Child Law Project

Presentation to the Department of Children, Equality, Disability, Integration and Youth

13 February 2024

Contents

On 31 January 2024, following an invitation from the Department of Children, Equality, Disability, Integration and Youth (DCEDIY), the Child Law Project gave a short presentation, alongside the National Review Panel, to departmental officials. Below is a short paper based on that presentation which was delivered by Dr Carol Coulter and Dr Maria Corbett of the Child Law Project.

1. Introduction to the Child Law Project

The Child Law Project is an independent project, funded by DCEDIY, which examines and researches judicial child care proceedings. The Child Law Project has been in operation for eleven years and since 2018 it is a company limited by guarantee (registered as CCLRP CLG).[1]

We attend and report on District Court child care and High Court special care hearings, relevant judicial reviews and wardship cases involving children and young adults who have previously been in care. Our remit is set and limited by section 29 of the Child Care Act 1991, which permits us to attend certain child proceedings and to access documents as part of our reporting work.[2]

We provide information to the public on the operation of the child care system in the courts with the aim of promoting transparency and accountability. We operate under a Protocol to protect the anonymity of the children and families subject to proceedings. We also use information from the cases we attend to identify emerging trends, and we conduct legal and policy analysis and research to identify possible reforms that would address the difficulties seen in our court reporting work. To date, we have published 980 case reports from our attendance at child care proceedings. Our latest volume of reports was published on 15 January 2024 and is available here.

1 CCLRP CLG is governed by a Board of Directors. It trades as 'Child Law Project' and previously as 'Child Care Law Reporting Project'.

2 Section 29 has been amended by section 3 of the Child Care (Amendment) Act 2007 and section 6 of the Child Care (Amendment) Act 2022. We operate in line with Regulation No. 467 of 2012 which allows organisations named in the legislation to nominate people to attend and report on child care proceedings.

We also publish periodic analytical reports drawing and observations on proposed legislative reforms. All our publications are available at: <www.childlawproject.ie>.

Our funding: We are solely funded by DCEDIY under a three-year funding agreement. We have two employees and engage a panel of reporters (between six and ten at any one time). The employees and reporters are all part-time. The grant will come to an end in October 2024. As such, a final volume of case reports will be published on 8 July 2024 and an analytical report, marking the end of the three-year contract, will be published in early October 2024. As far as we are aware, no decision has been made to date to continue to provide State funding for court reporting.

Importance of court reporting: The principle underpinning our work is that citizens need to know and understand how laws passed by the politicians they elect work out in practice. One of the main arenas the working out of the law is seen is in the courts. Child protection cases in Ireland are heard *in camera* to protect the privacy of the child and his or her family. However, this approach can hinder transparency and accountability and means there is limited information about how the courts are working. In the absence of comprehensive information, rumour and anecdote can hold sway. While most anecdotes undoubtedly reflect individual experiences there is no way of knowing how representative they are. Inevitably, therefore, they can form the basis for lobbying for specific policies, without an adequate evidence base for such policies having been established. Transparency in the courts system is therefore fundamental to the functioning of democracy.

In response to such criticisms, Ireland modified the *in camera* rule to 'open up' child care proceedings to reporting under the Child Care (Amendment) Act 2007 and later to limited media reporting under the Courts and Civil Law (Miscellaneous Provisions) Act 2013. Both sets of reporting are subject to maintaining the anonymity of the families involved. The text of the 2007 Act states that persons nominated by the bodies named in Regulations can attend and report on child care proceedings and have access to relevant documents, on the basis that this "is likely to provide information which will assist in the better operation of this Act, in particular in relation to the care and protection of children". By linking the purpose of the reporting to "the better operation of the Act", the 2007 Act differs from other legislation which relaxed the *in camera* rule. To this end we have collected and collated data from the cases we have attended and published analytical reports based on them.

Under the Act, we are not permitted to interview parents or children, or accept documents or information relating to cases we have not attended. We are sometimes contacted by people seeking assistance. We refer them to relevant bodies, including the Barnardos' pilot project supporting parents of children in care and the helplines run by EPIC and the Children's Rights Alliance.

2. Observations on Care Admissions

Reason for admissions: From our court reporting, we observe that the reason for the admission of a child into care usually falls into one of three categories. The majority relate to a concern that the parent had neglected or abused their child or failed to protect them from harm. A growing cohort are focused on the child's own presentation with emotional, behavioural, disabilities or mental health difficulties. A third cohort is where there is no adult responsible for the child, such as an unaccompanied or separated minor or where a parent is dead, has left the jurisdiction or is uncontactable (often related to addiction and homelessness).

Numbers in care: There appears to be a downward trend of the number of children in care. In 2016 there were 52 children per 10,000 in care, while in 2023 the figure had dropped to 45 children in care per 10,000.[3] We do not have adequate data to interpret what has led to this trend.[4] It may be that there has been a reduction in the number of children in need of care due to the success of preventative, early intervention and family support interventions. However, given the significant rise in referrals to the Child and Family Agency – Tusla over the same period, the question needs to be asked is the downward trend due to a rise in the 'threshold' applied by social workers in deciding whether or not to seek to have a child admitted into care. The 'threshold' may be influenced by social workers not being available within communities, the dearth of placements and/or an increase in the use of private family arrangements.

A child has a right to protection from harm under Irish and international law.[5] The European Court of Human Rights has found a State to have violated the ECHR in circumstances where authorities knew, had reason to suspect or ought to have known that abuse was going on and failed to act to protect children from abuse.[6] Examples from our latest volume could be used as case studies to explore the nature and timing of interventions:

- A GAL sought to refer the CFA's operation of the Signs of Safety policy in a specific case to the Ombudsman for Children. CFA committed to undertake an internal review.[7]
- The Garda armed response unit was needed to bring two young children into care, following the failure of numerous safety plans. The older sibling, of primary school age, on entering care was non-verbal, not toilet trained, aggressive and with significant self-harming behaviours. Foster families were unable to care for him so he was placed in residential care under the Joint Protocol.[8]

3 These calculations are based on Census figures. The 2023 figure does not include unaccompanied minors seeking protection.
4 Multiple issues may be in play including the flow of children into and out of care and changes in age profile etc.
5 CFREU Art 24(1); ECHR Art 3; RESC Arts 7(10); and CRC Arts 19 and 34-36.
6 This relates to Article 3 freedom from inhuman and degrading treatment. *Z v UK* (2002) 34 EHRR 3 and DP and *JC v UK* (2003) 36 EHRR 14.
7 See: https://www.childlawproject.ie/latest-volume/application-to-refer-cfas-signs-of-safety-policy-to-ombudsman-for-children-adjourned-pending-internal-review-2023vol234/
8 See: https://www.childlawproject.ie/latest-volume/full-care-orders-for-two-children-with-significant-special-needs-2023vol224/

3. Observations on Children in Care

Within each volume of our reports there are always cases where children are thriving in care and overcoming personal difficulties. We have seen examples of successful safeguarding interventions, including the identification of possible trafficking victims and innovative practice such as fostering both a child and their young mother. However, for some children the care system has collapsed in that the Child and Family Agency (CFA) is no longer able to operate in compliance with the law and national standards. Of particular concern is the use of unregistered care placements and children in care with no allocated social worker.

Social workers: The difficulties being experienced in the recruitment and retention of social workers have multiple knock-on implications. In breach of national standards,[9] 19 per cent of children in care do not have an allocated (designated) social worker.[10] This figure excludes unaccompanied and separated children so the true figure is likely to be higher.

In our latest volume, a Dublin judge refused to extend an interim care order for 28 days as the young boy in question did not have an allocated social worker. Instead, the judge made a 21-day order and sought an update at the next hearing. The judge said he would not continue to extend the interim care order without a social worker being allocated.[11]

Care plans: In breach of child care law,[12] 24 per cent of children in care do not have an up-to-date care plan (developed following a child-in-care review).[13] Again, this figure excludes unaccompanied and separated children so the true figure is likely to be higher.

In our latest volume, a Dublin judge directed the CFA to prepare a detailed care plan for a vulnerable teenage girl who had had a large number of placements, was residing at home and had not been in education for approximately 20 months.[14]

9 National Standards for Foster Care (2003) p 16 and National Standards for Children's Residential Centres (2018) p 7.

10 See: Child and Family Agency – Tusla, *Monthly Service Performance and Activity Report December 2023* (12 February 2024). https://www.tusla.ie/uploads/content/Monthly_Service_Performance_and_Activity_Report_Dec_2023_V1.0.pdf p 12.

11 See: https://www.childlawproject.ie/latest-volume/dublin-district-court-refuses-to-fully-extend-interim-care-order-for-a-young-boy-without-allocated-social-worker-2023vol27/

12 Section 42 of the Child Care Act provides that a care placement must be periodically reviewed and under the three sets of regulations there is an obligation to prepare a care plan for a child in care. See Child Care (Placement of Children in Residential Care) Regulations 1995 (S.I. No.259 of 1995) 23; Child Care (Placement of Children in Foster Care) Regulations 1995 (S.I. No.260 of 1995) 11; and Child Care (Placement of Children With Relatives) Regulations 1995 (S.I. No.261 of 1995) 11.

13 See: Child and Family Agency – Tusla, *Monthly Service Performance and Activity Report December 2023* (12 February 2024). https://www.tusla.ie/uploads/content/Monthly_Service_Performance_and_Activity_Report_Dec_2023_V1.0.pdf p 12.

14 See: https://www.childlawproject.ie/latest-volume/dublin-district-court-directs-the-cfa-to-prepare-a-detailed-care-plan-for-a-vulnerable-teenager-who-had-had-large-number-of-emergency-placements-2023vol232/

Placements: Over the past two years we have seen an increasing number of cases where an appropriate placement for a child in care cannot be found. We have observed that in some instances a lack of a stable and appropriate placement has led to a deterioration of their mental health and to a risk of coming into contact with youth justice services. We have observed in our reporting that the dearth of appropriate placements has led to sub-optimal arrangements, including:

- **No placement provided:** In some instances, the CFA cannot offer the child any placement so the child has returned to live at home.[15]

- **Unregistered placements:** Children in care are being placed by the CFA in unregistered placements (known as non-procured regional bespoke placements or special emergency arrangements (SEAs). This practice breaches section 60 of the Child Care Act which prohibits the operation of a children's residential centre unless it is first registered with the CFA.

  As of February 2024, there were 174 children in an unregistered placement, 111 of which were separated children seeking international protection.[16] SEAs placements may be in a premises leased for this purpose, a hotel room or BnB. Given their status as unregistered, these placements are not subject to inspection against the national standards.[17] They also have governance and resource implications.

  Unregistered placements are often temporary, so the child has no stability. They are often not able to meet the needs of the child to education, access to therapeutic supports, social contact with peers (as many are a single child placement) or contact with family (as many can be located a great distance from the child's home).

  The judiciary have raised concern about the practice of using unregistered placements.[18] Where a child is in an unregistered placement, a judge may keep the case under active review and make directions. In one case, the CFA sought to place a stay on the judge's direction to provide a trauma-focused placement for a teenager with specific needs. The teenage boy had had 30 different placements in 26 months, some of these placement were described as "very inappropriate".[19]

15 See: https://www.childlawproject.ie/latest-volume/dublin-district-court-directs-the-cfa-to-prepare-a-detailed-care-plan-for-a-vulnerable-teenager-who-had-had-large-number-of-emergency-placements-2023vol232/

16 RTE, This Week interview with Kate Duggan, CEO of the Child and Family Agency https://www.rte.ie/news/2024/0211/1431692-tusla-ceo/ and https://www.rte.ie/radio/radio1/clips/22353408/

17 Child Care (Placement of Children in Residential Care) Regulations 1995 (S.I. No.259 of 1995); Child Care (Placement of Children in Foster Care) Regulations 1995 (S.I. No.260 of 1995); and Child Care (Placement of Children With Relatives) Regulations 1995 (S.I. No.261 of 1995).

18 See for example: https://www.childlawproject.ie/wp-content/uploads/2023/07/01-2023vol1.pdf

19 This report is of yet unpublished, but will be published in July 2024 as part of our next volume.

In some instances, concern has been raised about poor practice in unregistered placements. In two cases we observed that placements were ended in an unplanned manner. In one, the placement for a teenage girl, whose parents were in prison, was abruptly ended and she not allowed return from school to collect her belongings, which were placed in black bags.[20] In another case, a 9-year old boy from Dublin in a residential unit in the north-west, was moved with two days' notice to the south-east.[21]

- **Delayed admission to and exit from special care:** Children are experiencing delayed entry into and exit from special care. Our reporting from the High Court has shown that in some cases a child was detained longer than necessary in special care due to the lack of a follow-on placement, which represents a potential breach of the child's right to liberty. In January 2023, we published a special report on special care based on 15 months of court attendance.[22] There are currently cases before the courts litigating about delays in admitting children to special care and the Supreme Court heard a case in December 2023, publication of the judgment in this case is expected shortly. The three special care units are not operating at full capacity. Of a potential 24 beds, only 11 were in operation in December 2023, despite a significant waiting list for places.[23] We understand that part of the difficulty is that the current remuneration package is not sufficient to attract and retain staff. Matters of remuneration require the approval of the Department of Expenditure and Public Reform.

Other Issues:

Interagency co-operation: We will prepare a separate paper on interagency co-operation on the provision of services to children and care leavers. This paper will examine the interplay between the child welfare and protection services delivered by the CFA and residential disability and mental health services delivered by the HSE.

Unaccompanied minors: In November 2023, we provided a paper on unaccompanied and separated children and the Child Care Act as part of a Strategic Engagement on Separated Children led by the CFA and facilitated by the Children's Rights Alliance.

20 See: https://www.childlawproject.ie/latest-volume/bespoke-placement-sought-for-teenage-girl-abruptly-evicted-from-placement/
21 See: https://www.childlawproject.ie/latest-volume/gal-permitted-by-court-to-bring-complaint-to-ombudsman-for-children-about-abrupt-change-in-placement-for-young-boy/
22 See: https://www.childlawproject.ie/latest-volume/overview-of-special-care-list-judge-stresses-need-for-legislative-reform-in-a-number-of-areas/
23 See: Child and Family Agency – Tusla, *Monthly Service Performance and Activity Report December 2023* (12 February 2024). https://www.tusla.ie/uploads/content/Monthly_Service_Performance_and_Activity_Report_Dec_2023_V1.0.pdf p 10.

4. Observations on Reform of the Child Care Act

We have provided observations on the Heads and General Scheme of the Child Care (Amendment) Bill 2023.[24] Below we summarise some key observations. There are several reforms not addressed in the General Scheme, including measures on domestic homicide, placing conferencing on a statutory footing and provision for unaccompanied and separated children.

Welcome Heads:

Head 7 Section 4 (voluntary care) – we would have liked to see an upper time limit

Head 17 Section 17 (interim care order)

- Welcome: extension of ICO for up to 90 days where any assessment is ongoing or due
- Welcome: Requirement to evidence need for extension past 1 year
- Reconsider: 1 year on consent is too long, 3-6 months would be preferable

Heads that need to be strengthened

Head 8 Section 5 – Homeless Accommodation – provides the Minister may introduce regulations (positive) but does little to strengthen the current legal protections offered to a child who is homeless. Proposals are weaker than CFA existing policy.

Head 10 Places a duty on relevant bodies to cooperate to respond to an information request. Needs to go further to include collaborating on the planning, delivery and funding of services, in particular residential placements.

Heads that we do not support:

Heads 17, 18 and 19 - Amend the grounds for granting an interim care order, care order and supervision order by merging the ground based on past behaviour with the ground based on likely future behaviour. We are not clear what the rationale for this change is. We caution against this change as it mixes up two different types of evidence.

Head 14 Extend the maximum duration of an emergency care order (section 13) from 8 to 15 days. We are not clear what the rationale for this change is, given that the option exists to apply for an interim care order. We caution against this change as it could lead to legal challenges especially given the level of power granted to the state under this order including that it can be made *ex parte* and location of child can be withheld from parent.

24 See: https://www.childlawproject.ie/wp-content/uploads/2023/05/Observations-on-the-Heads-and-General-Scheme-of-the-Child-Care-Amendment-Bill-2023-11-May-2023.pdf

5. Observations on Wardship Proceedings

For the last number of years, we has been reporting on wardship proceedings in the High Court concerning young people, many of whom are or have been in the care of the CFA. While this is a small cohort of young people, they have raised very challenging issues both legally and in terms of providing for them.

Taking a person into wardship requires a court finding that they are of "unsound mind" and lack capacity to make decisions for themselves. Being made a ward of court deprives a person of the right to make a wide range of decisions for themselves, including being able to choose where they live and whether to go on holiday, as well as major decisions relating to issues like money and marriage. The Law Reform Commission recommended that the regime be replaced by a more nuanced system placing the rights of the person concerned at its centre and recognising that people could have capacity in certain areas, but not in others. This report formed the basis for the Assisted Decision-Making (Capacity) Act (ADMCA), passed in 2015, which did not come into operation until April 2023. The test for capacity under the Act recognises that a person's capacity can change over time, meaning they might need more or less support in the future.

Under the Act, all of those currently wards of court should leave wardship within the next three years. Their situation will then be reviewed and the supports they need in their decision-making assessed. In some cases, this will require the courts appointing a person to assist them. The ADMCA does not apply to those between the age of 16 (when young people may make decisions concerning their health without parental permission) and 18 (the age of majority). This leaves those who have been made wards of court following a report on their capacity by a medical visitor in a wardship situation awaiting the review of their wardship at or just before the age of 18. The High Court asked the CFA to "think long and hard whether it was appropriate to have a new enquiry into the capacity of a young man", given that a new jurisdiction (the ADMCA) was shortly to come into force, and its aim was to discharge people from wardship.

A further issue raised in the reports is that the Act has no provision for the detention of those wards who are being detained for what is deemed by the court to be in their own interests. As the wardship regime came to an end in April 2023, the issue of how to deal with such people had to be examined by the High Court, and a number of young people fall into this category.

In our latest volume we reported on a number of cases in the High Court involving wards who either were or had been in the care of the CFA. In one the CFA asked the court to permit a young woman, formerly in its care, to be detained in a residential unit and returned to it by Gardaí if she absconded.

The High Court considered where the power to detain now resided, given that the wardship regime had been ended, and decided that the power to detain a person now rested with the inherent jurisdiction of the High Court, and outlined the considerations that should apply. However, this shows a gap in the Act, as some people may need detention, probably temporarily, for their own protection.

In our latest volume we also report on four cases where the High Court considered the situation of young people who had been made wards of court and sent to specialist units in the UK for the treatment of people with complex needs, because no such facilities exist in Ireland. One was a young woman who suffered from schizoaffective disorder and Autism Spectrum Disorder (ASD), was a risk both to herself and to staff, there had been multiple incidents of aggression, damage to her room, self-harm, including head-banging, suicidal behaviours, substance abuse and self-neglect. She had reported auditory hallucination telling her to harm herself and produced a ligature. She had had admissions as an inpatient to CAMHS in this jurisdiction, and spent time in various units, before being transferred to the unit abroad.

Another young woman sent abroad had experienced sexual abuse at the hands of a close family member and others and her diagnosis was of an emerging personality disorder, depression and complex needs. Two young men, both also wards of court, were in a specific psychiatric hospital in the UK, both for a number of years. One was secluded, meaning he was kept isolated, following incidents of racial abuse and assaults and threats against black staff. He had been on a deaf ward since he was a teenager, where most of the patients were much older than he was. Because of the specialist nature of the ward it included patients that were acutely unwell and also those undergoing long term rehabilitation. Some patients had been on the ward for a very long time.

Another young man, not deaf, had been in care, including secure care, in Ireland, and his treatment was described as complex. He too had been involved in a number of assaults in the unit, both as a victim and a perpetrator. He suffered from intellectual disability, a personality disorder, bi-polar disorder and autism. His treatment was complex.

The judge in one of these cases expressed regret that there was no specialist unit in Ireland for such young people, and one of the young people, while accepting the need to be where she was, was very homesick. The lack of appropriate psychiatric and psychological services, including in-patient care, for children and young people with complex needs, including psychological, disability and behaviour issues, has been highlighted by the Child Law Project in many of its volumes of reports.

6. Observations on the Justice System

The arena where the operation of the Child Care Act and Assisted Decision-Making (Capacity) Act is tested is the courts, both the District Court (and Circuit Court, on appeal, though this is rare) and the High Court, which deals with special care, wardship and judicial reviews. The courts exist to vindicate the rights of citizens, they cannot lay down government policy or spending priorities, though they can indicate where existing policy is in conflict with the constitutional rights, or the rights under legislation, of individual citizens and can even strike down legislation as unconstitutional. Where problems arise repeatedly throwing light on gaps or flaws in legislation, policy or practice, judges may express the view that these need urgent attention. There are a number of our reports where judges have done so.

Where the High Court, Court of Appeal or Supreme Court makes a judgment on policy or practice, that is then the law, just as legislation is, and there is a need to track and integrate caselaw into policy and practice and to inform the review of Child Care Act.

- Consider collecting and collating all High Court and Supreme Court judgments on child care and related matters, some will be covered in Geoffrey Shannon's book on 'Child and Family Law' and in the annual reports of the Special Rapporteur on Child Protection but new ones arise during the year.
- In addition to judgments of the superior court, there have been helpful rulings from judges of District Court on the presentation of social workers' reports and on the need for reports to be sent by the CFA to parents' and GAL lawyers in time for consultation with their clients. While these are not law and not binding on other District Courts, they are a contribution to best practice and are likely to be elements in Rules of Court for new District Family Court.

Our reports have also revealed problems in the functioning of the courts themselves: Lists are often too long and cases may not be able to be heard properly on the day they are listed; there are long wait times on hearing day and long wait times for care order dates. The decentralised District Court system means practice can vary in different parts of the country, in some courts cases are still heard as part of mixed list, including private family law and even some criminal and civil matters.

Since our inception we have stressed the urgent need for Family Court, and welcome the Family Courts Bill 2022, in particular the introduction of a common practice direction for all family courts at each court level (s42); and the vertical transfer of complex cases to a higher court (s70). We also welcome the *Family Justice Strategy 2022-2025* launched by the Department of Justice. As members of the Advisory Group for the Family Justice Strategy we urged the introduction of a Court Clinic for

assessments, where necessary, of children, and guidelines on experts. This should also be introduced in private family law.

To sum up, as well as attending court and reporting on individual child protection cases, we have, over the 11 years of the Child Law Project, reported on the issues affecting vulnerable children and families and highlighted the challenges facing the State institutions charged with protecting and helping them. We have also reported on how the courts themselves function. We have sought to identify issues and trends, and have seen both improvements in policy and practice and an increase in complexity and challenges. We have sought to "assist in the better operation of the (Child Care) Act", and hope we have done so.

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