

LAW SOCIETY SUBMISSION



REVIEW OF THE CHILDCARE ACT 1991

DEPARTMENT OF CHILDREN & YOUTH AFFAIRS

MARCH 2018

ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

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1. Introduction

- 1.1. This submission is made by the Child and Family Law Committee on behalf of the Law Society of Ireland, the representative body of solicitors in Ireland. The Committee comprises, inter alia, of solicitors practising in the area of child protection and welfare, both from the perspective of acting on behalf of the Child and Family Agency and representing the interests of parents under the Child Care Act 1991 (as amended).
- 1.2. In November 2015 the Law Society submitted a **Response to the Consultation Paper on Reform of Guardian ad Litem Services under the Child Care Act, 1991** to the Department of Children and Youth Affairs, which should be read in conjunction with this Submission. A copy is attached for ease of reference.

2. Promotion of welfare of children (Part II)

Comments including rationale/supporting information

- 2.1. Section 3 sets out the function and statutory responsibilities of the Child and Family Agency (CFA) in terms of the promotion of welfare of children who are not receiving adequate care and protection.
- 2.2. Section 3(2)(b) states that the welfare of the child “is the first and paramount consideration” and that the views of the child should be given “due consideration” while acknowledging the rights and duties of parents.
- 2.3. Section 3(2)(c) clearly states that “it is generally in the best interests of a child to be brought up in his own family”.
- 2.4. Subsection 2(a) identifies the requisite steps to identify children at risk and co-ordinate information about them. This particular subsection has long been used to ground the function of the CFA in the investigation of allegations of child abuse. In *MQ v Gleeson* [1998 4 IR 85] Justice Barr took the view that health boards had an implied right and duty to communicate information about a possible child abuser if, by failing to do so, the safety of some children may be put at risk.
- 2.5. This section has singularly generated a significant amount of case law in the High Court (*I v HSE* [2010 IEHC 159]; *PDP v A Secondary School* [2010 IEHC 189]) and has been the subject of many awards of costs and damages against the HSE and the CFA where the courts have found there to have been departures from fair procedures afforded to persons against whom allegations have been made. Case law has more recently evolved to a point where the High Court has affirmed the right on the part of a person against whom allegations have been made to cross examine (or have cross examined on their behalf) an adult complainant in a form of non-statutory hearing convened by the CFA to determine if allegations are credible or not (*EE v The CFA* [2016 No. 578 JR]).
- 2.6. The complainant in the case of *EE* had just turned 18 years of age when her disclosure of childhood sexual abuse emerged in the context of private family law proceedings concerning a younger half-sibling and in the absence of any criminal complaint/investigation.
- 2.7. These types of scenario frequently arise and the CFA has established specialist teams and a written policy for the assessment of such allegations, yet this fraught area of the law continues to be litigated upon and many feel section 3 as it stands is no longer fit for purpose and that it is out of sync with the legal requirements on the CFA to ensure due process and fair procedures for accused persons.
- 2.8. Many persons who make disclosures of retrospective childhood sexual abuse are not ready or willing to make a criminal complaint, leaving a tranche of such allegations to the CFA to assess and determine if other children are at current risk from the persons against whom allegations have been made and, frequently, credible findings are set

aside by the High Court following injunctive or judicial review proceedings taken by alleged abused persons.

- 2.9. Section 3 is neither sufficiently robust nor expansive enough to permit the CFA to lawfully carry out its investigative role parallel to that of An Garda Síochána.

Recommendations

- 2.10. Should the legislature determine that the CFA should continue to assess and investigate such allegations, section 3 should be amended to clarify the CFA's role and its responsibilities whilst establishing clear statutory procedures for so doing. The Society believes that this would go towards affording fair procedures to accused persons, allow for well-informed findings to be made which can, where appropriate, be communicated to third parties in furtherance of child protection and welfare principles.
- 2.11. The Society suggests that reporting obligations should be introduced into the legislation.
- 2.12. In light of Article 42A of the Constitution, the Society believes that consideration should be given as to how the views of children could be heard in such proceedings.
- 2.12. The principles as to the "best interest" of a child are set out in section 31 of the Guardianship of Infants Act, 1964, and appended to this submission.
- 2.13. The Society further suggests that either
- i. This principle should be specifically included in any amended legislation, or
 - ii. The section should be amended in order to remove the Agency's obligation to assess and investigate such allegations altogether.
- 2.14. The Society believes that standalone legislation, which takes into account all of the complex issues, would be more appropriate than all deriving the obligation from section 3.
- 2.15. This section should be amended and extended to set out clearly that, where a child is placed in voluntary care, the consent of the parent(s) must be an informed consent and the period of time for which the voluntary care arrangement is valid must be of limited duration. That time period should be renewable.

3. Protection of Children in Emergencies (Part III)

Comments including rationale/supporting information

- 3.1. The Law Society strongly endorses and fully supports the recommendations of Dr. Geoffrey Shannon set out in his 2017 Audit of Garda use of Section 12 of the Child Care Act 1991 (as amended). In particular the Society wishes to highlight the need for increased interagency cooperation between An Garda Síochána and the CFA, as per Chapter 6, paragraph 6.2.8 of the Audit, and the establishment of Specialist Child Protection Units within An Garda Síochána.
- 3.2. In terms of section 12(4), when a child is delivered into the custody of the CFA by the An Garda Síochána following a Section 12 removal, the CFA must (if not returning the child to parental custody) apply at the next scheduled sitting of the District Court or within a 72 hour period. The 72 hour period is present to allow for bank holiday weekends during which, in many District Court areas, there will be no scheduled sittings taking place. In practice, if a child is removed by An Garda Síochána and delivered into the custody of the CFA late on Friday evening or even during the early hours of Saturday morning, the 72 hour period will expire before the scheduled courts reconvene the following Tuesday. This prompts the need for the CFA to arrange a special sitting of the District Court on notice to the parent. However the parents will not realistically be able to access legal aid services or even those of a private solicitor during the weekend, leaving them in court wishing to contest the application but without legal representation.
- 3.3. In terms of section 13(4)(b), applications by the CFA to the District Court for emergency care orders can be made before any justice of the District Court if the justice for the District Court where the child ordinarily resides (or is found) is not immediately available. However, this valuable provision has led to confusion as to whether the CFA can bring their application in an alternative District Court area or whether the President of the District Court should send a judge to the District Court area where the child resides or is found?
- 3.4. Currently, warrants under section 13(3) require an address to be specified to enable An Garda Síochána to enter the location where the child is for the purpose of removing the child in conjunction with the granting of an Emergency Care Order. If the child is not at the address specified, this requires further speculation as to where the child may be and a new warrant to be issued. During this time the child may be placed at avoidable risk while an Emergency Care Order is in place.
- 3.5. In circumstances where the Gardaí invoke their powers under section 12, the legislation allows one of two options:
 - i. The child is returned to the care of the parent from whom he or she was removed, or
 - ii. An application is made for an Emergency Care Order.

Recommendations

- 3.6. The Society believes that Dr. Shannon's recommendations should be continuously reviewed by the stakeholders and that Government funding for their implementation should be provided.
- 3.7. The Society suggests that the 72 hour period under section 12(4) should be extended to 96 hours.
- 3.8. The Society would welcome the introduction of clarity around the wording of section 13(4)(b) to avoid delay in such urgent applications.
- 3.9. The Society suggests that the section be amended to allow for AGS to search for the child and lawfully remove them on foot of a warrant from such location/premises where they are reasonably believed to be located.
- 3.10. In practice the situation is that, often following an incident, the parents agree to sign the child into voluntary care. However, this is not provided for under the legislation and an application must then be made to the District Court and subsequently withdrawn. This, in the opinion of the Society, is a waste of time and resources. It is suggested that the section be amended to allow for a third option where the parents agree to sign the child into voluntary care pursuant to section 4.
- 3.11. Section 4 allows a Health Board to take a child into its care because it appears that the child is lost, a parent having custody of the child is missing or the child has been deserted or abandoned. The Board is required to endeavor to reunite the child with the parent where it appears to the Board to be in the child's best interests. This section has given rise to what is called 'voluntary care' where a parent will consent to the placement of their child in care. Voluntary care is frequently relied upon and is often misused where a voluntary care arrangement might be signed and remains in place for many years. The Society does not believe that this was the intention of the legislature.

4. Care proceedings (Part IV)

Comments including rationale/supporting information

- 4.1. Section 17 deals with Interim Care Orders and provides for an appropriate threshold/burden of proof for the CFA to meet. However, at present, if the CFA fails to establish that threshold of evidence in court, there is no “fall back” position. In contrast, section 18(5) allows the court to grant a supervision order if, on hearing the evidence, the court is satisfied that it is not necessary or appropriate to grant a Section 18 care order.
- 4.2. The Rules of the District Court currently require that any proceedings under Part 4 of the Act must be issued in the District Court area where the child ordinarily resides or is for the time being. This is problematic in cases where children and families at risk are moving between (very defined) District Court areas and judges refuse to deal with applications where children may have moved out of their particular area.
- 4.3. Section 18(7) refers to the authority of the District Court on the granting of a care order, to make an order requiring the parents (or either of them) to contribute financially to the maintenance of the child in care. This provision is rarely, if ever, invoked by either the CFA or the courts and appears to be punitive in nature.
- 4.4. Section 19 deals with Supervision Orders which can be a valuable child protection tool. The High Court has established that the District Court is not empowered under section 19 to direct that parents undergo parental capacity assessments or any medical/psychiatric assessment etc. The High Court in the case of *FH v Staunton* [2013 IEHC 533] noted that “it is fundamental to our legal order that something akin to medical treatment (e.g. psychotherapy) represents a voluntary choice on the part of the prospective client and that very clear and express language would be required before it could be assumed that the Oireachtas had given the District Court such power”.
- 4.5. It is the belief of the Society that this has the effect of almost neutralising the impact of a Supervision Order which can be a valuable child protection tool.
- 4.6. Section 19(5) creates a criminal offence for non-compliance with a Supervision Order or any directions made on foot of the Order. However, this requires the CFA to issue a summons and meet a criminal burden of proof to secure a conviction. The Society questions the purpose of this process.
- 4.7. Section 24 obliges the court, in so far as practicable, to give due consideration, having regard to the age and understanding of the child, to his or her wishes.
- 4.8. Section 25 deals with the joining of children or young people as parties to the proceedings under Part IV and appointing a solicitor to represent them. Often this section is overshadowed by section 26 of the Act which deals with the appointment of GALs. It can, however, be a valuable and empowering provision especially for older teenagers who wish to participate at some level in their proceedings.

- 4.9. In light of the Department of Youth and Children Affairs' guidance, the Society makes no comment on section 26 other than to point to **its submissions on the reform of the role of the GAL made in the context of the 2017 pre-legislative scrutiny of the General Scheme of the Child Care (Amendment) Bill** by the Joint Oireachtas Committee on Children and Youth affairs.
- 4.10. Section 27 makes provision for the District Court to request a report from such person it may nominate on a question affecting the welfare of a child subject to proceedings under Parts IV or VI. Whilst the section goes on to say that the costs of such a report can be discharged by such party or parties that the court directs, in practice, however, such costs are generally borne by the CFA .
- 4.11. Section 31 prohibits the identification of children in care through publication or broadcast media and defines both broadcast and written publication clearly under subsection 5. Because of the point in time of its drafting, the section does not deal with publication via the internet and in particular social media.
- 4.12. Section 37 deals with access to the child by its parents and others and creates a positive obligation on the CFA to facilitate "reasonable" access.
- 4.13. The Society welcomes greater consistency of approach taken by District Court judges in respect of care proceedings.
- 4.14. Circumstances often arise where a plan is made for a child to transition home. There is no provision for such a transitional order in the legislation. Very often, the Interim Care Order will be extended with a tacit agreement that the threshold has been met whereas, if it was tested, it probably would not be met because the child is transitioning to his/her home over the course of a number of weeks.

Recommendations

- 4.15. The Society suggests that section 17 should be amended to provide for a similar provision is contained in section 18(5) i.e. to allow the court to grant a Supervision Order in lieu of an Interim Care Order if the court, having heard the evidence, determines that it is not necessary or appropriate for an Interim Care Order to be made.
- 4.16. The Society suggests that some flexibility needs to be built into the Act to allow for such applications to be dealt within the District Court area where the CFA reasonably believes the child has been residing.
- 4.17. The Society suggests that the provision as currently set out in section 18(7) be removed along with section 18(8) which provides for the variation or discharge of the above maintenance orders.
- 4.18. The Society acknowledges the right of a parent not to be directed by a District Court under section 19 to engage in any form of treatment or assessment, and suggests that consideration should be given to the option of including recommendations (in

addition to or alternative to enforceable directions) made by the CFA on foot of a Supervision Order. Compliance or otherwise with such recommendations may then be taken into account at a later stage by the court in determining the best interest and welfare of the child.

- 4.19. The Society is of the opinion that section 19 should be amended and extended in order to allow the court to make such directions in circumstances where often these issues go to the very heart of the matter before the court.
- 4.20. The Society also suggests that consideration should be given, as an alternative to a criminal sanction, to a provision requiring re-entry by the CFA of Section 19 Orders before the District Court where compliance is an issue within two or three months of the granting of the Order and require the parent to respond to the reported non-compliance.
- 4.21. The Society also suggests that section 24 be brought into line with the wording of the Constitutional amendment set out in Article 42 A.
- 4.22. The Society believes that it would be useful if the Act contained a definition of what equates with a child's best interests. The wording currently is the welfare of the child is the first and paramount consideration. It is suggested that a variation of the best interest definition in the Child and Family Relationships Act would be appropriate. The Society does not believe that it would be appropriate to simply transfer that list into this Act but does suggest that a tweaking of it would be appropriate and helpful for all concerned.
- 4.23. The Society suggests that section 25 should be enhanced by reference to the appointment of a solicitor from a panel of practitioners with specialist training and expertise in the representation of children or young people in care proceedings. The Society believes that this would ensure the young person receives the highest quality service in keeping with their rights under Article 42A of the Constitution. The Society also suggests that there should be provision in the Act for the District Court to measure the solicitors' costs in default of agreement.
- 4.24. Section 27 Reports are directed by the courts and as such the court must have carriage of the referral. The Society suggests that the terms of the referral and the questions or issues to be addressed should be agreed, ideally by the parties, and the final report furnished directly to the court. The Society believes that the legislature should be cognisant of the CFA's responsibilities to adhere to its financial regulations and the procurement of reports and services from private service providers i.e. the requirement to obtain three quotes for any services running between €5,000 and €25,000. At present many of these reports run to costs in excess of €5,000.
- 4.25. Furthermore in respect of Section 27 Reports, the wording of the Act is quite brief and therefore the Society suggests that consideration should be given to the formulation of a checklist of questions to be addressed via section 27, similar to the provisions of section 32 of the Children and Family Relationships Act 2015.

- 4.26. A prohibition of publication via the internet and social media of identifying details in child care proceedings should be included within section 31, as most alleged breaches now occur by this media.
- 4.27. The Society notes that section 37 makes no mention of the child's best interest in determining a system of contact and access, and suggests that this should be revised and brought in line with Article 42A of the Constitution i.e. "the best interests of the child shall be the paramount consideration".
- 4.28. The Society believes that the establishment of specialist family law courts with judges designated and trained in the principles of child protection and welfare is essential to the process of State sanctioned intervention and the complex legal landscape that goes with it; careful management of court lists and allocation of a suitable number of judges is also essential to ensure each child and their family receives the time and consideration their individual stories require. To give meaning to Article 42A, judges require training on the methods by which to listen to and involve children and young people in proceedings and importantly, how children should be prepared and be supported through such a process. The Society would welcome suitable court infrastructures with adequate privacy, discrete consultation spaces, ease of access and video link facilities.
- 4.29. The Society believes that it would be useful if a section was introduced to allow for a Transition Order to be made in circumstances where, either following the granting and extending of an Interim Care Order or the granting of a Care Order, the Order can remain in place to reflect the reality, i.e. is that the child is returning home over a gradual period spending an increasing number of nights at home until residing at home fulltime.
- 4.30. The Society refers to its **Submission to the Department of Justice, Equality and Defence in December 2013 – "Family Law - The Future"** which addressed the court structure, conduct of proceedings, the involvement of children and use of alternative dispute resolution in the context of family law cases as much of the content is relevant to child care cases. A copy is attached for ease of reference.

5. Children in Special Care and Protection (Part IV.A)

Comments including rationale/supporting information

- 5.1. The Society notes that the introduction of the proposed Rules of the Superior Courts (Special Care of Children) 2017 are long overdue and reflects the longstanding practice of such applications being heard by the High Court and not at District Court level as originally provided.

6. Jurisdiction and procedures (Part V)

Comments including rationale/supporting information

- 6.1. See sections 3 and 4 above.
- 6.2. Section 28 deals with jurisdiction and which District Court area can deal with an application pursuant to parts 3, 4, or 6. It states that the District Court assigned to the district where the child resides or is for the time being is the appropriate district. In many cases, the child may reside in one place when taken into care and have moved to another place by the time the care proceedings have commenced. For instance, they may have moved foster placement. It is noted that this can sometimes cause confusion.

Recommendations

- 6.3. It would be helpful if it could be clearly stated in section 28 that the District Court appropriate to hear the care proceedings from start to finish is the District Court that was initially assigned when the first application was made, thus ensuring that the proceedings remain in that court.

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

Comments including rationale/supporting information

- 7.1. The Society is strongly of the opinion that the timely right of access by children in care to appropriate therapeutic services (e.g. CAMHs and Community Psychological services) should be addressed as a priority. It appears that there is an impression that children in care will receive priority for services but the reality is far from that.
- 7.2. Section 37 deals with access to the child by its parents and others and creates a positive obligation on the CFA to facilitate “reasonable” access.
- 7.3. Section 47 of the Act states that, where the child is in the care of a health board, the District Court may, of its own motion or on the application of any person, give such directions and make such order on any question affecting the welfare of the child as it thinks proper and may vary or discharge any such direction or order. This is a power which has been interpreted by the High Court as being exceptionally wide. Any person can bring the application. The reality of the situation is that the Child and Family Agency has limited resources. The Act establishing the Child and Family Agency mandates the Child and Family Agency to use its resources in an efficient and effective way.
- 7.4. Where a Section 47 application is brought by any person, that application must be grounded on an affidavit and a Notice of Application. This means the question to be determined is clear and therefore submissions can be made by and evidence heard from all sides. However, where the court of its own motion decides to do it, it is not on notice to any of the parties and it is not on an affidavit. Currently, there is no opportunity to consider the motion or make submissions before the court where the court of its own motion makes a Section 47 direction.
- 7.5. Where children are in care, they often require services which are not available within the Agency and which are the responsibility of the HSE. Very frequently, those services are not available. There is a joint protocol in operation between the two organisations and often there is significant delay and resistance to the provision of the service.

Recommendations

- 7.6. The Society believes that consideration should be given to the amendment of section 36 which deals with accommodation and management of children in care to incorporate provision to mandate the delivery of necessary therapeutic services to children in a timely way.
- 7.7. As previously indicated section 37 makes no mention of the child’s best interest in determining a system of contact and access, and the Society reiterates its suggestion that this should be revised in line with Article 42A of the Constitution i.e. “the best interests of the child shall be the paramount consideration”.

- 7.8. The Society is of the opinion that section 47 should be pared back and limited to only the Guardian ad Litem or the Court Guardian being permitted to bring an application. It is further suggested that reference should be made to Orders being made within the remit of the Agency's limited resources.
- 7.9. The Society further suggests that section 47 should be amended so that, if the court of its own motion wishes to make a direction, the issue upon which it requires to make a direction should be identified and an opportunity given to the parties to make submissions and submit evidence.
- 7.10. The Society further suggests that consideration should be given to amending the Act and the Health Act to impose an obligation for interagency co-operation.

8. Administration, Miscellaneous and Supplementary (Part IX and X)

Comments including rationale/supporting information

- 8.1. While section 23 of the Children Act 1997 is not strictly speaking being reviewed, it is the opinion of the Society that it is bulky, cumbersome and unworkable in its present format. The Act deals with the admission of hearsay evidence of children and requires a number of steps to be taken, including preliminary hearings before the court can even begin to consider the evidence. Often a number of days hearing have to be allocated to deal with the section 23 application in advance of the commencement of the Care Order hearing.

Recommendations

- 8.2. The Society suggests that the UK approach be followed in Ireland i.e. where the hearsay evidence is automatically admitted but it is then a matter for the judge to decide what weight is to be attributed to it.

The following Law Society submissions are attached in original email:

- Submission to the Department of Justice, Equality and Defence
Family Law – The Future
- Submission to the Joint Oireachtas Committee on Children & Youth Affairs
General Scheme of the Child Care (Amendment) Bill 2017
- Department of Children and Youth Affairs
Response of the Law Society to the Law Reform Consultation Paper on the reform of Guardian ad litem services under the Child Care Act 1991

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Appendix: Section 31 of the Guardianship of Infants Act, 1964

“Determination by court of best interests of child

31. (1) In determining for the purposes of this Act what is in the best interests of a child, the court shall have regard to all of the factors or circumstances that it regards as relevant to the child concerned and his or her family.

(2) The factors and circumstances referred to in subsection (1) include:

(a) the benefit to the child of having a meaningful relationship with each of his or her parents and with the 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;

(b) the views of the child concerned that are ascertainable (whether in accordance with section 32 or otherwise);

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

(d) 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 (a), and the desirability of preserving and strengthening such relationships;

(e) the child’s religious, spiritual, cultural and linguistic upbringing and needs;

(f) the child’s social, intellectual and educational upbringing and needs;

(g) the child’s age and any special characteristics;

(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;

(i) where applicable, proposals made for the child’s custody, care, development and upbringing and for access to and contact with the child, having regard to the desirability of the parents or guardians of the child agreeing to such proposals and co-operating with each other in relation to them;

(j) the willingness and ability of each of the child’s parents to facilitate and encourage a close and continuing relationship between the child and the other parent, and to maintain and foster relationships between the child and his or her relatives;

(k) the capacity of each person in respect of whom an application is made under this Act—

(i) to care for and meet the needs of the child,

(ii) to communicate and co-operate on issues relating to the child,

And

(iii) to exercise the relevant powers, responsibilities and entitlements to which the application relates.