk of being harmed;

(b) a report that is being prepared on any question affecting the welfare of the child;

(c)a report that is being prepared by the guardian ad litem appointed for the child;

(d) a report that is being procured under section 27 or section 35F(2) of this Act.

(2D) Where a child has been under an interim care order for a period which exceeds twelve months, and the Agency or any of the parties to the proceedings makes an application for a renewal of the interim care order, the Agency 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.

(3) An application for an interim care order or for an extension of such an order shall be made on notice to a parent having custody of the child or to a person acting *in loco parentis* except where, having regard to the interests of justice or the welfare of the child, the judge otherwise directs.

(4) Where an interim care order is made, the judge may order that any directions given under *subsection (7)* of *section 13* may remain in force subject to such variations, if any, as he may see fit to make or the judge may give directions in relation to any of the matters mentioned in the said subsection and the provisions of that section shall apply with any necessary modifications.

(5) Where, on an application for an interim care order, or an extension there of,the court is satisfied that-

(a)it is not necessary or appropriate that such an interim care order or an extension to an interim care order be made, and

(b) it is desirable that the child be visited periodically by or on behalf of the Child and Family Agency

the court may, on its own motion, make a supervision order under section 19."

This head makes certain reforms to the making of interim care orders. One particular cause of concern is that an interim care order can now be granted for a period of 90 days for the purposes of carrying out an assessment of the welfare of the child. It is not clear whether subsequent 90 day care orders can be made. It is also noted that an interim care order can be granted on consent to a period of one year. It is not clear how (or if) the court is to satisfy itself that such consent is informed.

Head 18 – Full care orders

Amended section 18

18.—(1) Where, on the application of the Child and Family Agency with respect to a child, the court is satisfied that—

(*a*) the child has been, is being or is likely to be assaulted, ill-treated, neglected or sexually abused,

(*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,

and that the child requires care or protection which he is unlikely to receive unless the court makes an order under this section, the court may make an order (in this Act referred to as a "*care order*") in respect of the child.

(2) A care order shall commit the child to the care of the Child and Family Agency for

so long as he or she remains a child or for such shorter period as the court may determine, on its own motion, or on the application of the Agency.

(2A) Where the court has made a care order in respect of a child that is due to expire before that child has reached the age of 18, it may, of its own motion or on the application of any person, extend the operation of that order if the court is satisfied that grounds for the making of a care order continue to exist with respect to the child.

(2B) Where the court has granted a care order , or an extension to a care order, for a different period than that applied for by the Child and Family Agency, the court shall set out the reasons for this decision in writing.

(3) Where a care order is in force, the Child and Family Agency shall—

(*a*) have the like control over the child as if it were his parent; and

(*b*) do what is reasonable (subject to the provisions of this Act and section 8 of the Child and Family Agency Act 2013) in all the circumstances of the case for the purpose of safeguarding or promoting the child's health, development or welfare;

and shall have, in particular, the authority to—

(i) decide the type of care to be provided for the child under *section 36*;

(ii) give consent to any necessary medical or psychiatric examination, treatment or assessment with respect to the child; and

(iii) give consent to the issue of a passport to the child, or to the provision of passport facilities for him, to enable him to travel abroad for a limited period.

(4) Any consent given by the Child and Family Agency in accordance with this section shall be sufficient authority for the carrying out of a medical or psychiatric examination or assessment, the provision of medical or psychiatric treatment, the issue of a passport or the provision of passport facilities, as the case may be.

(5) Where, on an application for a care order, the court is satisfied that—

(*a*) it is not necessary or appropriate that a care order be made, and

(*b*) it is desirable that the child be visited periodically in his home by or on behalf of the Child and Family Agency,

the court may make a supervision order under *section 19*.

(6) Between the making of an application for a care order and its determination, the court, of its own motion or on the application of any person, may give such directions as it sees fit as to the care and custody of, or may make a supervision order in respect of, the child who is the subject of the application pending such determination, and any such direction or supervision order shall cease to have effect on the determination of the application.

(7) Where a court makes a care order, it may in addition make an order requiring the parents of the child or either of them to contribute to the Child and Family Agency such weekly or other periodic sum towards the cost of maintaining the child as the court, having regard to the means of the parents or either of them, thinks fit.

(8) An order under *subsection (7)* may be varied or discharged on application to the court by the parent required to contribute or by the Child and Family Agency.
(9) Where a care order—

(*a*) has been made in respect of a child and—

(i) during the period for which the care order has effect a special care order or an interim special care order is made in respect of the child, and

(ii) the care order ceases to have effect during the period for which the special care order or interim special care order has effect,

or

(*b*) has not been made in respect of a child and a special care order or an interim special care order has been made in respect of that child,

the Child and Family Agency may apply for a care order in respect of that child during the period for which the special care order or interim special care order has effect.

(10) Where the District Court makes a care order, pursuant to the application referred to in *subsection (9)*, during the period for which the special care order or interim special care order has effect, it shall direct that the care order shall take effect immediately following the expiration of the special care order or, as the case may be, interim special care order.

The Board generally welcomes the reforms made in relation to care orders, the main substantive remedy available under the 1991 Act. The Board believes it would aid understanding and the jurisprudence in this area if the District Court was required to set out reasons in writing its decisions in relation to care orders and if appropriately redacted decisions were published. For that reason, the Board believes that the Court should give reasons for its decisions in all cases and not simply where the Court has granted a care order, or an extension to a care order, for a different period than that applied for by the Child and Family Agency. The Board in not clear on the reasoning for requiring the Court to give reasons only in the latter scenarios.

Head 19 – Supervision orders

Amended section 19

19.—(1) Where the court is satisfied that —

(i) there are reasonable grounds for believing that —

(a) the child has been, is being , or is likely to be, assaulted, ill-treated, neglected or sexually abused,
or

(b) the child's health, development or welfare has been, is being, or is likely to be avoidably impaired or neglected,

(ii) the child requires care or protection which he or she is unlikely to receive unless the court makes an order under this section, and

(iii) it is desirable that the child be visited periodically by or on behalf of the Child and Family Agency,

it may of its own motion or on the application of the Child and Family Agency, make an order (in this Act referred to as a "supervision order ") in respect of the child

(1A) For the avoidance of doubt and subject to subsection (1),following an application from the Agency, the court may make a supervision order on the expiration of -

(i) an emergency care order made under section 13,

(ii) an interim care order made under section 17,

(iii) a care order made under section 18.'

(2) A supervision order shall authorise the Child and Family Agency, on such periodic occasions as the Agency may consider necessary, to:

(a) visit the child at the place where he or she is residing, his or her school, or in a health care setting or another place in order to satisfy itself as to the health, development and welfare of the child;

(b) ascertain the views of the child without the presence of any parent or person acting in loco parentis;

(c) consult with any person whom it reasonably believes may be in a position to assist the Agency and,

(d) give any necessary advice or make recommendations as to the care of the child to the child's parents or to a person acting in loco parentis.

(3) Any parent or person acting *in loco parentis* who is dissatisfied with the manner in which the Child and Family Agency is exercising its authority to have a child visited in accordance with this section may apply to the court and the court may give such directions as it sees fit as to the manner in which the child is to be visited and the Child and Family Agency shall comply with any such direction.

(4) Where a court makes a supervision order in respect of a child, it may, on the application of the Child and Family Agency , either at the time of the making of the order or at any time during the currency of the order, give such directions as it sees fit as to the care of the child, which may require the parents of the child or a person acting in loco parentis to:

(a) cause the child to attend for medical or psychiatric examination, treatment

or assessment at a hospital, clinic or other place specified by the court;

(b) ensure the child is adequately cared for on a day to day basis, which may include directions in relation to the provision of adequate food, warmth, clothing, hygiene and supervision;

(c) cause the child to attend a recognised school on each school day subject to section 17(2) of the Education Welfare Act 2000;

(d) carry out such further actions, as the court may direct, where it is satisfied having regard to the circumstances of the child that it is necessary and in the best interests of the child to do so.

(5) Any person who fails to comply with the terms of a supervision order or any directions given by a court under *subsection (4)* or who prevents a person from visiting a child on behalf of the Child and Family Agency or who obstructs or impedes any such person visiting a child in pursuance of such an order shall be guilty of an offence and shall be liable on summary conviction to a class D fine or, at the discretion of the court, to imprisonment for a term not exceeding 6 months or both such fine and such imprisonment.

(6) A supervision order shall remain in force for a period of 12 months or such shorter period as may be specified in the order and, in any event, shall cease to have effect when the person in respect of whom the order is made ceases to be a child.

(7) On or before the expiration of a supervision order, a further supervision order may be made on the application of the Child and Family Agency with effect from the expiration of the first mentioned order.

(8) Where a supervision order—

(*a*) has been made in respect of a child and—

(i) during the period for which the supervision order has effect a special care order or an interim special care order is made in respect of the child, and

(ii) the supervision order ceases to have effect during the period for which the special care order or interim special care order has effect,

Or

(*b*) has not been made in respect of a child and a special care order or interim special care order has been made in respect of that child,

the Child and Family Agency may apply for a supervision order in respect of that child during the period for which the special care order or interim special care order has effect.

(9) Where the District Court makes the supervision order, pursuant to the application referred to in *subsection (8)*, during the period for which the special care order or interim special care order has effect, it shall direct that the supervision order shall take effect immediately following the expiration of the special care order or, as the case may be, interim special care order.

(10) Where the Agency is visiting a child in respect of whom a supervision order has been made, it shall consider during the course of such a visit–

(a)whether it is necessary to apply to the court for an interim care order, a care order, or a supervision order in respect of the child pursuant to its obligations under section 16 of the Principal Act, or

(b) whether it would be appropriate to make an application to the court for the supervision order to be discharged

This Head reforms the provisions in relating to supervision orders.

It is noted that there is a new power given to the Court to give directions to parents regarding how their children are to be raised. This is a cause of concern in terms of its intrusiveness into the home life of a family. It is to be noted that this point the children concerned are not in the State's care. It effectively changes the role of Tusla, in respect of a supervision order, in that they now may effectively see their role (or part of their role) as being to ensure that the Court's directions are being complied with and to seek a care order if they are not being complied with.

It also appears that the section does not appear to envisage that children might be home schooled (as is the right of parents to do so) and provision should be made in this regard.

Head 23 - Admissibility of hearsay evidence from children

Placeholder and explanatory note

Without a wording for this provision is not possible to make any comment however the Board will obviously have an interest in the proposal as it ultimately develops.

Head 25 – Enhanced rights for foster carers

Amended Section 43A (inserted by Child Care (Amendment) Act 2007

43A.— (1) This section applies to a child in the care of the Child and Family Agency whether in care under *section 18* and whether the child has been placed under *section 36(1)(a)* with a foster parent or under *section 36(1)(d)* with a relative.

(2) On the application of a foster parent or relative with whom the child has been placed, the court may grant an order under this section, but only if it is satisfied that—

(*a*) the foster parent or relative has been taking care of the child for a period of not less than three years beginning on the date of placement in accordance with this Act and ending on the date of application,

(*b*) the granting of the order is in the child's best interests,

(*c*) the Child and Family Agency has consented in advance to the granting of the order,

(*d*) the Child and Family Agency has, on behalf of the foster parent or relative if the child is in its care under *section 4*, obtained the consent to the granting of the order of a parent having custody of the child at the relevant time or of a person (other than the foster parent or relative) acting *in loco parentis* to the child, or

(*e*) the child's wishes have, in so far as is practicable, been given due consideration having regard to the age and understanding of the child.

(3) In determining whether a foster parent or relative has been taking care of a child for the period required by *subsection (2)(a)*, any interruption of the placement during that period shall be disregarded unless the total number of days of interruption, whether consecutive or not, exceeds 30.

(4) The requirement of *subsection (2)(d)* as to the consent or notification of a parent or other person does not apply if—

(*a*) the court is satisfied that he or she is missing and cannot be found by the Child and Family Agency, or

(*b*) the court, having regard to the child's welfare, so directs.

(5) Subject to any conditions or restrictions imposed under *subsection (6)*, an order under this section shall authorise the foster parent or relative to whom it is granted—

(*a*) to have, on behalf of the Child and Family Agency, the like control over the child as if the foster parent or relative were the child's parent, and

(*b*) to do, on behalf of the Child and Family Agency, what is reasonable (subject to the provisions of this Act and of the regulations for the time being in force under this Act) in all the circumstances of the case for the purpose of safeguarding and promoting the child's health, development or welfare and, in particular, give consent to—

(i) any necessary medical or psychiatric examination, treatment or assessment with respect to the child, and

(ii) the issue of a passport to, or the provision of passport facilities for, the child to enable the child to travel abroad for a limited period.

(6) In granting the order, the court may impose any conditions or restrictions it thinks fit as to the extent of the authority of the foster parent or relative to whom the order is granted.

(7) Any consent given by a foster parent or relative of the child in accordance with an order under this section shall be sufficient authority for the carrying out of a medical or psychiatric examination or assessment, the provision of medical or psychiatric treatment, the issue of a passport or the provision of passport facilities, as the case may be.

(8) In the absence of a consent referred to in subsection (5) being given by the foster parent or relative to whom an order under this section was granted, the Child and Family Agency has authority to give consent in accordance with *section 18(3)* in relation to the child.

(9) Nothing in this section or *section 18* shall be construed as making ineffective any consent that, by virtue of section 23 of the Non-Fatal Offences Against the Person Act 1997, would otherwise be an effective consent.

(10) Any arrangement that is in place or order that is in force under *section 37* with respect to access to the child immediately before an order under this section is granted continues in place or in force, unless when granting the order—

(*a*) in the case of an arrangement under *subsection (1)* of *section 37*, the court makes an order under *subsection (2)* of that section, or

(*b*) in the case of an order under *subsection (2)* or *(3)* of *section 37*, the court varies or discharges that order.

(11) *Subsection (10)* is without prejudice to the jurisdiction of the court to make, at any time, an order under *section 37* with respect to access to the child or to vary or discharge such an order, including an order continued or varied pursuant to that subsection.

(12) This section and *section 43B* are without prejudice to any other provisions of this Act, or any provisions of the regulations for the time being in force under this Act, that in the interests of a child in care assign functions to the Child and Family Agency.

(13) For the purpose of this section and *section 43B*, "relevant time" means in relation to a child in care under *section 18*, immediately before a care order was made in relation to the child.

This section reduces the amount of time that foster carers must wait before applying for enhanced rights from five to three years which is welcomed. It is noted that such cases are within the scope of civil legal services.

3. Other general observations

Section 29 (1) of the Act provides that:

> *“Proceedings under Part III, IV, IVA or VI shall be heard otherwise than in public.”*

The Board understands that in some court venues this is interpreted in such a manner that all parties in the list remain in the courtroom while the list is being heard. The Board is concerned that this is not within the spirit of section 29(1). It may be that the provision is clear and that this is down to individual judges or to lack of facilities in court venues for parties to wait outside the courtroom but this needs to be

examined. The Board also is of the view that child care proceedings should, if at all possible be dealt with on separate days to private family law proceedings or, indeed, any other types of proceedings.

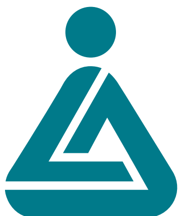
The Board suggests that it might be worthwhile, where appropriate to the circumstances of the case, holding hearings over an appropriate video-conferencing platform that would protect the privacy of the parties and allow them to engage fully with the proceedings.

It may also merit consideration as to whether specific protection needs to be given to the protection of unaccompanied children who apply for international protection in the State.

4. Conclusion

The Board thanks the Committee for being given the opportunity to input into its pre-legislation scrutiny of the General Scheme. The forthcoming legislation offers the opportunity to modernise our child care legislation, after over thirty years in operation. It follows closely on the Child Care (Amendment) Act 2022 which made further and better provisions for guardians *ad litem* which is welcomed.

This submission is commended to the Committee.



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Contact Us

Legal Aid Board
Quay Street,
Cahirciveen,
Co Kerry V23 RD36

Phone: 066 947 1000
Email info@legalaidboard.ie
Website **www.legalaidboard.ie**
Twitter @Legal_Aid_Board