



**Department of Children and Youth Affairs:
Review of the Child Care Act 1991**

Submission by the Ombudsman for Children's Office

23 February 2018

Contents

Recommendations

1. Introduction	1
2. Embedding children’s rights principles and a child-centred approach	3
2.1 <i>Embedding children’s rights principles</i>	4
2.2 <i>Embedding a child-centred approach</i>	10
3. General measures of implementation	14
3.1 <i>Coordination</i>	14
3.2 <i>Data collection</i>	17
3.3 <i>Disseminating information and advice</i>	18
4. Strengthening parts of the Child Care Act 1991	21
4.1 <i>Promotion of the welfare of children (Part II)</i>	21
4.2 <i>Children in the care of the Child and Family Agency (Part VI)</i>	22
4.3 <i>Children’s residential centres (Part VIII)</i>	27
4.4 <i>Administration, miscellaneous and supplementary (Parts IX and X)</i>	28
Appendix 1	30

Recommendations of the Ombudsman for Children's Office

Embedding children's rights principles

- In light of Ireland's obligations under the UNCRC and Article 42A.1 of the Constitution, the DCYA should take the opportunity presented by the current review of the 1991 Act to ensure that:
 - the revised legislation requires all relevant bodies under the Act to recognise children as rights-holders
 - explicit provisions are made in the revised Act for children's rights to be respected, protected and fulfilled, including children's right to know and be cared for by their parent(s) and to maintain regular direct contact with their parent(s), unless this is contrary to their best interests; children's right to preserve their identity; and children's right to special protection and assistance from the State when temporarily or permanently deprived of their family environment.

In this regard, the OCO encourages the DCYA to examine the scope for making provision in the revised Act to enable the Minister to prescribe through statutory regulations the specific rights of the child that Tusla, the courts, An Garda Síochána and other bodies with responsibilities under the Act will be required to take appropriate account of when taking actions and decisions affecting children.

- Appropriate provision should be made in the revised 1991 Act to ensure that the following core children's rights principles are mainstreamed as positive obligations in and across all parts of the Act:
 - children's right to non-discrimination
 - children's right to have their best interests treated as a paramount consideration in all actions and decisions affecting them
 - children's right to life, survival and development
 - children's right to express their views freely and to have due weight given to their views, in accordance with their age and maturity.

In this regard, the DCYA might give consideration to incorporating a section on guiding principles in the revised Act, which sets out these general principles and establishes that they must inform the interpretation and implementation of the whole Act.

- The DCYA should give serious consideration to making explicit provision in the revised Act for the factors and circumstances that must be considered by Tusla, the courts and other bodies with responsibilities under the Act when they are making a determination about what is in the best interests of a child. In relation to children's right to be heard, the DCYA should consider making provision to enable the Minister to make regulations prescribing how Tusla, the courts and other bodies will determine how best to ascertain

the views of the child and the corresponding procedures for consulting the child and affording due weight to their views.

Embedding a child-centred approach

Family support services

- Through amendments to the 1991 Act, a more comprehensive legislative framework should be put in place for the appropriate provision of quality family support services.

Timeliness

- A child-centred principle should be expressly incorporated into the revised 1991 Act which requires decisions and actions impacting on children to be prioritised and completed in the shortest time possible.

General measures of implementation

Coordination

- In line with developments in England and Scotland, the DCYA should give serious consideration to explicitly incorporating the concept of ‘corporate parenting’ in the revised 1991 Act. This should include placing a legislative duty on agencies and bodies with responsibilities for children and families (for example, health services, local authorities, housing authorities, education services, and criminal justice agencies) to cooperate with Tusla in the exercise of its functions under the revised Act.

Data collection

- Serious consideration should be given to strengthening the current legislative framework to place a clear obligation on the DCYA to collect and disseminate systematically disaggregated national data relating to the characteristics, experiences and outcomes of children who come into contact with family support services and the care system.

Disseminating information and advice

- Explicit statutory provision should be made for the right of children and their parent(s)/guardian(s) to receive timely, accessible and comprehensive information about any decisions or actions taken under the 1991 Act, which affect them.

Strengthening parts of the Child Care Act 1991

Promotion of the welfare of children (Part II)

- The revised 1991 Act should provide greater legislative clarity in relation to voluntary care, including as regards the purpose and operation of voluntary care arrangements. Among the operational matters that the revised Act might provide greater clarity on are the process by which voluntary care is entered into and ceased and the supports available to the child, their parent(s) and carer(s) both before and subsequent to a voluntary care placement being agreed.

Children in the care of the Child and Family Agency (Part VI)

- The revised 1991 Act should establish a statutory duty for Tusla to take strategic action to ensure that there are sufficient and appropriate placements within each administrative area, including for children in need of emergency accommodation.
- Similar to the approach adopted in England and Wales, provision should be made in the revised 1991 Act to require that alternative care placements are in proximity to children's former homes and schools, facilitate the joint placement of siblings and are suitable for the additional needs that children may have.
- The revised 1991 Act should reframe the current provision for access and expressly incorporate the right of the child to maintain personal relations and direct contact with their parents/guardians, siblings and extended family members on a regular basis, unless it is contrary to the child's best interests and taking into account the views of the child.
- As part of its review of the 1991 Act, the DCYA should strengthen the legislative framework to ensure that children who are leaving care or who are leaving accommodation provided by Tusla under Section 5 can enjoy their right to access appropriate transition support and aftercare services, including psychological support.

Children's residential centres (Part VIII)

- The revised 1991 Act should provide for the inspection of private and voluntary residential centres and their registration to be transferred to HIQA.

Administration, miscellaneous and supplementary (Parts IX and X)

- The revised Act should provide for the establishment of a Child Care Act Advisory Committee as a dedicated oversight mechanism to monitor the implementation of the Act's provisions as well as related legislative frameworks and statutory regulations and

guidance. This should be an inter-agency Committee, which includes representatives from the child care, education, health and justice sectors.

1. Introduction

In accordance with a commitment in Better Outcomes Brighter Futures – The National Policy Framework for Children and Young People 2014-2020, the Department of Children and Youth Affairs ('DCYA') has commenced a review of the Child Care Act, 1991 ('1991 Act'). The aims of this review are to identify what is working well within the legislation; to address any identified gaps and new areas for development; to capture current legislative, policy and practice developments; and, building on these steps, to revise the original legislation.

With a stated purpose of providing for the care and protection of children, the 1991 Act sets out the circumstances and manner in which the State may intervene in the lives of children and families where children may not be receiving adequate care and protection and where such intervention may entail the State taking the place of parents. As such, the 1991 Act is a very significant piece of legislation since actions and decisions taken by the State under its auspices can have a profound impact on children who are in vulnerable situations and on families who are experiencing considerable challenges.

As the DCYA has recognised, notwithstanding amendments that have been made to the 1991 Act, many of its key provisions have been in force for over 25 years. As a result, the 1991 Act can be seen to be out of date at a fundamental level: preceding as it does Ireland's ratification of the UN Convention on the Rights of the Child ('UNCRC') and the much more recent insertion of Article 42A into the Constitution, the 1991 Act broadly provides for a welfare approach rather than a rights-based approach to providing for the care and protection of children. The Ombudsman for Children's Office ('OCO') welcomes the current review as a vital opportunity for the State to affirm its commitment and give appropriate legislative underpinning to its obligations to respect, protect and fulfil the rights of children affected by the Act's provisions. Taking this opportunity means putting children first and will involve a focus on strengthening the visibility of children's rights in the 1991 Act. It will also entail setting out what the State requires and expects of the Child and Family Agency (Tusla), the courts, An Garda Síochána and other actors as regards discharging their roles and responsibilities under the Act in accordance with children's rights and best interests.

The current review of the 1991 Act also presents an important opportunity to reimagine and reframe the State's expectations of its own capacity to provide care and protection to children. Notwithstanding the fact that many families may benefit from the supports provided by the State and that many children in care may develop and thrive, a narrative can be seen to persist in which the State is recognised – and perhaps recognises itself at times - as being inevitably deficient in its capacity to care for children. The catastrophic past failures of the State in this regard are well documented. The multiple care placements that some children endure, the placement of certain children in care outside this jurisdiction, the disproportionate number of children with a care background in detention, the higher risk of homelessness faced by children leaving State care all point to ongoing serious deficiencies in

the State's capacity to meet the multiple and complex needs of certain children in its care. If the State is to intervene in the lives of children and families, and on occasion to the extent that children are placed in its care, it is incumbent on the State to have confidence in its ability to succeed with and for children and families and to equip itself accordingly for success. Putting in place a robust legislative framework is a key step in this regard. In leading the current review of the 1991 Act, the DCYA needs to set the bar high for the State. Children and their families deserve nothing less.

The OCO is an independent statutory body. One of the OCO's core statutory functions under the Ombudsman for Children Act, 2002 (as amended) is to promote the rights and welfare of children up to the age of 18 years. The OCO has prepared this submission in response to an invitation from the DCYA and pursuant to sections 7(1)(g) and 7(4) of the 2002 Act (as amended), which respectively provide for the Ombudsman for Children to review the operation of legislation and to advise on any matter concerning the rights and welfare of children.

In preparing this submission, the OCO has been mindful of the wide-ranging experience and expertise of the many stakeholders who will contribute to the DCYA's review of the 1991 Act and that the current review is focused on identifying *legislative* changes to the Act that are needed or merited. Correspondingly, this submission does not address itself to every part of the 1991 Act. Rather our submission focuses on highlighting a range of issues of concern that:

- have come directly to the OCO's attention in the context of exercising our statutory functions under the 2002 Act (as amended), in particular our statutory function to examine and investigate complaints made by or on behalf of children, *and*
- the OCO believes require or would benefit from legislative changes to the 1991 Act.

This submission comprises three sections. The first two sections focus on cross-cutting principles and measures that are not confined to one or more specific parts of the 1991 Act. The third section of our submission addresses itself to issues of concern that are relevant to particular parts of the 1991 Act and follows the DCYA's template for submissions. In addition to this current submission, the OCO encourages the DCYA to consider previous publications by the OCO that are relevant to the review of the 1991 Act. These publications are listed at Appendix 1 in this submission.

In accordance with the Ombudsman for Children's statutory function to promote the rights and welfare of children, the overall aim of this submission is to highlight a number of ways in which the OCO believes the 1991 Act could be improved in order to strengthen respect for and the protection and fulfilment of the rights of children affected by its provisions.

2. Embedding children’s rights principles and a child-centred approach

Following Ireland’s ratification of the UNCRC in 1992, the State is required to undertake “*all appropriate legislative, administrative and other measures*” for the implementation of children’s rights (Article 4).

In its guidance to States on how to fulfil their obligations to children under the UNCRC, the UN Committee on the Rights of the Child (‘UN Committee’) has advised that implementation is the process whereby States take positive action to ensure the realisation of all rights in the UNCRC for all children in their jurisdiction. In this regard, the UN Committee has emphasised that: “*Ensuring that all domestic legislation is fully compatible with the Convention and that the Convention’s principles and provisions can be directly applied and appropriately enforced is fundamental.*”¹ Following its most recent examination of Ireland’s progress in fulfilling its obligations to children under the UNCRC in 2016, the Committee recalled the important role played by legislation in advancing children’s rights. It recommended that Ireland should implement legislative amendments to ensure that the UNCRC is respected, including in administrative proceedings and decision-making processes.²

Notwithstanding amendments to the 1991 Act since its enactment, it continues to be underpinned primarily by a welfare approach which is at odds with the recognition of children as rights-holders signalled by the State’s ratification of the UNCRC and the insertion of Article 42A into the Constitution.³ The welfare approach recognises children as dependents in need of protection and results in decisions about children’s needs being made on their behalf, rather than in consultation and partnership with them.⁴

Ensuring that the revised 1991 Act recognises children as subjects of rights will support State actors, as well as private and voluntary providers involved in the delivery of child care and family support services, to adopt a child-centred approach that places the rights, needs and best interests of children affected by decisions and actions at the centre of the process.

¹ UN Committee on the Rights of the Child, *General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child* (2003) UN Doc. CRC/GC/2003/5 at para 1.

² UN Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic reports of Ireland* (2016) UN Doc. CRC/C/IRL/CO/3-4 at para 11.

³ The newly commenced Section 23D(3) is welcome in that it places an obligation on the High Court to have regard, at all times, to the rights of the child who is charged with an offence and the subject of an application for a special care or interim special care order, including his or her rights in the proceedings. However, this obligation is limited to specific cases in the High Court, whereas most child care proceedings take place in the District Court. The rights-based language used has not been mainstreamed throughout the 1991 Act.

⁴ N. Hayes, *Children’s Rights - Whose right? A review of child policy development in Ireland* (2009) available at https://www.tcd.ie/policy-institute/assets/pdf/BP9_Children_Hayes.pdf.

2.1 Embedding children's rights principles

The UN Committee has emphasised the particular importance of ensuring that domestic law incorporates the general principles of the UNCRC as they are integral to the implementation of all other children's rights.⁵ These principles are:

- **Article 2** provides that all children must be able to enjoy their rights without discrimination of any kind, irrespective of their circumstances or those of their parents/guardians.
- **Article 3** requires that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child must be a primary consideration.
- **Article 6** recognises the child's right to life, survival and development.
- **Article 12** provides for children's right to express their views freely in all matters affecting them, and for their views to be given due weight in line with their age and maturity.

2.1.1 Children's right to non-discrimination

The OCO is of the view that the 1991 Act does not make adequate provision for the non-discrimination principle set out in Article 2 of the UNCRC.

All children have the same fundamental rights and should have equal access to universal, quality services and opportunities to reach their full potential. In order to ensure that children are treated equally, it is essential to recognise their diverse needs and circumstances.

A recent investigation published by the OCO, Molly's case,⁶ demonstrates how a failure to recognise and meet the specific needs of a child, or a particular cohort of children, can exacerbate the disadvantage that they may experience and act as a barrier to ensuring that they have access to the services and supports they need. This investigation found that the standardised approach adopted by Tusla with respect to all children in care, regardless of whether or not they have a disability, and by the HSE with respect to all children with a diagnosis of moderate, severe, or profound intellectual disability, regardless of whether or not they are in State care, resulted in both agencies engaging in undesirable administrative practice with respect to a child with a disability in foster care. As the OCO highlighted, in

⁵ UN Committee on the Rights of the Child, *supra* note 1 at para 22.

⁶ See Ombudsman for Children's Office, *An Investigation by the Ombudsman for Children's Office - Molly's* case: How Tusla and the HSE provided and coordinated supports for a child with a disability in the care of the State* (2018).

2015 there were 472 children with a diagnosed moderate to severe disability in foster care placements in Ireland. These children represented approximately 8% of the foster care population.

In particular, this investigation demonstrated that a failure by Tusla and the HSE to take sufficient account of a child's additional needs can have a significant impact on the child and the success of their placement in practice. In this case, this included a failure to put specific training and specialised support in place, and to introduce an appropriate system of payments for the expenditure incurred by those fostering a child with a disability or other additional needs.⁷

Article 42A of the Irish Constitution provides that "*the State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights*". This is a strong statement that all children have equal rights and that the State has an obligation to realise these rights through its laws.

The UN Committee recognises that addressing the non-discrimination principle in Article 2 of the UNCRC may require changes in legislation. It also obliges the State to actively identify individual children and groups of children, the recognition and realisation of whose rights may demand special measures.⁸ This requirement to take positive measures to ensure that disadvantaged or vulnerable groups have equal enjoyment of their rights has also been upheld by the European Court of Human Rights: "*The right not to be discriminated against in the enjoyment of rights guaranteed under the [ECHR] is also violated when States...fail to treat differently persons whose situations are significantly different*".⁹

The 1991 Act does not expressly incorporate the principle of non-discrimination or place an obligation on the State and its actors to take special measures where necessary to ensure that all children can enjoy their rights and access services on an equal basis.

2.1.2 Children's right to have their best interests treated as a paramount consideration

The OCO is of the view that the best interests principle has yet to be fully integrated into the 1991 Act.

A number of complaints received by the OCO illustrate that the best interests of children in care are not consistently treated as a primary consideration in practice. The issues raised in

⁷ During this investigation, several Tusla and HSE front line staff asserted that the stability of Molly's placement was at risk as a consequence of the financial, emotional, and physical strain on the family unit. Subsequently, Molly's placement did in fact destabilise.

⁸ UN Committee on the Rights of the Child, *supra* note 1 at para 12.

⁹ *Thlimmenos v. Greece*, 34369/97, 6 April 2000.

these complaints include children having to stay in unsuitable placements due to the lack of forward planning as well as difficulties in accessing appropriate social work and aftercare support. In some cases, this has resulted in children being left in a situation of uncertainty as to their future. The OCO is of the view that if children's best interests were consistently treated as a primary consideration in practice, such issues would not have reached the point where complaints needed to be brought to our office.

These complaints are echoed by the findings of research published by the OCO in 2011. This research found that individual children, including children in alternative care, appeared to be largely invisible in the decision-making processes of public bodies. Other considerations appeared to dominate over ensuring that the rights and interests of individual children were met - for example, the blind pursuit of the goal of policy implementation and the application of blanket, inflexible rules.¹⁰

When reviewing Ireland's record on children's rights in 2016, the UN Committee raised concerns that children's right to have their best interests treated as a primary consideration has yet to be fully implemented as a positive obligation in all relevant legislation, administrative procedures and decision-making processes.¹¹

In addition to the principle set out in Article 3, Articles 9, 20 and 37 of the UNCRC require that children's best interests are taken into account when decisions are being made about family separation, contact and deprivation of liberty. Article 42A.4.2^o of the Constitution establishes a higher standard at a domestic level: it commits the State to introducing legislation to ensure that the best interests of the child are the "*paramount*" consideration in specific court proceedings, including child care proceedings. The express rights afforded to children under this provision are limited to certain judicial settings. However, to ensure consistency and equal treatment, it should be embedded at a legislative level that the best interests of the child must be the paramount consideration in all actions and decisions impacting on them.

Section 3 of the 1991 Act recognises that Tusla shall, in the performance of its functions, regard the welfare of the child as the first and paramount consideration and have regard to the principle that it is generally in the best interests of a child to be brought up in his own family. Section 24 provides that in any proceedings before a court under this Act, the court shall regard the welfare of the child as the first and paramount consideration. References to children's best interests are also made in specific provisions, including as a consideration to be taken into account by the High Court in determining whether to make, vary or extend a special care or interim special care order.¹²

¹⁰ U. Kilkelly, *A Children's Rights Analysis of Investigations* (2011) at p. 77.

¹¹ UN Committee on the Rights of the Child, *supra* note 2 at paras 29-30.

¹² See Sections 23H, 23I, 23J, 23L and 23N.

However, the 1991 Act does not make express provision for the best interests principle to be a paramount consideration in all actions and decisions taken within the scope of the Act.

2.1.3 Children’s right to life, survival and development

The OCO is of the view that Article 6 of the UNCRC, which provides for children’s right to life, survival and development, needs to be more fully incorporated as an overarching principle within the revised 1991 Act.

There is evidence from investigations that the OCO has conducted that children’s health, social and educational development are impaired by a lack of stability in their placements and the administrative arrangements in place for the provision of services - for example, mental health services not accepting a transfer from one area to another.¹³ This is supported by the findings of research published by the OCO in 2013, which showed that children who have had multiple care placements and experienced disruptions and difficulties in their care home very often have problems at school and experience barriers to educational success.¹⁴

According to the UN Committee, States are expected to interpret the term ‘development’ in Article 6 in its broadest sense as a holistic concept, embracing the child’s physical, mental, spiritual, moral, psychological and social development. States are required to provide optimal conditions for childhood through the enforcement of all other rights of the child, as well as through respect for the responsibilities of parents and the provision of quality services.¹⁵

The term development is referred to in different sections and provisions of the 1991 Act. For example, when deciding on an application for a care order under Section 18(1), a court must have regard to whether the child’s development has been, is being, or is likely to be avoidably impaired or neglected. Under Section 18(3), when a care order is in force Tusla has an obligation to do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child’s health, development or welfare. However, there is no broad provision that applies across the Act, which requires all agencies making decisions that affect children to consider their right to life, survival and development,

¹³ For example, see Ombudsman for Children’s Office, *Meta-Analysis of Repetitive Root Cause Issues Regarding the Provision of Services for Children in Care* (2013).

¹⁴ M. Darmody, L. McMahon, J. Banks and R. Gilligan, *Education of Children in Care in Ireland: An Exploratory Study* (Commissioned by the Ombudsman for Children’s Office, 2013) at p. 61. See also, Ombudsman for Children’s Office, *Homeless Truths: Children’s Experiences of Homelessness in Ireland* (2012).

¹⁵ UN Committee on the Rights of the Child, *General Comment No. 7: Implementing child rights in early childhood* (2005) UN Doc. CRC/C/GC/7/Rev.1 at para 10 and UN Committee on the Rights of the Child, *supra* note 1 at para 12.

irrespective of whether the child is receiving family support services, is placed in voluntary care or is the subject of an application for a specific order.

2.1.4 Children’s right to express their views and to be heard

The OCO is concerned that children’s right to express their views and to be heard is not consistently implemented in all decisions and actions taken under the 1991 Act.

Over a number of years, the OCO has been concerned about children having a lack of input into day-to-day decision-making affecting them, including children not being adequately involved in meetings where their care plans were being discussed and the absence of a participatory approach in some residential centres.¹⁶ This has continued to be a cross-cutting theme across complaints in different contexts. More recently, the OCO received complaints from young people in care who did not feel that they were consulted, or that their views were taken into account, as part of decisions that had a significant impact on their lives, including decisions around aftercare, access arrangements, and placement planning.

Article 42A.4.2^o of the Constitution commits the State to introducing legislation to ensure that the views of the child will be heard and taken into account in certain court proceedings, including child care proceedings. Similarly, in addition to the rights afforded to children under Article 12 of the UNCRC, Article 9 establishes that in proceedings that may involve the separation of a child from its parents, “*all interested parties*” should have the opportunity to participate in proceedings and give their views. In this regard, children’s right to be heard should not be subject to any age limits or other arbitrary restrictions, either in law or in practice.¹⁷

The UN Committee has called for the introduction of legislation at a domestic level to provide children in all forms of alternative care with meaningful opportunities to express their views and for those views to be given due weight throughout the decision-making process.¹⁸ It has also encouraged States to introduce legislative measures that place a duty on decision-makers in judicial proceedings to explain the extent of the consideration given to the views of the child and the consequences for the child.¹⁹ Furthermore, the UN Committee has emphasised the importance, not only of ensuring that legislative provisions

¹⁶ See, for example, U. Kilkelly, *Barriers to the realisation of children’s rights in Ireland* (Commissioned by the Ombudsman for Children’s Office, 2007) at p. 25.

¹⁷ UN Committee on the Rights of the Child, *General Comment No. 12 on the right of the child to be heard* (2009) UN Doc. CRC/C/GC/12 at paras 15-21.

¹⁸ *Ibid.* at para 90.

¹⁹ *Ibid.* at para 30.

recognise children’s right to have their views heard, but also the need for the Irish State to take measures to ensure the effective implementation of such provisions.²⁰

Section 3 of the 1991 Act states that Tusla shall, in the performance of its functions and in so far as is practicable, give due consideration, having regard to their age and understanding, to the wishes of the child. Under Section 24, a court conducting any proceedings in relation to the care and protection of a child is required to give due consideration to the wishes of the child in so far as is practicable. Other provisions, such as Section 29 and Section 23F of the Act, also recognise the importance of consulting with children directly affected by a decision as part of the process.

However, these provisions fall short of the standard set by Article 12 of the UNCRC, particularly due to the use of the terms ‘wishes’ and ‘in so far as is practicable’. Crucially, the right of children to express their views and to be heard has not been mainstreamed as a general principle throughout the 1991 Act.

Recommendations:

- **In light of Ireland's obligations under the UNCRC and Article 42A.1 of the Constitution, the DCYA should take the opportunity presented by the current review of the 1991 Act to ensure that:**
 - **the revised legislation requires all relevant bodies under the Act to recognise children as rights-holders**
 - **explicit provisions are made in the revised Act for children's rights to be respected, protected and fulfilled, including children's right to know and be cared for by their parent(s) and to maintain regular direct contact with their parent(s), unless this is contrary to their best interests; children's right to preserve their identity; and children's right to special protection and assistance from the State when temporarily or permanently deprived of their family environment.**

In this regard, the OCO encourages the DCYA to examine the scope for making provision in the revised Act to enable the Minister to prescribe through statutory regulations the specific rights of the child that Tusla, the courts, An Garda Síochána and other bodies with responsibilities under the Act will be required to take appropriate account of when taking actions and decisions affecting children.

- **Appropriate provision should be made in the revised 1991 Act to ensure that the following core children's rights principles are mainstreamed as positive obligations in and across all parts of the Act:**
 - **children's right to non-discrimination**

²⁰ UN Committee on the Rights of the Child, *supra* note 2 at para 31.

- children's right to have their best interests treated as a paramount consideration in all actions and decisions affecting them
- children's right to life, survival and development
- children's right to express their views freely and to have due weight given to their views, in accordance with their age and maturity.

In this regard, the DCYA might give consideration to incorporating a section on guiding principles in the revised Act, which sets out these general principles and establishes that they must inform the interpretation and implementation of the whole Act.

- The DCYA should give serious consideration to making explicit provision in the revised Act for the factors and circumstances that must be considered by Tusla, the courts and other bodies with responsibilities under the Act when they are making a determination about what is in the best interests of a child. In relation to children's right to be heard, the DCYA should consider making provision to enable the Minister to make regulations prescribing how Tusla, the courts and other bodies will determine how best to ascertain the views of the child and the corresponding procedures for consulting the child and affording due weight to their views.²¹

2.2 Embedding a child-centred approach

Embedding positive obligations in legislation is a vital step in ensuring that the State fulfils its duty to realise the rights of all children. It also provides a clear framework to support a child-centred approach to decision-making and the delivery of services on the ground.

2.2.1 Family support services

The OCO is concerned that the delivery of services to provide support to families, promote parental care and prevent family separation are not given sufficient statutory underpinning in the 1991 Act.

We have received complaints where specific issues relating to family support services (as opposed to child protection services more broadly) were an element of the complaint. These complaints point to deficits in supports provided to families to prevent the entry of a child into care. In particular, complainants have expressed concerns about the difficulties experienced by children and their families in accessing adequate supports for medical needs and disabilities. The wider evidence also suggests that provision of early support to families remains patchy and can depend on the culture of individual local arrangements. In

²¹ Section 19 of the Adoption Act 2010 (as amended) may provide a useful model for the DCYA in this regard.

particular, there can be different interpretations about the ‘right’ amount of support that a family should receive to promote parental care, as well as the ‘right moment’ at which a child should be taken into care. This can result in a failure to provide the necessary support to a family, as well as delays in making appropriate interventions.²²

The Preamble to the UNCRC recognises that “*family, as the fundamental group in society and the natural environment for the growth and well-being of all of its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community*”. Providing the necessary protection and assistance to families requires the development of facilities and services for the care of children, as well as material assistance and support programmes (Articles 18, 19 and 27 of the UNCRC). The Council of Europe Recommendation on children’s rights and social services friendly to children and families (‘Council of Europe Recommendation’) has also emphasised that social services should provide a range of preventative, comprehensive and responsive services, with special regard to children deprived of their rights and families with the greatest needs. Such services should include the provision of support systems for children and families in situations of poverty, with disabilities, with mental health difficulties, or engaged in substance abuse or other risk-taking behaviour.²³

Section 3(2)(c) of the 1991 Act states that Tusla shall have regard to the principle that it is generally in the best interests of a child to be brought up in his or her own family, while Section 3(3) places an obligation on Tusla to provide child care and family support services. Section 8(3) of the Child and Family Agency Act, 2013 is also of relevance in this context as it sets out that Tusla shall provide preventative family support services aimed at promoting the welfare of children, as well as services relating to the psychological welfare of children and their families. In addition to these legislative provisions, DCYA has indicated that supporting and encouraging parental support and the effective functioning of families is a public policy priority of the Government.²⁴

The statutory obligations on Tusla and the priority given to the concept of family support are very welcome. However, in order to ensure that these obligations and commitments are strengthened in the interests of children and families, the delivery of family support services should be underpinned by a more comprehensive legislative framework through appropriate amendments to the 1991 Act. In this regard, corporate parenting and parenting by families/guardians should not be seen as mutually exclusive. The State should be

²² N. Connolly, C. Devaney and R. Crosse, *Parenting Support and Parental Participation – Mapping Parenting Support in the Irish Context* (NUI Galway: Child and Family Research Centre, 2016). See also, C. Hannon, C. Wood and L. Bazalgette, “*In loco parentis: To deliver the best for looked after children, the state must be a confident parent . . .*” (2010) at http://www.barnardos.org.uk/in_loco_parentis_-_summary.pdf.

²³ Council of Europe, *Recommendation CM/Rec(2011)12 on children’s rights and social services friendly to children and families* (2011).

²⁴ For example, see Department of Children and Youth Affairs, *Better Outcomes, Brighter Futures: The national policy framework for children & young people 2014 – 2020* (2014) at https://www.dcy.gov.ie/documents/cypp_framework/BetterOutcomesBetterFutureReport.pdf, Goal 1.

recognised as capable of acting as a 'parallel parent' for children and families who need ongoing support.

Recommendation:

- **Through amendments to the 1991 Act, a more comprehensive legislative framework should be put in place for the appropriate provision of quality family support services.**

2.2.2 Timeliness

Delays in decision-making or protracted decision-making processes can have particularly adverse effects on children. For example, a slow determination of a child's best interests or rights could delay access to supports and services vital to his/her development.²⁵

Delays can occur at a number of stages when a child is being taken into care, as well as at later stages in the process - for example, when a child's needs are being assessed or a placement is being allocated. For those children coming from situations of abuse or neglect, such delays may place them at an increased risk of harm, or exacerbate mental health and emotional difficulties they may be experiencing. The issue of delay has been a theme that has arisen in complaints received by the OCO in the area of alternative care. For example, a number of complaints indicate that a delay in the allocation of a social worker to a child may impact on the child's education or contact with their family. Delays in implementing agreed actions as part of the care planning process, resulting in the necessary supports not being put in place for children in a timely manner, have also been brought to the OCO's attention.

The UN Committee has advised States to ensure that all procedures and processes affecting children are prioritised and completed in the shortest time possible. It has further emphasised that: *"The timing of the decision should, as far as possible, correspond to the child's perception of how it can benefit him or her, and the decisions taken should be reviewed at reasonable intervals as the child develops and his or her capacity to express his or her views evolves"*.²⁶ The UN Guidelines for the Alternative Care of Children ('UN Guidelines') are more specific in setting out that permanency for a child should be secured without undue delay through family reunification, or, if this is not possible, through the

²⁵ UN Committee on the Rights of the Child, *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013) UN Doc. CRC/C/GC/14 at para 93.

²⁶ *Ibid.*

placement of the child in an alternative stable family setting or in stable, appropriate residential care.²⁷

The 1991 Act does not make any explicit reference to the importance of carrying out actions and making decisions within the scope of the Act in a timely manner. As a comparison, Section 4(2) of the Care of Children Act, 2004 in New Zealand stresses the need for decisions affecting a child to be made and implemented within a timeframe that is appropriate to the child's '*sense of time*'.²⁸

Recommendation:

- **A child-centred principle should be expressly incorporated into the revised 1991 Act which requires decisions and actions impacting on children to be prioritised and completed in the shortest time possible.**

²⁷ United Nations General Assembly, *Guidelines for the Alternative Care of Children* (2010) UN Doc. A/RES/64/142 at para 60.

²⁸ See <http://legislation.govt.nz/act/public/2004/0090/latest/DLM317233.html>. See also, Centre for Effective Services, *International Review of Child Care Legislation – Phase II: Identified Areas of Interest* (2016) at <https://www.dcy.gov.ie/documents/legislation/20171212CESInternationalReviewChildcareLeg.pdf>, p. 39.

3. General measures of implementation

The UN Committee has emphasised that the effective implementation of children's rights requires States to adopt a range of general measures, including the promotion of cross-sectoral coordination, the collection of disaggregated data, and the dissemination of information about children's rights among children, their families and those involved in the implementation process.²⁹

3.1 Coordination

Inter-professional and multi-agency collaboration means continuously working together for the benefit of each and every child. Most children have engaged with a variety of services for some time before receiving family support or being admitted to the care of the State, including general services such as health and education as well as specialist support. Effective collaboration among agencies working across the continuum of family support and children's services is critical to ensuring that children's needs are both assessed and met in a timely manner.

When the OCO examines complaints relating to children in care it frequently has occasion to investigate matters relating to interagency coordination. In 2015, the OCO highlighted to the UN Committee that, through the course of its work, it has become apparent that the interaction between child protection, mental health and disability services is still not optimal.³⁰ This has been a consistent feature in complaints. In particular, the OCO has found that referrals between different services can be problematic, leading to situations in which children needing to avail of a combination of these services are not being provided with a complete wrap around service. Such problems have presented to the OCO particularly when a child in care moves between different geographical areas. For example, complaints received by the OCO have highlighted the refusal of CAMHS to provide services to a particularly vulnerable child as their social worker was not locally based, as well as to a child with an intellectual disability as this was not considered to be within their remit following several reviews of the referral request.³¹

The investigation by the OCO into the care provided to Molly, a child with a disability in foster care, also demonstrates that the lack of coordination between Tusla and the HSE meant that the services and supports provided by both agencies were insufficient (see Section 2.1.1 above for further detail). This investigation highlighted that, although there is

²⁹ UN Committee on the Rights of the Child, *supra* note 1.

³⁰ Ombudsman for Children's Office, *Report of the Ombudsman for Children to the UN Committee on the Rights of the Child on the occasion of the examination of Ireland's consolidated Third and Fourth Report to the Committee* (2015) at pp. 26-27.

³¹ Ombudsman for Children's Office, *supra* note 13.

a joint protocol between the HSE and Tusla, the steps required for engagement and procedure are not laid down and Tusla staff at operational levels are not implementing or adhering to the protocol. It also highlighted concerns from Disability Services that there appears to be a “*concerted effort*” from Tusla to ensure that where a child presents with a disability, he/she is the responsibility of the disability services. The OCO called for the current gap in the provision and coordination of supports and services to children with a diagnosed moderate to severe disability in foster care to be addressed, including through legislative means.

The international and European children’s rights standards recognise the importance of ensuring that children and families with complex and multiple needs benefit from coordinated services from professionals cooperating across different sectors, including education, health and social services.³² The UN Guidelines state that: “*All State entities involved in the referral of, and assistance to, children without parental care, in cooperation with civil society, should adopt policies and procedures which favour information-sharing and networking between agencies and individuals in order to ensure effective care, aftercare and protection for these children*”.³³ When reviewing Ireland’s record on children’s rights in 2016, the UN Committee raised concerns that, for children who are placed in alternative care, there is “*inadequate coordination between the State party bodies responsible for child protection, mental health and disabilities resulting in fragmented or inadequate care being provided for children in such situations*”.³⁴

Section 3(1) of the 1991 requires Tusla to coordinate information from all relevant sources relating to children, while Section 5 requires it to enquire into a child’s circumstances when it appears that he or she is homeless. Other provisions also require engagement between Tusla and An Garda Síochána³⁵ and for the convening of family welfare conferences with the inclusion of professionals with particular expertise.³⁶ However, the 1991 Act does not include an overarching provision on interagency coordination.

Section 8(8) of the Child and Family Agency Act, 2013 provides that Tusla shall “*facilitate and promote enhanced inter-agency cooperation to ensure that services for children are coordinated and provide an integrated response to the needs of children and their families*”. Although this provision is welcome, it does not address the duties of other agencies involved in the provision of care and support to children and families to engage with Tusla to ensure the full implementation of this provision. By the very nature of the issue, it is clear that one Agency alone cannot implement interagency cooperation.

³² Council of Europe, *supra* note 23.

³³ United Nations General Assembly, *supra* note 27 at para 70.

³⁴ UN Committee on the Rights of the Child, *supra* note 2 at paras 43-44.

³⁵ See Section 12 and Section 23G(3) for example.

³⁶ See Section 23A for example.

Corporate parenting and effective interagency collaboration are intrinsically linked.³⁷ In England, the Children Act, 2004 provides corporate parenting with a statutory basis. Section 10 of the Act places a duty on local authorities to promote cooperation with all relevant partners in making arrangements relating to the protection of children from harm and neglect and the promotion of their well-being. The relevant partners in turn have a statutory obligation to cooperate with the local authority to support it in the exercising of its functions.³⁸ Scotland has also recently put corporate parenting on a statutory basis through the Children and Young People Act (Scotland), 2014. Part 9 of this Act, and the accompanying statutory guidance, identifies the agencies and bodies that are considered to be corporate parents, including Government Ministers, local authorities, social services, the Police Authority, as well as education, housing and health services. Section 60(1) states that corporate parents must, in so far as is reasonably practicable, collaborate with each other when exercising their responsibilities, including by sharing information and providing advice or assistance to safeguard and promote the wellbeing of children.³⁹

The OCO previously recommended in 2015 that the State must ensure that current difficulties in interagency cooperation between Tusla and the mental health and disability arms of the Health Service Executive are addressed as a matter of priority.⁴⁰ Similarly, the UN Committee has recommended that the State should adopt measures to ensure that children in alternative care who have disabilities or mental health needs have those needs addressed in an integrated and comprehensive manner. These recommendations have yet to be fully implemented.⁴¹

Recommendation:

- **In line with developments in England and Scotland, the DCYA should give serious consideration to explicitly incorporating the concept of ‘corporate parenting’ in the revised 1991 Act. This should include placing a legislative duty on agencies and bodies with responsibilities for children and families (for example, health services, local authorities, housing authorities, education services, and criminal justice agencies) to cooperate with Tusla in the exercise of its functions under the revised Act.**

³⁷ Centre for Effective Services, *supra* note 28, pp. 40-41.

³⁸ See <http://www.legislation.gov.uk/ukpga/2004/31/section/10>. See also, Centre for Effective Services, *ibid.* at p. 40.

³⁹ See <http://www.legislation.gov.uk/asp/2014/8/part/9/enacted>. See also, Centre for Effective Services, *ibid.* at p. 43.

⁴⁰ Ombudsman for Children’s Office, *supra* note 30 at pp. 26-27.

⁴¹ UN Committee on the Rights of the Child, *supra* note 2 at paras 43-44.

3.2 Data collection

The OCO is concerned that there is a deficit of comprehensive data with regard to children receiving family support services or living in alternative care.

The recently published Indicator Set for Better Outcomes Brighter Futures includes broad statistical data from 2014 and 2016, including the number of children in care, the number of children and families receiving family support services, the number of young people in receipt of aftercare in full-time education, the types of placements that children in care are in and the percentage of children who had three or more care placements in one year.⁴² However, this data is not disaggregated to enable an adequate insight into the characteristics and experiences of children in care in Ireland or to identify variations in outcomes for different groups of children in care, as well as between children in care and the general population. Data in other areas (for example children's experience of discrimination or stigmatisation and children's awareness of their rights) is marked as '*not available*'.⁴³ The Indicator Set states that further detailed reporting of the data on each indicator by different subgroups in the population will be undertaken. However, no specific timeframes are set out in this regard.⁴⁴

The OCO is aware of the lack of comprehensive and disaggregated data on children through its own work. For example, research published by the OCO in 2013 found that there is a significant deficit in data relating specifically to children in care and that "*[a]s a result of the lack of relevant data, it is not possible to generate an adequate profile of, among other things, attendance, participation, and attainment rates in education among children in care or to compare them with the general population of children*".⁴⁵ The research also concluded that this data deficit impedes the development of evidence-informed policy-making and practice.⁴⁶

The OCO has also found that sufficient information about the characteristics of children admitted to special care units and the arrangements for children in relative care and in voluntary care is not available. Furthermore, the OCO acknowledges that while an increased number of young care leavers are in receipt of aftercare, there is no data available about the nature and quality of the aftercare services provided. In this regard, the OCO recently highlighted that there has been no systematic follow-up of all young people who have left care and therefore it is not possible to estimate the percentage who experience

⁴² Department of Children and Youth Affairs, *An Indicator Set for Better Outcomes, Brighter Futures: The national policy framework for children & young people 2014–2020* (2017) at <https://www.dcy.gov.ie/documents/ReportOnTheIndicatorSetForBetterOutcomesBrighterFuturesTheNationalPolicyFrameworkForChildrenAndYoungPeople2014-2020.pdf>, pp. 18, 26.

⁴³ Department of Children and Youth Affairs, *ibid.* at pp. 26, 29-30.

⁴⁴ Department of Children and Youth Affairs, *ibid.* at p. 4.

⁴⁵ M. Darmody, L. McMahon, J. Banks and R. Gilligan, *supra* note 14 at p. 29.

⁴⁶ *Ibid.*

difficulties beyond those normally encountered in the transition from adolescence to adulthood.⁴⁷ With regard to the approximately 471 children with a moderate or severe disability in foster care, the recent investigation by the OCO into Molly's case demonstrates the need for the development of specific data, including outcome measures, for this cohort of children.⁴⁸

The UN Committee has emphasised that the necessary data and information about children must be collected, generated and disseminated to support the design and implementation of appropriate legislation to advance the rights of the child. It has also highlighted that the collection of sufficient, reliable and national data on children, disaggregated to enable identification of discrimination and/or disparities in the realisation of children's rights, is an essential part of the implementation of the UNCRC.⁴⁹ It reminded Ireland of its obligations in this regard in 2016.⁵⁰

The 1991 Act places a specific obligation on Tusla to prepare an annual report on the adequacy of the child care and family support services available. This is a limited provision in that it only relates to the services provided by Tusla and has not been fully implemented in practice (the most recent report published was in 2015⁵¹).

Recommendation:

- **Serious consideration should be given to strengthening the current legislative framework to place a clear obligation on the DCYA to collect and disseminate systematically disaggregated national data relating to the characteristics, experiences and outcomes of children who come into contact with family support services and the care system.**

3.3 Disseminating information and advice

The OCO is of the view that the 1991 Act does not make adequate provision for requiring Tusla, the courts and other bodies with responsibilities under the Act to provide children and their families with accessible information about their rights, the decision-making processes in place and other relevant matters affecting them.

⁴⁷ Ombudsman for Children's Office, *Submission to Tusla on the Review of the National Leaving and Aftercare Policy 2011* (2016) at pp. 2, 17.

⁴⁸ See Ombudsman for Children's Office, *supra* note 6 at p. 9.

⁴⁹ UN Committee on the Rights of the Child, *General comment No. 19 on public budgeting for the realization of children's rights* (2016) UN Doc. CRC/C/GC/19 at para 21 and UN Committee on the Rights of the Child, *supra* note 1 at para 48.

⁵⁰ UN Committee on the Rights of the Child, *supra* note 2 at para 18.

⁵¹ See <http://www.tusla.ie/publications/review-of-adequacy-reports>.

One example which demonstrates the importance of providing such information relates to the operation of voluntary care arrangements. In 2015, 59% of admissions to care were voluntary admissions and 35% of children in care at the end of December 2015 were in care under a voluntary arrangement (2,231 children).⁵² As this involves the admission of a child into the care system by agreement, rather than by court order, it is of vital importance that there is complete transparency about the process.

However, there is some evidence from complaints to the OCO that parents may not always fully understand what voluntary admission to care entails prior to making a decision. A number of cases suggest that there can be confusion about the differences between a placement with relatives and voluntary admission to care.

The Council of Europe Recommendation sets out that from their first involvement with the social service system, children and their families should be promptly and adequately informed and advised of their rights to access social services; the services available; the possible consequences of alternative forms of action; and all other relevant information about their situation.⁵³ More specifically, the UN Guidelines emphasise that all decision-making on alternative care should “*involve full consultation at all stages with the child, according to his/her evolving capacities, and with his/her parents or legal guardians. To this end, all concerned should be provided with the necessary information on which to base their opinion*”.⁵⁴ Similarly, the UN Committee has called for the introduction of legislation providing children in all forms of alternative care with the right to information about any placement, care and/or treatment plan.⁵⁵

Section 4 of the 1991 Act provides legislative underpinning for the system of voluntary care. It does not provide for the right of the child or his or family to receive information and advice about the operation of the voluntary care arrangement. Section 23NM of the Act sets out that in the specific context of a child placed in a special care unit, Tusla must provide a parent or guardian with information about the placement, the child’s care requirements and the behaviour of the child prior to the provision of special care. However, this does not incorporate the right of the child to information about his or her situation and placement. There is also no broader provision in the 1991 Act establishing the right of children and their families to receive all relevant information from their first point of engagement with child care and family support services and throughout the process, as set out in the international and European standards.

⁵² Child and Family Agency, *Annual Review on the Adequacy of Child Care and Family Support Services Available* (2015) at http://www.tusla.ie/uploads/content/Review_of_Adequacy_2015_Final.pdf, pp.65-76.

⁵³ Council of Europe, *supra* note 23 (2011).

⁵⁴ United Nations General Assembly, *supra* note 27 at para 57.

⁵⁵ UN Committee on the Rights of the Child, *supra* note 17 at para 90.

Recommendation:

- **Explicit statutory provision should be made for the right of children and their parent(s)/guardian(s) to receive timely, accessible and comprehensive information about any decisions or actions taken under the 1991 Act, which affect them.**

4. Strengthening parts of the Child Care Act 1991

4.1 Promotion of the welfare of children (Part II)

4.1.1 Voluntary care

Further to the issues raised with regard to the provision of information and advice in Section 3.3 above, the OCO is concerned that there is insufficient legislative clarity in place with regard to the purpose and operation of voluntary care arrangements.

There is evidence from OCO complaints, which demonstrates that children can be in a voluntary care arrangement for years. Due to the manner in which voluntary care can be ended by a child's parent(s), this may lead to feelings of instability and uncertainty for some children. As parental rights are not extinguished by virtue of a voluntary care arrangement, this can also create ongoing difficulties in obtaining consent for medical treatment or foreign travel.

The UN Guidelines state that: *“When a public or private agency or facility is approached by a parent or caregiver wishing to place a child in care for a short or indefinite period, the State should ensure the availability of counselling and social support to encourage and enable him or her to continue to care for the child. A child should be admitted to alternative care only when such efforts have been exhausted and acceptable and justified reasons for entry into care exist”*.⁵⁶ States are also encouraged to take appropriate measures to ensure the welfare and protection of children in more informal care arrangements, including by formalising the care arrangement,⁵⁷ with the consent of the child and parents concerned, after a suitable lapse of time, if the arrangement has proven to be in the best interests of the child to date and is expected to continue for foreseeable future.⁵⁸

Section 4(3) of the 1991 Act provides that where Tusla has taken a child into its care under a voluntary care arrangement, it has a duty to maintain the child in its care so long as his or her welfare appears to require it and while he or she remains a child. Tusla is required to have regard to the wishes of a parent having custody of the child or any person acting *in loco parentis* in the provision of such care. However, the 1991 Act lacks sufficient clarity as regards the purpose of voluntary care, including as an ongoing alternative to family reunification or court ordered care. Legislative clarity is also lacking in relation to important matters concerning the operation of voluntary care, including the process by which

⁵⁶ United Nations General Assembly, *supra* note 27 at para 45.

⁵⁷ For example, through a voluntary care agreement or a court order, as appropriate.

⁵⁸ United Nations General Assembly, *supra* note 27 at paras 18, 56.

voluntary care is entered into and ceases and the supports that should be provided to the child, their parent(s) and carer(s) before and subsequent to the placement being agreed.

Recommendation:

- **The revised 1991 Act should provide greater legislative clarity in relation to voluntary care, including as regards the purpose and operation of voluntary care arrangements. Among the operational matters that the revised Act might provide greater clarity on are the process by which voluntary care is entered into and ceased and the supports available to the child, their parent(s) and carer(s) both before and subsequent to a voluntary care placement being agreed.**

4.2 Children in the care of the Child and Family Agency (Part VI)

4.2.1 The provision of appropriate placements

The OCO has an ongoing concern about the availability of a sufficient number of appropriate placements for children taken into care or otherwise accommodated under the 1991 Act.

In 2012, the OCO examined homelessness services provided for children under Section 5 of the 1991 Act. This examination identified a number of issues relating to the range of accommodation services available nationally for children who present as homeless, out of home or in a crisis situation, as well as the appropriateness and level of services provided to children using emergency accommodation.⁵⁹ In a subsequent consultation by the OCO, children with experience of homelessness highlighted their perspectives on the debilitating impact of multiple and fragmented care placements, and the inappropriate locations and/or environments of particular emergency placements.⁶⁰

The OCO also published a Meta-Analysis of Repetitive Root Cause Issues regarding the Provision of Services for Children in Care in 2013.⁶¹ This analysis found that children with very serious challenging or self-harming behaviours, and those with a range of mental health difficulties and disabilities, were being placed in residential or secure services far removed from their families and communities, including in services outside the State. The OCO recommended that Tusla urgently develop a strategic development plan for residential child care services which would shape the future direction of services, plan for the provision

⁵⁹ Ombudsman for Children's Office, *Statement on the examination and proposed investigation of HSE Homelessness Service provision to children who are homeless and accommodated under Section 5 of the Child Care Act and those in the Care of the HSE accessing homeless services* (2012).

⁶⁰ Ombudsman for Children's Office, *supra* note 14.

⁶¹ Ombudsman for Children's Office, *supra* note 13.

of sufficient services in locations throughout the country and ensure that the needs of children and young people are met.

There is ongoing evidence from the OCO's complaints and investigations work that there is insufficient provision of placements within each of the administrative units of Tusla and that this is resulting in children being placed at a considerable distance from their homes and local communities. Other complaints indicate that children are being kept in inappropriate placements - for example, they are required to stay in secure care for longer than mandated or necessary due to the absence of suitable onward placements. Children can also experience multiple different placements, including short-term placements. The use of unsuitable emergency accommodation for children, including for extended periods of time, has continued to emerge as a concerning reality arising from a lack of adequate provision. Furthermore, some complaints received by the OCO have highlighted the issue of children being separated from their siblings in different alternative care placements. This can result in the loss of a supportive relationship for a child.⁶²

The OCO is of the view that the location and design of all alternative care placements must support the continuity of key relationships between children and their families, friends, professionals, schools and communities, except when this is contrary to a child's best interests. Furthermore, a stable and supportive environment for children in care can enhance their motivation to do well in school and to have high aspirations while, conversely, multiple placements can disrupt their education.⁶³

This is reflected in the UN Guidelines which set the following standard for State agencies with regard to placements for children in alternative care: *"All decisions...should take full account of the desirability, in principle, of maintaining the child as close as possible to his/her habitual place of residence, in order to facilitate contact and potential reintegration with his/her family and to minimise disruption of his/her educational, cultural and social life"*.⁶⁴ These Guidelines also emphasise the importance of ensuring that siblings with existing bonds are, in principle, not separated by placements of alternative care unless there is a clear risk of abuse or other justification in the best interests of the child.⁶⁵ In 2016, the UN Committee raised concerns about insufficient alternative care services in Ireland for children with complex needs, which has resulted in the need for such children to be accommodated in alternative care institutions outside the jurisdiction. It recommended that the State *"prioritise the development of its special care services to ensure the needs of such children are addressed...throughout [its] territory"*.⁶⁶

⁶² See, for example, *ibid.*

⁶³ M. Darmody, L. McMahon, J. Banks and R. Gilligan, *supra* note 14 at p. 12.

⁶⁴ United Nations General Assembly, *supra* note 27 at para 11.

⁶⁵ United Nations General Assembly, *supra* note 27 at para 17.

⁶⁶ UN Committee on the Rights of the Child, *supra* note 2 at paras 43-44.

Section 5 of the 1991 Act establishes that Tusla must take such steps as are reasonable and necessary to make available suitable accommodation for a child who appears to be homeless. Section 36 of the 1991 Act provides that where a child is in care, Tusla shall make suitable arrangements for the child, taking into account his/her best interests, including by providing the child with a foster parent or by placing the child in residential care. Other provisions are also of relevance in this regard, including for example Section 38 which empowers Tusla to enter into arrangements with private or voluntary providers, to ensure the provision of an adequate number of residential places for children in its care. However, there is no legislative obligation for Tusla to plan for the provision of sufficient services in locations throughout the country or to provide joint placements for siblings in need of alternative care.

Notably, the Children Act, 1989 (England and Wales) places a duty on local authorities to secure sufficient accommodation for looked after children. Furthermore, Section 22C(8) of this Act sets out the ways in which looked after children are to be accommodated and maintained:

“The local authority must ensure that the placement is such that—

- a) it allows C to live near C's home;*
- b) it does not disrupt C's education or training;*
- c) if C has a sibling for whom the local authority are also providing accommodation, it enables C and the sibling to live together;*
- d) if C is disabled, the accommodation provided is suitable to C's particular needs.”⁶⁷*

Recommendations:

- **The revised 1991 Act should establish a statutory duty for Tusla to take strategic action to ensure that there are sufficient and appropriate placements within each administrative area, including for children in need of emergency accommodation.**
- **Similar to the approach adopted in England and Wales, provision should be made in the revised 1991 Act to require that alternative care placements are in proximity to children’s former homes and schools, facilitate the joint placement of siblings and are suitable for the additional needs that children may have.**

4.2.2 Access for children in care

The OCO is concerned that there is evidence in complaints we have received that access to siblings may not always be adequately facilitated. For example, a child was denied access to

⁶⁷ See <https://www.legislation.gov.uk/ukpga/1989/41/section/22C>.

their sibling and this was causing worry and stress, particularly as the child felt they were not provided with an adequate reason for this decision.

The protection and promotion of family relationships when a child is in care is of huge importance. Article 9 of the UNCRC and the UN Guidelines emphasise the right of children in alternative care to maintain personal relations and direct contact with their parents, siblings and other persons close to them (e.g. friends, neighbours, previous carers) on a regular basis, except if this is contrary to their best interests.⁶⁸ The implementation of this right requires children to be provided with access to information on the situation of his/her family members in the absence of direct contact with them.⁶⁹

Section 37 of the 1991 Act states that when a child is in care, Tusla shall “*facilitate reasonable access to the child*” by his parents, any person acting in loco parentis or any other person who, in the opinion of Tusla has a *bona fide* interest in the child. The focus on this provision is on the right of adults to access a child, as opposed to Tusla’s responsibility to give effect to the right of children in care to maintain contact with their family members. There is also no express reference in the 1991 Act to the access rights of a child in care with regard to his or her siblings.⁷⁰

Recommendation:

- **The revised 1991 Act should reframe the current provision for access and expressly incorporate the right of the child to maintain personal relations and direct contact with their parents/guardians, siblings and extended family members on a regular basis, unless it is contrary to the child’s best interests and taking into account the views of the child.**

4.2.3 Aftercare

The OCO is concerned that there are ongoing gaps in the provision of appropriate aftercare support to children who are leaving care or who have received other accommodation services under the 1991 Act.

General themes arising from the OCO’s examination and investigation of complaints in this area include:

- the failure to allocate aftercare workers
- the inappropriateness of onward placements

⁶⁸ United Nations General Assembly, *supra* note 27 at para 17.

⁶⁹ United Nations General Assembly, *ibid.* at para 81.

⁷⁰ See Section 4.5.1 above in relation to the joint placement of siblings.

- inconsistent provision of psychological and educational assessments and reports
- delays in aftercare planning and the inadequate levels of planning provided to a young person to support their transition towards adulthood and potential independent living, and
- a wide variation in aftercare service provision nationally.

By way of specific example, we received a complaint in 2016 from a social care manager on behalf of a young person in residential care. The young person at the centre of the complaint was turning 18 and his social care manager was concerned that no aftercare arrangements had been made in the locality of his current placement – where he had settled well and wanted to stay. The social work team had advised that they could supply an aftercare worker and programme in the area where this young person had lived previously but the complainant contended that this would be detrimental to the young person’s well-being and could place his safety at risk. Following engagement with Tusla, the OCO was informed that this young person was allocated an aftercare worker for his new area and a plan to complete preparation tasks with him was now in place. It was envisaged that the new area would supply the aftercare worker for advice and guidance and the young person’s area of origin would provide the core financial support.⁷¹

The UN Committee has emphasised the right of adolescents leaving care to support, including psychological support, in preparing for the transition from care and gaining access to employment and housing.⁷² In 2016, the Committee expressed concern about the existing inadequate aftercare services and support provided to children leaving care in Ireland, particularly those who have experienced homelessness. The UN Guidelines provide detailed guidance and outline States’ obligations in relation to aftercare. In particular, these Guidelines highlight that, throughout the period of care, the State should systematically aim at preparing the child to assume self-reliance and to integrate fully in the community. The process of transition from care to aftercare should take into consideration the child’s gender, age, maturity and particular circumstances and include counselling and support, and aftercare should be prepared as early as possible in the placement.⁷³

The OCO welcomes the enactment of the Child Care (Amendment) Act in December 2015, which strengthens provisions in the 1991 Act regarding aftercare and imposes a specific duty on Tusla to prepare an aftercare plan for an eligible young person.⁷⁴ Section 45(5) provides that Tusla “*subject to its available resources*” implement an aftercare plan or an updated aftercare plan. However, the OCO is of the view that the discretionary nature of this obligation is likely to result in ongoing inconsistencies and variations in the provision of

⁷¹ Ombudsman for Children’s Office, *Annual Report 2016* (2016) at p. 29.

⁷² UN Committee on the Rights of the Child, *General comment No. 20 (2016) on the implementation of the rights of the child during adolescence* (2016) UN Doc. CRC/C/GC/20 at paras 53-54.

⁷³ United Nations General Assembly, *supra* note 27 at Section E.

⁷⁴ See Section 45 of the 1991 Act.

aftercare supports and services to care leavers across Ireland. Furthermore, the current legislative criteria excludes *ab initio* young people who have been in care for less than 12 months and young people who have experienced homelessness and received services under Section 5 of the 1991 Act, but who have not been formally in care.⁷⁵

Recommendation:

- **As part of its review of the 1991 Act, the DCYA should strengthen the legislative framework to ensure that children who are leaving care or who are leaving accommodation provided by Tusla under Section 5 can enjoy their right to access appropriate transition support and aftercare services, including psychological support.**

4.3 Children’s residential centres (Part VIII)

4.3.1 Provision for HIQA to inspect private and voluntary centres

The inspection of residential centres is divided between HIQA, which inspects statutory children’s residential centres, and Tusla, which inspects and registers voluntary and private children’s residential centres.

In 2015, the OCO published a report on its own volition investigation into the registration, monitoring and inspection of voluntary and private residential centres for children in the care of the State.⁷⁶ This investigation highlighted significant gaps in the task of monitoring residential centres, which is a vital component of safeguarding children living in alternative accommodation. The OCO found that a child was, or may have been, adversely affected due to a failure to monitor residential centres in accordance with the requirements of the National Standards in place and that there were significant inconsistencies across the country in respect of the arrangements for the registration, inspection and monitoring of centres.

The OCO concluded that a clear gap in the approach to the inspection of residential centres has developed between HIQA and Tusla. We recommended that the inspections of these centres and their registration should be transferred to HIQA without delay.⁷⁷ In June 2015,

⁷⁵ For further information, and additional recommendations of the OCO in relation to the provision of aftercare services and supports see, Ombudsman for Children’s Office, *supra* note 47.

⁷⁶ Ombudsman for Children’s Office, *Own Volition investigation into the HSE’s (now Tusla – the Child and Family Agency) registration, inspection and monitoring service for private and voluntary children’s residential centres* (2015).

⁷⁷ *Ibid.* at p. 31.

the DCYA confirmed its commitment to seeking to advance the transfer of investigative functions from Tusla to HIQA as recommended in our report.

The UN Guidelines confirm that it is the role of the State, through its competent authorities, to ensure the supervision of the safety, well-being and development of any child placed in alternative care. The Guidelines also state that: *“Agencies, facilities and professionals involved in care provision should be accountable to a specific public authority, which should ensure, inter alia, frequent inspections comprising both scheduled and unannounced visits, involving discussion with and observation of the staff and the children”*.⁷⁸

The 1991 Act currently provides for the registration and inspection of non-statutory (private and voluntary) children’s residential centres under Part VIII.

Recommendation:

- **The revised 1991 Act should provide for the inspection of private and voluntary residential centres and their registration to be transferred to HIQA.**

4.4 Administration, miscellaneous and supplementary (Parts IX and X)

4.4.1 Provision for a Child Care Act Advisory Committee

There is no provision for monitoring the implementation of the provisions of the 1991 Act and related legislative frameworks (for example, the Child and Family Agency Act 2013 and the Children Act 2001) and Regulations, on a continuous basis.

Section 7(1) of the Act places an obligation on Tusla to establish one or more child care advisory committees. However, the scope of these committees is limited to advising Tusla on the performance of its functions, as well as reporting on child care and family support services and reviewing the needs of children who are not receiving adequate care and protection. Other functions under the 1991 Act, for example those relating to the courts are not covered.

The UN Committee has emphasised that comprehensive reviews of domestic legislation and related guidance to ensure full compliance with the UNCRC should be continuous rather than once-off in nature and should recognise the interdependence and indivisibility of

⁷⁸ United Nations General Assembly, *supra* note 27 at para 128.

human rights. The process should also facilitate the inclusion of children, national human rights institutions, civil society and others.⁷⁹

Recommendation:

- **The revised Act should provide for the establishment of a Child Care Act Advisory Committee as a dedicated oversight mechanism to monitor the implementation of the Act's provisions as well as related legislative frameworks and statutory regulations and guidance. This should be an inter-agency Committee, which includes representatives from the child care, education, health and justice sectors.**

⁷⁹ UN Committee on the Rights of the Child, *supra* note 1 at paras 18-19.

Appendix 1 – Publications by the Ombudsman for Children’s Office relevant to the DCYA’s Review of the Child Care Act 1991

Complaints and Investigations

- Ombudsman for Children’s Office, *An Investigation by the Ombudsman for Children’s Office - Molly’s* case: How Tusla and the HSE provided and coordinated supports for a child with a disability in the care of the State* (2018). See [here](#).
- Ombudsman for Children’s Office, *Own Volition investigation into the HSE’s (now Tusla – the Child and Family Agency) registration, inspection and monitoring service for private and voluntary children’s residential centres* (2015). See [here](#).
- Ombudsman for Children’s Office, *An investigation into a decision by the HSE (now Tusla, the Child and Family Agency) to cease a Section 10 payment to a family* (2014). See [here](#).
- Ombudsman for Children’s Office, *A Meta-Analysis of Repetitive Root Cause Issues Regarding the Provision of Services for Children in Care* (2013). See [here](#).
- Ombudsman for Children’s Office, *A statement based on an investigation into provision by the Department of Education and Skills and the HSE for a child in care* (2013). See [here](#).
- Ombudsman for Children’s Office, *Statement on the examination and proposed investigation of HSE Homelessness Service provision to children who are homeless and accommodated under Section 5 of the Child Care Act and those in the Care of the HSE accessing homeless services* (2012). See [here](#).
- Ombudsman for Children’s Office, *A statement based on an investigation into the provision of supports and therapeutic services for a child with special needs in foster care* (2011). See [here](#).
- U. Kilkelly, *A Children’s Rights Analysis of Investigations* (Commissioned by the Ombudsman for Children’s Office, 2011). See [here](#).

For all other publications relating to OCO investigations and complaints, see [here](#).

Consultation with Children and Young People

- Ombudsman for Children’s Office, *Homeless Truths: Children’s Experiences of Homelessness in Ireland* (2012). See [here](#).

Advice on Legislation and Public Policy

- Ombudsman for Children’s Office, *Submission to the Joint Committee on Children and Youth Affairs in relation to the General Scheme of the Child Care (Amendment) Bill 2017* (2017). See [here](#).
- Ombudsman for Children’s Office, *Submission to Tusla on the Review of the National Leaving and Aftercare Policy 2011* (2016). See [here](#).
- Ombudsman for Children’s Office, *Consultation Paper by the Department of Education and Skills on the Statement of Strategy 2016-2018: Submission of the Ombudsman for Children’s Office* (2016). See [here](#).
- Ombudsman for Children’s Office, *Consultation Paper by the Department of Children and Youth Affairs on preparing a Policy Approach to Reform of Guardian ad Litem Arrangements in Proceedings under the Child Care Act 1991: Observations from the Ombudsman for Children’s Office* (2015). See [here](#).
- Ombudsman for Children’s Office, *Advice of the Ombudsman for Children on the Courts Bill 2013* (2013). See [here](#).
- Ombudsman for Children’s Office, *Advice of the Ombudsman for Children on the Child Care (Amendment) Bill 2009* (2010). See [here](#).

Research

- M. Darmody, L. McMahon, J. Banks, the Economic and Social Research Institute and R. Gilligan, Children’s Research Centre, Trinity College, *Education of Children in Care in Ireland: An Exploratory Study* (Commissioned by the Ombudsman for Children, 2013). See [here](#).
- U. Kilkelly, *Barriers to the realisation of children’s rights in Ireland* (Commissioned by the Ombudsman for Children, 2007). See [here](#).

Reports to the UN

- Ombudsman for Children's Office, *Report of the Ombudsman for Children to the UN Committee on the Rights of the Child on the occasion of the examination of Ireland's consolidated Third and Fourth Report to the Committee* (2015). See [here](#).
- Ombudsman for Children's Office, *A Word from the Wise: Children, young people and parents whose complaints the OCO has dealt with share their stories* (2015). See [here](#).

For all previous reports to the UN, see [here](#).

OCO Annual Reports

- Ombudsman for Children's Office, *Annual Report 2016* (2016). See [here](#).
- Ombudsman for Children's Office, *Annual Report 2015* (2015). See [here](#).
- Ombudsman for Children's Office, *Annual Report 2014* (2014). See [here](#).
- Ombudsman for Children's Office, *Annual Report 2013* (2013). See [here](#).

For all previous OCO Annual Reports, see [here](#).