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Submission by the Council of The Bar of Ireland to the Department of Children and Youth Affairs on the Review of the Child Care Act 1991

11 September 2020

Table of Contents

Introduction

The Council of The Bar of Ireland **("the Council")** is the accredited representative body of the independent referral Bar in Ireland, which consists of members of the Law Library and has a current membership of approximately 2,170 practising barristers. The Bar of Ireland is long established, and its members have acquired a reputation amongst solicitors, clients and members of the public at large as providing representation and advices of the highest professional standards. The principles that barristers are independent, owe an overriding duty to the proper administration of justice and that the interests of their clients are defended fearlessly in accordance with ethical duties are at the heart of the independent referral bar.

Scope of Submission

The Department of Children and Youth Affairs **("the Department")** is currently reviewing the Child Care Act 1991 - the primary piece of legislation regulating child care and child protection policy in Ireland.

The purpose of the review is to:

- Identify what is working well within the legislation, including its impact on policy and practice;
- Address any identified gaps and new areas for development;
- Capture current legislative, policy and practice developments;
- Building on those steps, revise the original legislation.

The Department has consulted extensively with stakeholders in recent years and it has identified a number of areas where improvements could be made. It is now inviting comment from interested parties on a series of initial proposals to amend the legislation, on topics ranging from more abstract themes such as the incorporation of guiding principles into the Act, to more concrete topics such as proposed changes to care orders.

Members of The Bar of Ireland represent both the State (via the Child and Family Agency), and parents/respondents whose children are the subject of applications on foot of the Child Care Act 1991. As such they have experienced and observed the operation of the Act at close quarters, and are in the unique position of being able to offer practical insight, observations and expertise on child care and child protection proceedings from the perspective of the State, the parent, and the child.

In considering its response to the consultation questions, the Council is guided by the fundamental principle of a constitutional right of access to the court and the importance of access to legal representation, particularly where child welfare is concerned.

The Council's response deals with each of the proposed changes in the order that they appear in the Consultation Paper.

New Part of Act

Guiding Principles

The Council is supportive of the introduction of comprehensive guiding principles as it is a long-held theory that composite guiding principles are required in legislation to ensure accountability and consistency of outcome. This, it is submitted, is to the benefit of the public and practitioner alike as it creates the opportunity for consistent decision making across all of the districts within the State. In particular, the Law Reform Commission have regularly recommended that composite guiding principles are the best approach for statutory interpretation (see 'Vulnerable Adults and the Law', LRC 83-2006) and assists in creating a clear jurisprudence, while avoiding an "outcome based" approach.

However, if the Legislature is inclined to enshrine composite guiding principles in Statute, those principles must avoid a situation where there is a conflict of laws. These principles must also ensure that they are consistent with Constitutional provisions and not create burdens that might undermine the legislation as a whole.

To that end, the role of the family and the guiding principle that there must be "adequate engagement" may warrant further consideration as the case of *JG v Staunton* [2014] 6 I.C.L.M.D. raised the question of whether obligations could be placed on parents.

As of 2013, Hogan J. was of the view that the District Court did not have the authority to impose obligations on a parent. He further stated that very clear language would be required in order to impose a responsibility on parents.

He went on to state that the constitutional rights of parents towards their children enjoy the "the highest possible level of legal protection which might realistically be afforded in a modern society". In light of the dicta from *JG*, where an obligation of "engagement" is placed on a parent, the Oireachtas must consider whether same is consistent with the constitutional protections of the family in order to avoid unnecessary uncertainty in implementing the guiding principles.

In summary, the Council endorses the annunciation of guiding principles. The composite guiding principles should be clear and unambiguous as to what has to be considered by a decision maker before deciding a course of action. The principles should avoid potential conflicts and should be consistent with the principles of fair procedure and natural justice.

PART II Promotion of Welfare of Children

Interagency coordination and collaboration

The co-ordinated provision of services is to be welcomed. The importance of a coherent statutory regime of coordination and collaboration between state agencies cannot be over-emphasised. A robustly drafted legislative provision will ensure clarity at an early intervention stage. This should in turn reduce any conflict or confusion over which agency is responsible for providing certain services.

This will be an important development of public law and the proposed future position will need to be carefully drafted to create this statutory cooperation model without administrative barriers.
This need for inter-agency cooperation has long since been recommended by various reviews, most notably by Ms Justice Catherine McGuinness in the Kilkenny Incest Report in May 1993. The investigation team recommended at page 105 of the report:

> "*Senior managers must ensure the establishment of effective working relationships within the health care system and between the health board and other agencies. A process of continuous inter-agency review needs to be operational in each health board area and arrangements and time schedules for such reviews must be formally agreed between the agencies involved.* ***We recommend that responsibility for ensuring that inter-agency reviews are carried out should be assigned to the health board*****.**
>
> *The difficulties of inter disciplinary and interagency cooperation are compounded where administrative and clerical support is unavailable and where the effort required in contacting persons in another agency and communicating with them is seen as disproportionate to the benefit from such co-operation. Adequate administrative resources must be provided to facilitate and support such inter-agency contact and coordination."*

There is value, in particular, in the recommendation that appropriate administrative and clerical support will be the backbone of securing an efficient system of inter-agency coordination and collaboration.

Early intervention and family support

Section 3 of the Child Care Act 1991 (**"section 3"**) provides an important protection for children who are not receiving adequate care and attention. The duty placed on the Child and Family Agency is clear and has been accepted in a long line of Superior Court jurisprudence (starting with *MQ v Gleeson* [1998] 4 IR 85).

It is noted that the Child and Family Agency Act 2013 contains certain protections that, to an extent, overlap with the provisions of section 3 (as set out at page 9 of the Consultation Paper):

> *encouraging and supporting the effective functioning of families where such service may involve preventative family support services, domestic, sexual or gender-based violence services and those related to the psychological welfare of children and their families.*

This provision is contained in section 8 of the Child and Family Agency Act 2013 (**"section 8"**) which is a welcome addition to the protections offered to children as it sets out specifically the "preventative" role of the Child and Family Agency.

It should be noted that, in some respects, section 8 may not provide the same level of protection for children as section 3. First, section 8 refers to the "effective functioning of families" whereas section 3 provides explicit protection for children who are not receiving adequate care and attention. It should

also be noted that section 8 provides that the protection offered "may" involve preventative family support.

It is the view of the Council that should section 3 be repealed that any replacement provision be worded in such a manner that it includes at least as much protection as that contained in section 3 and that this protection explicitly include an absolute obligation on the Child and Family Agency to intervene early to ensure that children are receiving adequate care and protection where called for by the individual circumstances of each child. Any such provision should ideally avoid being overly prescriptive and should place a mandatory duty on the Child and Family Agency in similar terms to that contained in section 3.

Voluntary Care Agreements

The Council welcomes in general the proposals in respect of Voluntary Care. It considers the proposal in relation to sharing of information to be reasonable and it welcomes the proposed compilation and analysis of annual data in respect of children in voluntary care.

The Council offers the following general comments on other proposals:

- Access to legal advice for parents prior to entering into or renewal of a written Voluntary Care agreement should be provided for in the Act;

- While the proposed details of the Voluntary Agreement are reasonable, its duration, renewal and matters to be included in it should be made explicit in statute and the form and detail of the Agreement should be set out in a Statutory Instrument;

- While it is reasonable that certain rights transfer under the Agreement to Tusla, these concessions by a parent would need to be detailed in the Agreement, further emphasising the need for legal advice for parents prior to agreeing to voluntary care for a child;

- A mechanism should be provided for obtaining the views and wishes of the children involved and affected by the Agreement and for the appointment of a Guardian ad Litem for the child concerned;

The proposal that "*Care orders be made ex parte from a voluntary care arrangement, where the court is satisfied that the relevant threshold is met and there is acceptable consent from the parents who choose the out of court option to consent to care"* is in our view problematic. The Council will wait until such a proposal is more clearly presented before a final observation is submitted but in its current form it appears to:

- Not adequately address the rights of children and parents;

- Considering the high proportion of children in voluntary care and the proportion of care orders that are granted on consent where parents are notified and have the benefit of legal representation, it is not clear what its purpose is;

- The proposal is open to the interpretation that voluntary care is being reclassified as a gateway provision to full care orders on an *ex parte* basis in circumstances where parents or the child concerned may have no legal representation to ensure their rights are protected and there is no way of knowing the consent given is informed consent;

- As such, it would appear to accentuate the power imbalance between the State and parents in the direction of enhancing the power of the State as against preserving the constitutional rights of children and parents;

- It appears to conflate two quite different sections of the Child Care Act 1991, Section 4 where there is no conflict between the State and parents, and Section 18 where there is a clear conflict between the State and parents.

Unaccompanied children seeking asylum and taken into care

The Council emphasises the need to ensure proper representation of an unaccompanied minor by the appointment of a Guardian ad litem and the need for court reviews to ensure:

- Appropriate care arrangements are made, and an appropriate care placement is available for the minor;

- Compliance in respect of making application for international protection and/or residency;

- All the rights of an unaccompanied minor are respected and vindicated, including the right to family reunification where applicable;

- Appropriate care planning to ensure that, on attaining 18 years, the residency status of the person is clear.

The proposed amendment should also provide that an assigned social worker can apply for naturalisation for a child the subject of a care order.

We urge that consideration be given to the preparation of a Statutory Instrument under the Act to deal specifically with the circumstances of unaccompanied minors.

Accommodation for homeless children

The Council considers helpful and necessary the proposal that "*Tusla publish national guidance in relation to the use of section 5, including minimum appropriate age for intervention, time limits for use, circumstances in which it may be used etc".*

PART III Protection of Children in Emergencies

Emergency Care Orders

The proposed amendment to allow an extended period from the point at which Section 12 of the Act is invoked in which an application must be made pursuant to Section 13 by the Child and Family Agency is a sensible amendment which will allow for the practical difficulties that arise if Section 12 is invoked outside of ordinary working hours. Section 13 of the Act, along with Section 12 of the Act, is an extremely necessary power for the protection of children in emergency situations. However, the necessary encroachment on the constitutional rights of parents and families cannot be over-emphasised. The reasons which would warrant the extension of the maximum length of order, from 8 to 14 days, must be justified or provided for in this legislative amendment. This is particularly so as an emergency care order could potentially be made for 14 days on an *ex Parte* basis.

PART IV Care proceedings

Interim Care Orders

ICO extension beyond 28 days:

The Council is strongly of the view that the expedient and efficient resolution of family law proceedings is in the interests of children and indeed all parties to proceedings. As has previously been identified by the Council in its submissions regarding the reform of the family law system as a whole[1], every effort must be made to avoid delays and/or drift within Court proceedings.

In order to avoid same, the Dublin Metropolitan District Court has adopted Practice Directions and Rules in an effort to reduce the delays experienced in proceedings. This practice direction has not been applied outside of Dublin and could, if applied in all Districts, limit delays and ensure expedient hearings. In addition, outside of Dublin, the number of days allocated to family law sittings can be quite limited which results in system clogging and long gaps between the institution of proceedings and their determination. Practically, this can mean that clients attend court on numerous dates only for the case not to be heard with the inevitable frustration and anxiety this can cause as a result. Greater efficiencies must be pursued outside of Dublin in order to ensure timely access to the resolution of family and child care proceedings.

It is submitted that these issues, as opposed to the duration of an interim care order, are more likely to benefit the smooth running of cases rather than increasing the duration of interim care orders.

Transfer of further parental rights to TUSLA:

If the Oireachtas is to consider *"Day-to day parental rights can transfer to Tusla such as permission for school trips and GP appointments",* the Oireachtas should also consider the proportionality of such further encroachment into the environs of the constitutionally protected parental rights. The purpose

[1] Submission by the Council of The Bar of Ireland on the Reform of the Family Law System (March 2019)

of an interim care order is to transfer day to day care to the State in circumstances where the parents have failed in their duty, but for a prescribed period of time only.

In those circumstances, if the State is entitled to determine the medical decisions for children in their care on an interim basis, this will have the effect of further diminishing parental rights that are enshrined in the constitution. As was noted by Hogan J. in *JG*[2] in discussing the language of the Constitutional protections for family, the use of language like "inalienable" was used to convey an important signal as to how necessary it was considered that these rights should be safeguarded against encroachment. The Council is therefore concerned that such proposals may have constitutional implications.

Finally, the Council notes that it is the intention of the legislature to create provision for the:

> *Sharing of relevant information on the child and the parents between Tusla and health and education professionals.*

While any statutory provisions would need to be GDPR compliant, the Council would once more point to the case of *JG v Staunton*[3] and the dicta which confirmed that positive obligations could not be placed on parents, unless there was clear statutory provision for same[4].

Care Orders

The Council proposes to deal with each aspect of the proposed changes to the regulatory framework concerning Care Orders as set out in the Consultation Paper.

1. *"the guiding principle that final decisions should be made as quickly as circumstances allow"* – This is a welcome statement on the importance of concluding Section 18 proceedings in an expeditious manner. However, this should not be in a manner which compromises important fair procedure entitlements of all interested parties, especially the parents/guardians of the child concerned.

2. *"they can be made without Supervision Orders, Voluntary Care Agreements or Interim Care Orders previously being in place"* – Although it is typical for the Child and Family Agency to seek an Interim Care Order pursuant to Section 17 of the Child Care Act 1991 prior to seeking a Care Order pursuant to Section 18, there is nothing in Section 18 which requires that this be done. It is open to the Child and Family Agency to bring an application for a Care Order without having first brought an application for an Interim Care Order. It may well be asserted at a Care Order hearing that this approach is disproportionate, but that is a matter for each individual case and not a bar to such applications being brought.

   There are some practical considerations which may make the bringing of a Section 18 application without a Section 17 application first problematic:

[2] [2014] 6 I.C.L.M.D. 43
[3] ibid
[4] See in particular paragraphs 24 -27 of the judgement ibid

(i) It will typically take a significant amount of time to gather the evidence required to bring a Section 18 application. What provision will be made for the child in question from the moment the Child and Family Agency is of the view that a Section 18 application is in order until such evidence is ready and sufficient court time is available?

(ii) This consideration of evidence is even more problematic where expert evidence (which often comes from outside the jurisdiction) is required. The preparation of such a report will necessarily involve a considerable amount of time.

(iii) Similarly, the requirements of fair procedures and constitutional justice may afford the respondents the right to call rebuttal evidence, including that of relevant experts.

It will typically take several months to deal with the issues from (i) – (iii) above and clearly, where the Child and Family Agency has made a determination that a Section 18 application is in order (that the child is or has been assaulted, ill-treated, neglected or sexually abused and/or the child's health, development or welfare is or is likely to be impaired or neglected) it will almost always be the case that some interim measure, typically an Interim Care Order, will be necessary and proportionate.

There may be a limited number of cases where the above circumstances do not apply and in those cases it may be prudent to apply for a Care Order as suggested. Indeed, this would have the added benefit of avoiding duplication of court hearings (for the interim care order and full care order) and avoiding the stress and trauma for all parties and witnesses of giving the same evidence twice.

3. *"can be made ex-parte at the courts discretion"* – The Council is very concerned that an order such as a Care Order under Section 18 of the Child Care Act 1991 could ever be granted on an *ex parte* basis. It is noted that one of the concerns raised in the Consultation Paper is "repeated non-attendance of any party". It should be pointed out that non-attendance by a party is entirely separate and distinct from an application *ex parte*. An *ex parte* application is made without notice to the other side who is therefore unable to oppose the application. This is entirely different to circumstances where a party or parties fail to attend. If this occurs it is then a matter for the presiding judge to consider whether service is in order and if it is appropriate for the hearing to go ahead in the absence of a party or parties (which is not the same as a hearing *ex parte*).

4. *"or a shorter proportional time applied for by Tusla"* – Section 18 currently provides for a Care Order for "as long as he remains a child or such shorter period as the court may determine." It therefore seems that it is open to the Court to make a shorter order than to 18 years which may be applied for by the Child and Family Agency. It does not appear that any change to Section 18 is required in this regard.

5. *"(or for such shorter period as the court may determine and provide a written judgment for)"* – As set out at 4 above, Section 18 provides for the Court to make such shorter orders. It seems that the requirement for the Court to provide a written judgment is an unnecessary interference with judicial independence. It does not appear that any change to Section 18 is required in this regard.

6. *[U]nless it is successfully challenged by the parents or discharged by the court because of changed circumstances identified initially through a Section 22 leave to apply hearing* – This proposal is somewhat unclear and lacking in detail. Any requirement for a "leave to appeal" for parents seeking to discharge a Care Order involves a restriction on the rights of parents to access justice. If any such provision is to be considered it should be clearly set out what is envisaged and what the standard to be applied and court procedures are. In the absence of further details on this the Council cannot provide any further guidance other than to note a word of caution on any restriction on the rights currently enjoyed by parents under the Child Care Act 1991.

7. "*Sharing of relevant information on the child and the parents between Tusla and health and education professionals is allowed."* – In similar fashion to 6 above, it is somewhat unclear what is envisaged here. If it is simply to ensure to protect the Child and Family Agency (and its employees and agents) from complaints regarding the sharing of reports/information, then an issue does not appear to arise. The sharing of reports can arise in only two circumstances; first, before a full Care Order is made by application to the District Court to lift the *in camera* rule; second, after the full Care Order is made. In either circumstance there does not seem to be any exposure to the Child and Family Agency under Regulation 2016/679 ("GDPR").

Supervision Orders

Supervision orders, as matters stand, are not as effective as they could be. The use of supervision orders at present is primarily to provide access by the Child and Family Agency to a child about whom there is a concern for their welfare so that the child and parents may be monitored. The new framework under which the Child and Family Agency are approaching all child welfare and protection cases, is known as the "Signs of Safety" model. It appears to be intended by the Agency that this framework would allow for a much more collaborative and open way of engaging with a family about whom child welfare or protection concerns arise. However, there are instances where a family or parents are not initially willing or open to engage with the Child and Family Agency. In those circumstances, the Supervision Order as proposed would serve as a much more effective tool to encourage engagement between families and the Agency.

The proposal to require that a written document is provided to the family to give details of the purpose of the order and the plans and supports available for the child and the family ensures that there is clarity about the concerns of the Agency and their proposed solutions to support the family.

Most importantly, the proposal to allow for an inspection of the house the child is living in, the ability to talk to the child on their own, to visit the child outside of the home (e.g. in school) and to consult

with the wider family network is necessary for this section to be effective. This will also provide the possibility for a more robust support plan to be implemented before any concerns escalate further which might require more serious interventions by the Agency.

The application for a Supervision Order may be necessary in cases involving low-level but persistent concerns of neglect such as truancy or parental addiction, that do not yet meet the threshold for interim or full care orders. The proposed solution is to be welcomed which would provide a mechanism for the court to address those concerns with directions.

PART IVB Private Foster Care

Private Foster Care

The Council agrees that, as "Children First" has introduced mandated reporting, the need for Part IVB of the Act has been removed.

PART V Jurisdiction and Procedure

Jurisdiction – operation of the courts and hearing of proceedings

The Council supports the establishment of a dedicated Family Court Division and acknowledges the need for reform. The Council is of the view that family law cases will be dealt with more efficiently if a specialist division of family law courts and Judges is created. This would ensure that the same Judges would deal with family law lists on an ongoing basis which would not only ensure greater efficiency but also greater consistency. It is not envisaged that specialist Judges would be confined to family law, rather they would be assigned to family law from the pool of general Judges.

The Council welcomes the proposal to introduce concurrent jurisdiction between District and Circuit level courts so that complex cases can be transferred to the Circuit Court. An improved case management system to facilitate effective case preparation is furthermore welcome. Such measures will help to resolve any issues concerning expert witnesses and/or the admissibility of evidence in advance of any hearing date being granted. The Council is of the view that case management hearings ought to be mandatory in such circumstances to avoid lengthy cases and unnecessary encroachment into valuable court time.

The proposed reforms will require further consideration when more detailed proposals are available but for the purpose of the present consultation process, the proposal is welcome.

Voice of the child

The Council considers a child's participation rights in all matters affecting him or her must be given the central position in all decision making under the Act. It welcomes proposals that ensure the vindication of those participation rights and agrees that a child should be able to retain guardian ad litem when becoming a party to proceedings under the Act. This will be particularly useful in Special Care proceedings where the child is typically older and will have complex needs and requirements.

The decisions being made will have a significant impact on their life when they turn 18 years of age and giving the child ownership of the process through active participation in the proceedings will allow for better aftercare outcomes.

Regarding assessment of the admissibility of hearsay evidence from the child, the Council submits that this is a very important aspect of the judicial consideration process, but it will reserve its position on the intended reforms until the detail of such proposals are made sufficiently clear by the Department. The Council would welcome the opportunity to make submissions at that juncture.

PART VI Children in the Care of Child and Family Agency

Corporate Parenting

The Council welcomes the opportunity to make the following points:

There is no express reference to "corporate parenting" or "corporate parenting approach" in the 1991 Act. However, section 18(3) of the Child Care Act 1991 (as amended) does appear to confer and impose powers and duties on the Child and Family Agency which are, in the nature of corporate parenting, powers and duties where a Court has made a care order in respect of a child pursuant to section 18(1) of the Child Care Act 1991 (as amended). Section 18(3) of the Child Care Act 1991(as amended) states: -

> *(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) 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."*

Accordingly, it is axiomatic from the wording of section 18(3) of the Child Care Act 1991 (as amended) that (i) where a child is the subject of a care order made under section 18(1) of the 1991 Act, the Child and Family Agency are conferred with the authority to act in relation to that child as if it was the parent of the child and (ii) the Child and Family Agency, in its capacity as a corporate parent, is obliged to fulfil its statutory duties to the said child in respect of safeguarding or promoting the child's health, development and/or welfare in accordance with the 1991 Act.

It would appear that something different and broader is intended to be meant by the terms "corporate parenting" or "corporate parenting approach." It is respectfully suggested that it is essential that those terms must be defined and that what such an approach is intended to encompass is clearly formulated.

The consultation paper refers to the "corporate parenting approach" in place in Scotland and it is, therefore, apparent that the term is intended to encompass other bodies in addition to the Child and Family Agency and other powers, duties and circumstances in addition to those specified in section 18(3) of the 1991 Act.

The Explanatory Notes prepared by the Scottish Government in respect of the Children and Young People (Scotland) Act 2014 explain that Part 9 of the 2014 Act gives effect to a concept of "Corporate Parenting".[5] The Explanatory Notes to the 2014 Act highlight that the concept of "Corporate Parenting" involves placing new duties on certain public bodies to act in particular ways in support of certain children and young people.[6] Schedule 4 of the 2014 Act specifies the public bodies which are deemed "Corporate Parents" for the purposes of Part 9 of 2014 Act. These public bodies include (but are not limited to) local authorities, health boards, the Scottish Social Services Council, the Scottish Sports Council, the Chief Constable of the Police Service of Scotland, the Mental Welfare Commission for Scotland, and the Scottish Housing Regulator.[7] Section 58(1) of the 2014 Act outlines the "Corporate Parenting responsibilities" of the aforesaid public bodies. In particular, section 58 (1) of the 2014 Act states: -

> *"(1) It is the duty of every corporate parent, in so far as consistent with the proper exercise of its other functions—*
>
> *(a) to be alert to matters which, or which might, adversely affect the wellbeing of children and young people to whom this Part applies,*
>
> *(b) to assess the needs of those children and young people for services and support it provides,*
>
> *(c) to promote the interests of those children and young people,*
>
> *(d) to seek to provide those children and young people with opportunities to participate in activities designed to promote their wellbeing,*

[5] Explanatory Notes to the Children and Young People (Scotland) Act 2014 at pg. 19.
[6] Ibid.
[7] Schedule 4 of the Children and Young People (Scotland) Act 2014.

(e) to take such action as it considers appropriate to help those children and young people—

(i) to access opportunities it provides in pursuance of paragraph (d), and

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

(f) to take such other action as it considers appropriate for the purposes of improving the way in which it exercises its functions in relation to those children and young people."

Section 57 of the 2014 Act specifies the category of children to whom the aforementioned duties are owed by "Corporate Parents". These children include (a) children who are "looked after" by a local authority in accordance with section 17(6) of the Children (Scotland) Act 1995 and (b) young persons who are under the age of 26 and were (on their 16th birthday or at any subsequent time), but are no longer "looked after" by a local authority.

Notably, section 60 of the 2014 Act imposes a duty to collaborate upon "Corporate Parents" in the exercise of their "Corporate Parenting responsibilities' where such collaboration would safeguard or promote the wellbeing of children and young persons to whom Part 9 to 2014 Act applies. In this regard, section 60 of the 2014 Act states: -

"(1) Corporate parents must, in so far as reasonably practicable, collaborate with each other when exercising their corporate parenting responsibilities or any other functions under this Part where they consider that doing so would safeguard or promote the wellbeing of children or young people to whom this Part applies.

(2) Such collaboration may include—

(a) sharing information,

(b) providing advice or assistance,

(c) co-ordinating activities (and seeking to prevent unnecessary duplication),

(d) sharing responsibility for action,

(e) funding activities jointly,

(f) exercising functions under this Part jointly (for example, by publishing a joint plan or joint report)."

It would seem to the Council that the purpose of the model of "Corporate Parenting", as envisaged in the Children and Young People (Scotland) Act 2014, is to ensure that specified public bodies exercise their functions in a manner which upholds and promotes the rights, wellbeing, and interests of children in care and/or care leavers and it is therefore very considerably broader than section 18(3) of the 1991 Act. It is not clear from Part VI of the Consultation Paper whether the Department ultimately strives to introduce a similar statutory model of "Corporate Parenting" as enshrined in the Children and Young People (Scotland) Act 2014.

Even though the Department does not propose to legislate for the introduction of a "Corporate Parenting" approach in Ireland at this juncture, it is submitted that, as a preliminary imperative, the Department should define the concept of "Corporate Parenting" and/or the "Corporate Parenting approach" which it aspires to implement in Irish law. This course of action would assist the relevant state agencies and/or stakeholders in understanding what "Corporate Parenting" encompasses as distinct from the Child and Family Agency discharging its statutory duties and/or exercising its statutory authority under the Child Care Act 1991 in its capacity as a corporate parent. Moreover, if the Department ultimately intends to introduce a similar statutory model of "Corporate Parenting" as enshrined in the Children and Young People (Scotland) Act 2014, it is submitted that such a model must be implemented by statute in a manner which is compatible with the Constitution of Ireland 1937, the European Convention on Human Rights and the UN Convention on the Rights of the Child 1990. However, the Council submits that, prior to introducing such a model of "Corporate Parenting" by way of legislative measure, the proposed model should be subject to the public consultative process whereby the relevant stakeholders can provide submissions on any proposed statutory model of "Corporate Parenting".

The Council notes the Department's views that interagency collaboration is a significant challenge to securing good outcomes for children in care and that in order to secure the aforesaid interagency collaboration, the Department envisages that the interagency co-ordination proposal outlined in the Consultation Paper will help lay the ground for any future "Corporate Parenting" approach. In particular, the Department outlines that it is considering the imposition of a statutory duty on all relevant services to work together in the planning and delivery of services which promote the welfare and well-being of vulnerable children in care.

It is respectfully suggested that the Ministerial guidance envisaged by the Department would be inadequate to create and impose the envisaged enforceable statutory duty on state agencies to collaborate on statutory footing. Rather, if the Department envisages imposing a statutory duty on the relevant state agencies to collaborate in the planning and delivery of services to promote the welfare and well-being of children in care, such a duty must be provided for and specified in statute.
The Council submits that the absence of any provision for the, as yet, undefined concept of "Corporate Parenting" and/or a "Corporate Parenting approach" in the Child Care Act 1991 (as amended) does not attenuate the existing statutory duties owed[8] and/or authorities/powers[9] exercisable by the Child and Family Agency in respect of (i) children who are not receiving adequate care and protection from

[8] For example, see sections 3, 16 and 36 of the Child Care Act 1991 (as amended).
[9] For example, see section 18(3) of the Child Care Act 1991 (as amended).

their parents/guardians and (ii) children who are the subject of a care order under section 18 of the Child Care Act 1991 (as amended).

Further Comments

Allegations of child sexual abuse or neglect (Section 3 Assessments)

Investigations conducted by the Child and Family Agency into allegations of child sexual abuse or neglect, known as Section 3 assessments, are regularly subject to judicial review proceedings. The Section 3 assessments are conducted under the general duty and powers granted to the Agency under Section 3 of the Child Care Act 1991, as amended. The current procedures followed by the Agency were drafted in September 2014 and the new procedure (Child Abuse Substantiation Procedures) is due to be published. The difficulty with such procedures is that they do not have the benefit of primary legislation in having been debated and passed by the Oireachtas nor do they have certainty of primary legislation. This is a complex and fraught area of law which must first protect the welfare of children, but which must also protect the rights of a person suspected of abuse. Legislative provision is necessary to bring legal and procedural certainty to these investigations.

Conclusion

The Council would like to thank the Department for the opportunity to contribute to this review and remains available to the Department to clarify its position in relation to any of the foregoing.

THE BAR
OF IRELAND

The Law Library

Distillery Building
145-151 Church Street
Dublin 7 D07 WDX8

Tel: +353 1 817 5000
Fax: +353 1 817 5150
Email: thebarofireland@lawlibrary.ie
Twitter: @TheBarofIreland
www.lawlibrary.ie