Review of the Child Care Act 1991

Submission to the

Department of Children and Youth Affairs

March 2018

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1. Brief Introduction to the person or organisation making the submission

Founded in 1976, Treoir is the national federation of services for unmarried parents and their children. Treoir, in partnership with its member agencies, has promoted the rights and best interests of unmarried parents and their children through its National Specialist Information Service and by advocating for their rights.

Treoir works to achieve this aim by:

- providing a National Specialist Information Service to unmarried parents, their extended families and those working with them through answering queries, information website, publications and outreach workshops;
- co-ordinating the Teen Parents Support Programme;
- promoting change at every level to achieve constitutional and legal equality for unmarried parents, and to improve services and attitudes to unmarried parents;
- promoting/undertaking research to better understand the situation of unmarried parents and their children in Ireland;
- collaborating with other agencies to promote our aim through the federation of Treoir and agencies outside Treoir

Treoir recognises the diversity of family life in Ireland and that all families, including unmarried families, have the same rights to respect, care, support and protection. In addition, Treoir supports and promotes the rights of all children as outlined in the United Nations Convention on the Rights of the Child.

In 2017 Treoir's National Specialist Information Service responded to over 5,000 calls, a significant number of which were from lone parents, unmarried fathers, extended family and professionals. The recommendations in this submission are based on the experience of those contacting Treoir's National Specialist Information Service.

Summary of Recommendations

2. Promotion of welfare of Children (Part II)

1. Section 4 of the Child Care Act 1991 must be aligned with guardianship rules under current Irish law in order to make clear and specific provision regarding who is entitled to consent to the placement of a child in voluntary care. This alignment should extend to all relevant parts of the Child Care Act 1991. It is critical that professional specialised training is provided.

2. Without a Central Register of Guardianship Agreements the Children and Family Agency may be at risk of breaching their statutory duty to identify and consult all the legal guardians of a child. A Central Register for Statutory Declarations for Joint Guardianship should be initiated and hosted either by the Department of Justice and Equality or the Department of Social Protection. If the State does not legislate for a Central Register of Guardianship Agreements there is a possibility that a non- governmental organisation might initiate one. There is a precedent for this in the adoption area. A non-governmental agency initiated a Voluntary Contact Register for adoptees and birth parents as none previously existed. The Adoption Board eventually took responsibility for hosting the National Adoption Contact Register.

3. Part II of the Child Care Act 1991 to introduce a section that makes compulsory the appropriate provision of information about voluntary care, as well as timely legal advice, that takes into account the vulnerabilities of the recipient parent(s)/guardian(s) and that are independent from the Child and Family Agency. It is also necessary that comprehensive data regarding voluntary care is obtained.

4. Section 3 of the Child Care Act 1991 to expand the functions of the Child and Family Agency to include preventative measures and to promote the least possible State intervention such as supervisory orders. It will explicitly provide

that where the Child and Family Agency estimates that intervention is necessary, it shall first consider whether proper care could be given with the child staying within his/her family with the appropriate supports provided by the agency.

5. Section 3 of the Child Care Act 1991 to explicitly provide that, where a child is in care, the Child and Family Agency shall make every reasonable effort to support the parent(s)/guardian(s) to facilitate reunification. This is in line with section 24 (1) (a) of the Adoption (Amendment) Act 2017, which amends section 54 (1) of the 2010 Act. This provision requires that the Child and Family Agency must be satisfied that every reasonable effort has been made to support the parents of a child before that child can be adopted without the consent of the birth parents. The Adoption (Amendment) Act 2017 provides that where the child's parents have failed in their parental duty to the child for 36 months, the High Court can proceed without parental consent and allow the Adoption Authority to make an adoption order for the child.

6. Part II of the Child Care Act 1991 to provide for the independent supervision of voluntary care arrangements in order to ensure that it is truly a temporary arrangement during which child and family supports are provided and real efforts at family reunification are made. Corbett (2018)[1] suggests as possible oversight models a reformed court process; a quasi-judicial body similar to the Adoption Authority of Ireland; or an independent administrative system.

7. Part II of the Child Care Act 1991 to provide that, after a fixed period of time deemed unreasonably long for a child to be in voluntary care, the Child and Family Agency shall implement appropriate measures to protect these children including pursuing full care orders where appropriate. In addition, a minimum period of notice to withdraw consent to voluntary care shall be mandatory. The period of notice could increase according to the time the child has been in voluntary care. These measures will address uncertainty and maximise the chances of a child to settle in a placement.

[1] Maria Corbett, *Irish Journal of Family Law* (2018) 21(1) I.J.F.L., p. 14

4. Care proceedings (Part IV)

8. Prompt establishment of specialist family court in order to appropriately deal with child protection cases.

9. Judges should be given comprehensive training in relation to issues that are particular to child welfare and development. The Child and Family Agency needs to invest resources to train staff in the law surrounding State intervention in child welfare and protection.

7. Jurisdiction and procedures (Part V)

10. To include a provision stating that the best interests of the child is the paramount consideration in relation to any matter, application or proceedings under the Child Care Act 1991 in line with Article 42A.4.1° of the Irish Constitution which protects children rights. The best interests of the child principle should extend not just to proceedings but also to voluntary care arrangements as well as regulations governing foster care.

    The provision could include a non-exhaustive list of the factors or circumstances that the Court, relevant agencies, bodies and/or authorities shall have regard to when determining the best interest of the child in the context of child care proceedings. These factors will enable them to focus on various aspects of the child's present and future wellbeing when determining his/her best interests in the context of child welfare and protection.

11. To align Section 24 of the Child Care Act 1991 with Article 42A of the Irish Constitution and to make provision in the legislation to ensure that the voice of the child is independently heard, not just in the context of proceedings, but also in child protection measures that are not subject to the supervision of the courts such as voluntary care arrangements.

8. Children in the Care of Child and Family Agency (Part VI)

12. To amend section 43A of the Child Care Act (1991) to mirror Section 6C of the Guardianship of Infants Act 1964 as inserted by Section 49 of the Children and Family Relationships Act 2015. The provision will allow a foster carer/relative who has a child in care for a continuous period of 12 months or more to apply, if in the best interest of the child, for a court order to have specific and limited guardianship rights, subject to periodical reviews, without the withdrawal of support or involvement from the Child and Family Agency. This provision will aim to support children in their day-to-day upbringing while in the care of the State.

    In particular, it could address the circumstances of children who have been in voluntary care for a long period of time - where there is no prospect of reunification - to give a secure foundation and a sense of permanency. The court could make an order dispensing with the consent of a guardian of the child if satisfied that the consent is unreasonably withheld and that it is in the best interest of the child to make such an order.

13. To expand the categories of persons who may have access to a child while in care to explicitly include relatives, legal guardians and a person with whom the child resides or has formerly resided in order to ensure that the child maintains key meaningful relationships.

    To amend Section 37 (1) of the Child Care Act as follows:

    37.—(1) Where a child is in the care of the Child and Family Agency whether by virtue of a voluntary care arrangement under Part II , an order under Part III or IV or otherwise, the Agency shall, subject to the provisions of this Act, facilitate reasonable access to the child by his parents, legal guardians where applicable, relatives, a person with whom the child resides or has formerly resided or any other person who, in the opinion of the board, has a bona fide interest in the child and such access may include allowing the child to reside temporarily with any such person.

2. Promotion of welfare of Children (Part II)

a. Comments including rationale/supporting information

Voluntary Care

Section 4 of the Child Care Act 1991 provides a mechanism whereby parent(s)/guardian(s) may voluntarily place a child in the care of the Child and Family Agency without the involvement of the Court. The latest available statistics show that in 2015, 59% of admissions to care were under a voluntary agreement.

As the less adversarial child protection alternative provided by the Child Care Act 1991, it needs to be promoted as a non-judgemental supportive arrangement for parent(s)/guardian(s) who are experiencing special difficulties, such as medical, psychological, or other circumstances. In addition, a reduction of costs related to child protection court proceedings could lead to more available resources to fund support services for families.

Section 4 (2) provides that the Child and Family Agency is not authorised "*to take a child into its care* ***against the wishes*** *of a* ***parent having custody*** *of him or of any* ***person acting in loco parentis*** *or to maintain him in its care if that parent or any such person wishes to resume care of him.*" In addition, Section 4 (3) (b) states that the Child and Family Agency shall have regard to the wishes of a parent or any person acting *in loco parentis* as to how the care is provided.

"Person Acting in Loco Parentis"

There is no a statutory definition of the term *in loco parentis*. It is generally understood as referring to an individual, not the parent, who assumes parental rights, duties, and obligations without going through the formal process of, for example, adoption of the child. It refers to any situation where one person assumes the moral responsibility to provide for the material needs of another but it is not binding in law.

The term *in loco parentis* is arguably outdated following the commencement of certain provisions of the Children and Family Relationships Act 2015, which have substantially reformed private family law to provide legal recognition to different types of modern families and to create new rights for parents, both biological and non-biological, and for children.

"Parent Having Custody of the Child"

Custody refers to the day- to-day care and control of the child. The concept of custody is distinct from the concept of guardianship. A guardian is entitled to be consulted and to have input into the important decisions of a child's life even though the guardian may not have the day-to-day custody of the child.

In the context of consent, reference to '*parent*' is intended to mean a parent as defined by Section 2 of the Guardianship of Infants Act 1964 and as amended by the Status of Children Act 1987 and the Children and Family Relationships Act 2015. The HSE National Consent Policy clarifies that "***these provisions mean that only a person who is a legal guardian, whether a parent or not, may give consent in respect of his/ her child***".

In order to adhere to best practice, where a child accesses a social care service in the company of an adult, the adult should be asked to confirm that they are the child's parent and/or legal guardian and this should be documented in the child's record. In the event that they indicate that they are not the child's parent and/or legal guardian, contact must be made with the child's parent and/or legal guardian in order to seek appropriate consent.

The key element of Section 4 of the Child Care Act 1991 is that it can not be activated without the appropriate consent. It is important that the Child and Family Agency obtains consent from each legal guardian, whether a parent or not, to admit a child to voluntary care and subsequently to take part in key decisions relevant to the child while in care. Therefore, **Section 4 of the Child Care Act 1991 needs to be updated to reflect guardianship rules under current Irish law**.

Consent to Voluntary Care: Who is a guardian of a child?

The Children and Family Relationships Act 2015 amended the Guardianship of Infants Act 1964 to develop the law relating to the guardianship and custody of, and access to, children. Following the commencement of certain provisions of the Children and Family Relationships Act 2015, there are currently seven types of guardianship:

1. Automatic Guardianship
2. Guardianship by Statutory Declaration
3. Guardianship by Court
4. Non-Parental Guardianship
5. Temporary Guardianship
6. Testamentary Guardianship
7. Guardianship Acquired in Other Jurisdictions

The Children and Family Relationships Act 2015 extends the categories of persons who may apply to court to be appointed a guardian of a child. This could result in a child having more than two legal guardians, if it is deemed to be in the best interest of the child concerned, as the appointment of a guardian will not affect the previous appointment of existing guardians.

Arguably this may have an impact on the demand for State intervention as children may have a wider safety net. However, as the Children and Family Relationships Act

2015 expands the category of persons from whom consent may be sought, it could potentially make the process of obtaining consent quite complex.

For instance, the Children and Family Relationships Act 2015 has amended the Passport Act 2008 to provide that before issuing a passport to a child, the Minister for Foreign Affairs and Trade must be satisfied on reasonable grounds that where the child has two guardians, each guardian of the child should consent to the issuing

of a passport. Where the child has more than two guardians, **not fewer than two of those guardians should consent to the issuing of a passport to the child.**

The HSE National Consent Policy indicates that "*even where both parents/legal guardians have not clearly indicated their wish to be involved in decision making, if the decision will have profound and irreversible consequences for the child, both parents/legal guardians should be consulted if possible*".

It is important to note that a mother's guardianship rights can only be removed if her child is adopted while the court may remove from office a guardian if the court is satisfied that this is in the best interest of the child on application by a guardian or a proposed guardian.

The following is a brief summary of the complexities of guardianship rules under current Irish law, which demonstrates the challenges of obtaining consent from legal guardians to voluntary care.

1. Automatic Guardianship

Where the **parents of the child are or were married**, and the other parent is still alive, **both parents are automatically legal guardians** and therefore are entitled to provide parental consent to voluntary care.

When a child is born to parents who have not married each other only the mother is automatically the (sole) guardian of her child. Often it is mistakenly believed that if the father's name is on the child's birth certificate, this gives him automatic guardianship rights to his child but it does not. **Where the parents are not married, the father's consent is only required if he is a joint guardian of the child.**

The non-marital father **automatically** becomes a joint legal guardian of his child by virtue of cohabiting with the child's mother for 12 consecutive months, including not less than three months after the child's birth. The cohabitation requirement is not retrospective, hence the 12 consecutive months must occur after the 18th of January

2016, the date the provision of the Children and Relationships Act 2015 came into operation.

The three-month period does not have to take place directly after the birth of the child. It can be fulfilled any time before the child turns 18 provided that it is part of the 12 consecutive months during which the parents have resided together. The non-marital father who qualifies for automatic guardianship may apply to the court for a declaration of guardianship to demonstrate he has acquired joint guardianship rights.

2. Guardianship by Statutory Declaration

In addition, a father and mother who are not married can complete and sign the statutory declaration for joint guardianship[2] in the presence of a Peace Commissioner or a Commissioner for Oaths. This form declares that: the parents have not married each other; they are the parents of the child and they agree to the appointment of the father as a joint legal guardian. A separate statutory declaration must be made in respect of each child.

There is no Central Register for Guardianship Agreements. Where a declaration is lost or destroyed there is no evidence of the fact that the father has guardianship rights to his child/children. Treoir has long advocated for the initiation of a Central Register for Guardianship Agreements because of the hardship caused to unmarried fathers and their children when fathers are unable to prove guardianship.

The failure of the State to establish a Central Register was held not to constitute a breach of the child's rights pursuant to Articles 41 and 40.3 of the Constitution and Article 8 of the European Convention on Human Rights. Nevertheless, following the introduction of Article 42A on children's rights into the Irish Constitution, the State could potentially be found liable in a future challenge. Without a Central Register of Guardianship Agreements the Children and Family Agency may be at risk of breaching their statutory duty to identify and consult all the legal guardians of a child.

[2] S.I. No 5 of 1998, The Guardianship of Children (Staturory Declarations) Regulations, 1998

3. Guardianship by Court Order

If the mother does not consent to allowing the father to become a legal guardian then the non-marital father can apply to the local District Court to be appointed a guardian of his child. This is possible whether or not his name is on the child's birth certificate. The appointment shall not affect the prior appointment of any other person as guardian of the child unless the court orders otherwise. A court appointed guardian should act jointly with any other guardian of the child concerned.

Therefore, where the parents are not married, and the non-marital father is not a joint legal guardian by virtue of statutory declaration, cohabitation, court order or guardianship acquired in another jurisdiction, **only the mother is required to provide parental consent as she is the sole legal guardian of the child**. **This applies even if the father's name is on the child's birth certificate**.

4. Non-Parental Guardianship

The Children and Family Relationships Act 2015 enables the court to appoint certain persons, other than a parent, as a guardian where the person:

- is married to, is in a civil partnership with or has cohabited with the child's parent for over 3 years and in each case has shared responsibility for the child's day-to-day care for more than 2 years or

- has provided for the child's day-to-day care for more than 12 months and where there is no parent or guardian willing or able to exercise the rights and responsibilities of guardianship in respect of the child. In this case, **the Child and Family Agency will be on notice of the application and will have the possibility of giving views.**

Where the court appoints an eligible person as a non-parental guardian of a child, and one or both of the parents of that child are still living, the non-parent will generally have restricted powers. The court must expressly order the specific listed

statutory rights and responsibilities the non-parent guardian shall enjoy as well as the extent and the limitations.

These rights could include all or some of the listed statutory guardianship rights such as to provide consent under specified enactments related to children such as child passport application; to consent to medical, dental and other health related treatment for the child in respect of which a guardian's consent is required; to decide on the child's place of residence or to make decisions regarding the child's religious, spiritual, cultural and linguistic upbringing.

5. Temporary Guardianship

In addition, the Children and Family Relationship Act 2015 enables a qualifying guardian to nominate a person to act as a temporary guardian in the event of the qualifying guardian becoming incapable of exercising the rights and responsibilities of guardianship through illness or injury. A qualifying guardian in relation to the child means a person who is a guardian of that child and who:

- is a parent of the child and has custody of him or her or
- not being the parent of the child has custody of him or her to the exclusion of any living parent of the child.

The qualifying guardian can specify limitations on the listed statutory guardianship rights and responsibilities to be exercised by the temporary guardian. The nominated person can apply to the court to act as a guardian if the qualifying guardian is subsequently incapacitated. **The Child and Family Agency, any other parent or guardian and the qualifying or the nominated person as applicable, must be put on notice**. The appointment will be subject to the court's approval.

6. Testamentary Guardianship

A guardian who is the parent of a child, or not being the parent of the child has custody of him or her to the exclusion of any living parent, may appoint by deed or

will a testamentary guardian to act on his/her behalf in the event of his/her death before the child is 18.

7. Guardianship Acquired in Other Jurisdictions

Section 49 of the Children and Family Relationships Act 2015 provides that a person should be a guardian of a child where the rights and responsibilities equivalent to guardianship were acquired in another State.

RECOMMENDATION:

Section 4 of the Child Care Act 1991 must be aligned with guardianship rules under current Irish law in order to make clear and specific provision regarding who is entitled to consent to the placement of a child in voluntary care. This alignment should extend to all relevant parts of the Child Care Act 1991. It is critical that professional specialised training is provided.

RECOMMENDATION:

Without a Central Register of Guardianship Agreements the Children and Family Agency may be at risk of breaching their statutory duty to identify and consult all the legal guardians of a child. A Central Register for Statutory Declarations for Joint Guardianship should be initiated and hosted either by the Department of Justice and Equality or the Department of Social Protection. If the State does not legislate for a Central Register of Guardianship Agreements there is a possibility that a non-governmental organisation might initiate one. There is a precedent for this in the adoption area. A non-governmental agency initiated a Voluntary Contact Register for adoptees and birth parents as none previously existed. The Adoption Board eventually took responsibility for hosting the National Adoption Contact Register.

Informed Consent

As voluntary care arrangements are not subject to the supervision of the courts, there is no scrutiny of this child protection measure and therefore there is a serious lack of publicly available data. The circumstances surrounding how consent to voluntary care is arrived at and whether parent(s)/guardian(s) have the capacity to

understand the consequences of such a decision are unknown. For instance, what type of information and legal advice, if any, is available; particularly if the legal parent(s)/guardian(s) suffer from an intellectual disability, mental illness or addiction; and where there are literacy or language barriers.

Based on the experience of those contacting Treoir's National Specialist Information Service, it appears that often vulnerable parent(s)/guardian(s) do not understand the voluntary care agreement and on occasion they may feel they have been coerced to enter it. There is arguably a conflict of interest if the Child and Family Agency provides directly any information or advice. In addition, it appears that although Civil Legal Aid is available, the Legal Aid Board prioritises cases involving care proceedings over voluntary agreements therefore there are significant delays in obtaining this support.

RECOMMENDATION:

Part II of the Child Care Act 1991 to introduce a section that makes compulsory the appropriate provision of information about voluntary care, as well as timely legal advice, that takes into account the vulnerabilities of the recipient parent(s)/guardian(s) and that are independent from the Child and Family Agency. It is also necessary that comprehensive data regarding voluntary care is obtained.

Family Support During Voluntary Care

Article 42A 2.1° states: "*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."*

In addition, Section 3 (*c*) of the Child Care Act 1991 states that the Child and Family Agency should promote the welfare of children and in the performance of this

function shall have regard to the principle that it is generally in the best interests of a child to be brought up in his own family.

Although the State has a statutory duty to work towards the reunification of parent(s)/guardian(s) and their children while in voluntary care, it appears that limited support services or reunification plans are available to parent(s)/guardian(s) once the child is placed in care. They are often distressed from being excluded from the life of their children and from the lack of constructive engagement with representatives from the Child and Family Agency.

It is respectfully submitted that the functions of the Child and Family Agency should be expanded to include preventative measures. Accordingly, once the Child and Family Agency estimates that intervention is necessary, it will have a statutory obligation to consider in the first instance whether proper care could be given with the child staying within his/her family with the appropriate supports provided by the agency. Similarly, where a care order is needed, the Child and Family Agency will be bound to first consider whether a supervisory order could be an appropriate measure.

It is important that reunification is kept as a prospect and that every effort is made even though some parent(s)/guardian(s) may never meet what is required. This is particularly the case since section 24 (1) (a) of the Adoption (Amendment) Act 2017 now requires that, before a child can be adopted without the consent of the birth parents, the Child and Family Agency must be satisfied that every reasonable effort has been made to support the parents.

Where the child's parents have **failed in their parental duty to the child for 36 months**, the High Court can **proceed without parental consent** and allow the Adoption Authority to make an **adoption order** for the child. In some situations, it could be argued that the State has failed to support parent(s)/guardian(s) in their goal of family reunification by providing housing, parenting courses, addiction or mental health support, etc.

RECOMMENDATION:

Section 3 of the Child Care Act 1991 to expand the functions of the Child and Family Agency to include preventative measures and to promote the least possible State intervention such as supervisory orders. It will explicitly provide that where the Child and Family Agency estimates that intervention is necessary, it shall first consider whether proper care could be given with the child staying within his/her family with the appropriate supports provided by the agency.

RECOMMENDATION:

Section 3 of the Child Care Act 1991 to explicitly provide that, where a child is in care, the Child and Family Agency shall make every reasonable effort to support the parent(s)/guardian(s) to facilitate reunification. This is in line with section 24 (1) (a) of the Adoption (Amendment) Act 2017, which amends section 54 (1) of the 2010 Act. This provision requires that the Child and Family Agency must be satisfied that every reasonable effort has been made to support the parents of a child before that child can be adopted without the consent of the birth parents. The Adoption (Amendment) Act 2017 provides that where the child's parents have failed in their parental duty to the child for 36 months, the High Court can proceed without parental consent and allow the Adoption Authority to make an adoption order for the child.

RECOMMENDATION:

Part II of the Child Care Act 1991 to provide for the independent supervision of voluntary care arrangements in order to ensure that it is truly a temporary arrangement during which child and family supports are provided and real efforts at family reunification are made. Corbett (2018)[3] suggests as possible oversight models a reformed court process; a quasi-judicial body similar to the Adoption Authority of Ireland; or an independent administrative system.

[3] Maria Corbett, *Irish Journal of Family Law* (2018) 21(1) I.J.F.L., p. 14

Duration of Voluntary Care

Based on the experience of those contacting Treoir, some children remain in voluntary care for a significant number of years. Due to the temporary nature of this care arrangement, children have no certainty about their future, which can cause great concern and anguish. Every effort should be provided for the reunification of the child with his/her parent(s)/guardian(s), if this is in the child's best interests. However, measures should be put in place to avoid a child remaining in voluntary care long-term.

In addition, children may suffer distress due to delays in securing consent for key issues related to their upbringing such as medical treatment, passports or permission to travel abroad. It is necessary to ensure that after a fixed period of time, alternative care arrangements will be sought in order to give the child a secure foundation and a sense of permanency.

RECOMMENDATION:

Part II of the Child Care Act 1991 to provide that, after a fixed period of time deemed unreasonably long for a child to be in voluntary care, the Child and Family Agency shall to implement appropriate measures to protect these children including pursuing full care orders where appropriate. In addition, a minimum period of notice to withdraw consent to voluntary care shall be mandatory. The period of notice could increase proportionally to the time the child has been in voluntary care. These measures will address uncertainty and maximise the chances of a child to settle in a placement.

4. Care proceedings (Part IV)

a. Comments including rationale/supporting information

Family Court

The need for a dedicated Family Court has been long recognised. In certain parts of the country, District Courts are experiencing considerable difficulties in allocating

time and judges. Child protection cases are listed together with civil disputes and other non-related matters. In addition, delays may result in the seeking of care orders based on outdated evidence. Child protection cases are complex and merit a specialist family court in order to be given suitable time and resources.

RECOMMENDATION:

Prompt establishment of specialist family court in order to appropriately deal with child protection cases.

Training

Judges assigned to deal with child care matters should be given comprehensive training in relation to issues that are particular to child welfare and development. Similarly, it is important that the Child and Family Agency invests resources to train staff in the law surrounding State intervention in child welfare and protection.

RECOMMENDATION:

Judges should be given comprehensive training in relation to issues that are particular to child welfare and development. The Child and Family Agency needs to invest resources to train staff in the law surrounding State intervention in child welfare and protection.

7. Jurisdiction and procedures (Part V)

a. Comments including rationale/supporting information

It is necessary to ensure that the Child Care Act (1991) is aligned with the children constitutional rights introduced by the 31st amendment to the Constitution (Article 42A).

The Best Interest of the Child Principle

Article 42A 4. 1° of the Irish Constitution states that provision shall be made by law that the best interests of the child shall be the paramount consideration in the

resolution of all proceedings brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected.

Section 24 (a) of the Child Care Act 1991 does not provide the definition of "*welfare of the child*" although it is the Court's first and paramount consideration in any proceedings in relation to the care and protection of a child. The Court has defined it to include health and wellbeing, physical and emotional welfare, moral and religious welfare and being materially provided for.

The Children and Family Relationships Act 2015 introduces a new definition of '*best interests of the child*' in line with Article 42A.4.1° of the Irish Constitution which protects children rights. The court must have regard to 11 factors and circumstances when determining what is in the best interests of the child in any proceedings related to guardianship, custody or access to a child. According to anecdotal evidence from legal practitioners, the definition provided by the 2015 Act has been adopted in the context of child care proceedings.

The list of factors and circumstances include, for instance, 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; the child's religious, spiritual, cultural and linguistic upbringing and any harm which the child 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 wellbeing. This new statutory guidance enables the court to focus on tangible factors related to a child's present and future wellbeing.

Likewise, the Adoption (Amendment) Act 2017 brings the best interests of the child to the fore in adoption proceedings. In line with Article 42A.4 1° of the Irish Constitution, it provides that the best interests of the child is the paramount consideration in relation to any matter, application or proceedings under the Adoption Act 2010. It states that, in determining what is in the child's best interests, the Authority or the court, as the case may be, shall have regard to all of the factors

or circumstances that it considers relevant to the child concerned. A non-exhaustive list of those factors and circumstances is specifically enumerated including:

- the child's age and maturity,
- the physical, psychological and emotional needs of the child,
- the likely effect of adoption on the child,
- the child's views on his or her proposed adoption,
- the child's social, intellectual and educational needs,
- the child's upbringing and care
- the child's relationship with his or her parent, guardian or relative as the case may be, and
- any other particular circumstances pertaining to the child concerned.

RECOMMENDATION:

To include a provision stating that the best interests of the child is the paramount consideration in relation to any matter, application or proceedings under the Child Care Act 1991 in line with Article 42A.4.1° of the Irish Constitution which protects children rights. The best interests of the child principle should extend not just to proceedings but also to voluntary care arrangements as well as regulations governing foster care.

The provision could include a non-exhaustive list of the factors or circumstances that the Court, relevant agencies, bodies and/or authorities shall have regard to when determining the best interest of the child in the context of child care proceedings. These factors will enable them to focus on various aspects of the child's present and future wellbeing when determining his/her best interests in the context of child welfare and protection.

The Voice of the Child

Article 42A 4. 2° 1° of the Irish Constitution states that provision shall be made by law for securing, as far as practicable, that in all proceedings brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, the views of the child, in

respect of any child who is capable of forming his or her own views, shall be ascertained and given due weight having regard to the age and maturity of the child.

In line with the children's constitutional rights, a new provision of the Children and Family Relationships Act 2015 permits the court to give directions to obtain from an expert a report in writing regarding any question affecting the welfare of the child or to appoint an expert to determine and convey the child's views in private law proceedings. The Minister for Justice and Equality, in consultation with the Minister for Children and Youth Affairs, may issue regulations to provide for any matters considered necessary.

Likewise, the Adoption Amendment Act 2017 provides that the views of the child shall be ascertained by the Adoption Authority or by the court, as the case may be, and shall be given due weight, having regard to the age and maturity of the child. The Adoption Amendment Act 2017 will enable regulations to be introduced setting out methods through which the child's voice can be conveyed to the Authority or the court, as the case may be.

Section 24 (b) of the Child Care Act 1991 provides that in any proceedings before the court in relation to the care of protection of a child, in so far as practicable, the Court shall have regard to the wishes of the child having regard to his age and understanding. The *Guardian ad Litem* Service provides children involved in court proceedings with an independent voice in court, however children in care who are not involved in court proceedings do not have an independent voice. The voice of the child principle should extend not just to proceedings but also to voluntary care arrangements and regulations governing foster care.

RECOMMENDATION:

To align Section 24 of the Child Care Act 1991 with Article 42A of the Irish Constitution and to make provision in the legislation to ensure that the voice of the child is independently heard, not just in the context of proceedings, but also in child protection measures that are not subject to the supervision of the courts such as voluntary care arrangements.

8. Children in the Care of Child and Family Agency (Part VI)

Section 43 of the Child Care Act 1991: Enhanced Guardianship

The Child Care (Amendment) Act 2007 inserted Section 43A in the Child Care Act (1991). This section allows a general/relative foster carer who has a child in care for a continuous period of five years or more to apply for a court order to have enhanced rights. The purpose of the section is to allow long-term general/relative foster carers increased autonomy while the State continues to be the guardian of the child in care.

General/relative foster carers granted this type of order may be entitled in particular to give consent for school trips, medical examinations, treatment and assessment; consent to the issue of a passport for the child; and/or bring the child abroad for a limited period. It appears that there is a shortage of information available regarding general/relative foster carers obtaining guardianships rights under these provisions but studies suggest a very limited take up.

It has been suggested that a time requirement shorter than five years would lead to more demand from general/relative foster carers. In return, increased guardianship rights for general/relative foster carers could assist in stabilising a higher number of placements. The fact that the Child and Family Agency must have consented in advance of the granting of the order may also be a deterrent for general/relative foster carers to apply for enhanced guardianship rights under Section 43A.

The non-parental guardianship introduced by the Children and Family Relationships Act 2015 allows grandparents, other relatives and persons who are exercising the responsibilities of raising a child to acquire the significant decision-making rights associated with guardianship as recommended by the Law Reform Commission.

By virtue of this section it may be possible for a foster carer/relative – who has provided for a child's day to day care for more than twelve months - to be appointed a non-parental guardian in the best interests of a child. A non-parental guardianship court order outlines the specific rights granted – tailored to each individual case – and allows for the inclusion of limitations, conditions and periodical reviews when appropriate.

The Child and Family Agency is on notice of this type of application and has the right to give views. The general/relative foster carer could be allowed specific and limited guardianship rights that would not compete against the guardianship rights of the State, parents or other legal guardians. A non-parental guardianship order shall not be made without the consent of each guardian of the child and the applicant concerned. Nevertheless, the court may make an order dispensing with the consent of a guardian of the child if it is satisfied that the consent is unreasonably withheld and that it is in the best interest of the child to make such an order.

However, acquiring guardianship under this provision involves the child leaving the care of the Child and Family Agency. Therefore the foster care allowance and other essential supports are withdrawn, which is understandably a deterrent for general/relative foster cares. As a result children in care do not avail of this essential support in their day-to-day upbringing, which could assist in securing permanency of placements.

RECOMMENDATION:

To amend section 43A of the Child Care Act (1991) to mirror Section 6C of the Guardianship of Infants Act 1964 as inserted by Section 49 of the Children and Family Relationships Act 2015. The provision will allow a foster carer/relative who has a child in care for a continuous period of 12 months or more to apply, if in the best interest of the child, for a court order to have specific and limited guardianship rights, subject to periodical reviews, without the withdrawal of support or involvement from the Child and Family Agency. This provision will aim to support children in their day-to-day upbringing while in the care of the State.

In particular, it could address the circumstances of children who have been in voluntary care for a long period of time - where there is no prospect of reunification - to give a secure foundation and a sense of permanency. The court could make an order dispensing with the consent of a guardian of the child if satisfied that the consent is unreasonably withheld and that it is in the best interest of the child to make such an order.

Section 37 of the Child Care Act 1991: Access to Children in Care

Access, or the right to visit and spend time with a child, is fundamental in order for a child to maintain a meaningful relationship with parents, relatives or other persons while in the care of the State. It should be promoted and facilitated as much as possible to enrich the life of the child. Regularly relatives of a child in care, such as grandparents, complain about the challenges of getting access to the child. Likewise, foster carers often have to travel unreasonable long distances for access to take place. This is arguably not in the best interest of the child and preventative measures should be put in place as much as possible.

Section 37(1) of the Child Care Act (1991) provides that the Child and Family Agency should facilitate reasonable access to the child by his parents, any person acting in loco parentis or any other person who in the opinion of the Agency has a bona fide interest in the child and such access may include allowing the child to reside temporarily with that person. The section does not explicitly include relatives or legal guardians in the context of voluntary care placements.

The Children and Family Relationships Act 2015 provides that any person who is a relative of a child, or, is a person with whom the child resides or has formerly resided may apply for access to child. '*Relative*', in relation to a child, means a grandparent, brother, sister, uncle or aunt of the child. These categories could be explicitly included in Section 37 of the Child Care Act 1991 to ensure that the child maintains key meaningful relationships.

RECOMMENDATION

To expand the categories of persons who may have access to a child while in care to explicitly include relatives, legal guardians and a person with whom the child resides or has formerly resided in order to ensure that the child maintains key meaningful relationships.

To amend Section 37 (1) of the Child Care Act as follows:

37.—(1) *Where a child is in the care of the Child and Family Agency whether by virtue of a voluntary care arrangement under Part II , an order under Part III or IV or otherwise, the Agency shall, subject to the provisions of this Act, facilitate reasonable access to the child by his parents,* ***legal guardians*** *where applicable,* ***relatives, a person with whom the child resides or has formerly resided*** *or any other person who, in the opinion of the board, has a bona fide interest in the child and such access may include allowing the child to reside temporarily with any such person.*

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