Barnardos, Irish Association of Young People in Care, Irish Foster Care Association
Initial Observations[1] on the
Child Care (Amendment) Bill 2009

January 2010

Introduction

Barnardos, the Irish Association of Young People in Care and the Irish Foster Care Association (hereafter referred to as the Group) welcomes the opportunity afforded by the Child Care (Amendment) Bill 2009 to improve the support and care provided for all children coming into the care system, and in particular those in secure care, high support units, and aftercare. These children are a particularly vulnerable and at risk group and require the full protection of the law to ensure their needs and rights are met adequately. While we welcome a number of measures in the Bill, specifically Sections 6, 7 and 8 for their strengthening of efficiencies and protection for these children, we remain concerned at a number of other areas of the proposed amendments. In particular, the group is concerned that the current drafting of the Bill cements the current system in place rather than striving to build on existing structures and services to improve outcomes for the vulnerable children in high support and secure care. We are also concerned at the lack of statutory provision for the representation of the child's voice and best interest in proceedings concerning special care orders. The group considers it imperative that the outlined amendments are made to this Bill in order to ensure the best possible protection and care to children whose welfare is at risk for a variety of reasons.

Barnardos' Guardian *ad litem* (GAL) service, IAYPIC and the IFCA have all been involved with many children in high support care and secure units. We look forward to continued opportunities to offer our expertise and knowledge to help develop a model that works in the best interests of the children in such units in a spirit of partnership with policy makers, legislators and practitioners at Government level.

I. Voice of the Child

Right to representation

A significant gap in the Bill is that it fails to address the rights of a child to be heard in relation to the making of a special care order. The Bill is unclear regarding the child's right to representation and it fails to give the child an automatic right to representation, either through the child having party status in the proceedings or through the appointment of a GAL. By contrast the child's rights in relation to criminal proceedings are explicitly stated in section 23D of the Bill. In relation to a child's right to be heard under the Child Care Act 1991 Kilkelly states,

> [T]he legislative provision is so riddled with caveats and discretion that it falls significantly short of an effective duty to ensure the child's views are heard, as required by Art 12 of the CRC. It also fails to guide the courts in the exercise of their extensive discretion as to whether to hear children in such cases and if so, by what method[2].

[1] The organisations may submit additional information to inform the ongoing debate over the coming months.
[2] Ursula Kilkelly, *Children's Rights in Ireland: Law, Policy and Practice* (Tottel Publishing, 2008) at page 216. Here Kilkelly is referring to section 24 of the Child Care Act 1991, which states that in any proceedings under the Act the court shall, in so far as is practicable and having regard to the child's age and understanding, give due consideration to the wishes of the child.

The group believes that there should be clarity in relation to this and that the Bill should expressly provide the child with an automatic statutory right to representation. Where a child is old enough and has the competency to instruct a solicitor they should be entitled to individual legal representation. While a solicitor will represent a child's view to the court, it is also necessary that an independent person should be acting in the best interests of the child. If a GAL is appointed to each child they will be able to ensure that both of these functions are carried out.

Statutory right to Guardian *ad Litem*

Section 26 of the Child Care Act 1991 authorises the court to appoint a GAL if satisfied that it is necessary in the interests of the child and in the interests of justice to do so. Section 12 of the Bill introduces several amendments to this section. New section 12 2B(a) states that a GAL shall promote the best interests of the child and convey the views of the child to the court. This is a welcome amendment as it recognises the dual role of the GAL. Section 12 2B(b) allows a GAL to instruct a solicitor if one is appointed by the court under subsection 12 2C. This amendment is positive in that it gives recognition to the need for a GAL to have a legal input in these matters. The group believes that appointing a Guardian *ad litem* to represent a child ensures that the child's voice and best interests are both adequately represented to the court. The Child Care (Amendment) Bill represents a significant opportunity to include a statutory provision for the appointment of a GAL in cases affecting children subject to special care orders and we urge Government to include such a provision in the best interests of children.

Concerns regarding proposed amendments to appointment of Guardian *ad Litem* Services

Although, as stated above, the introduction of section 12 2B(b) is welcome it is a cause of concern that the appointment of a solicitor to represent the GAL under section 12 2C is in the hands of the court and that the court may direct the solicitor as to the performance of their duties, including directions for the appointment of counsel. The group believes that if a GAL is appointed by the court they should be entitled to instruct and direct their solicitor free from any interference as other participants in the proceedings would. We are concerned that restrictions to GAL services will hamper the ability to properly and fully represent the best interests of the child in legal proceedings and undermine the important function this provides for children. It is our opinion that unreasonable restrictions to the GAL that do not apply to other parties in the legislation will weaken the protection for children and must be revised before this Bill is passed into law.

The group is further concerned by amendments introduced under the Bill which relate to the costs of the GAL in these proceedings. Section 26(2) of the 1991 Act provides that any costs incurred by a GAL shall be paid by the HSE and the HSE can apply to the court to have these costs taxed. The Bill amends this so that only costs 'reasonably' incurred by a GAL will be paid by the HSE. The group believes that the inclusion of the word 'reasonably' is unnecessary as the 1991 Act already provides for the costs to be taxed on the application of the HSE. We also believe that the inclusion of the word 'reasonably' may cause confusion as it is unclear what will amount to reasonable costs in these types of proceedings. In addition it is our view that by continuing to hold the HSE responsible for the costs of a GAL, as in the current legislation, it is possible that the independence of a Guardian may be compromised and may cause difficulties where the GAL is in direct conflict with the HSE. This is not in the child's best interests. Perhaps the responsibility of incurring the cost of a GAL should be removed from the HSE and placed with an independent agency with no interest in the proceedings, such as the Courts.

The Bill also amends section 27 of the 1991 Act, relating to the power of the court to give directions to procure a report. This amendment states that any reference in section 27 to the 'party' or 'parties' will include a GAL. It appears that the recognition that a GAL is a party to the proceedings will be limited to this section. The group believes that when a GAL has been appointed they should be regarded as a party to the proceedings for the purpose of the Act in general and not just for the purpose of this section in order to adequately perform their duties to the child. We would welcome clarity in relation to this point.

A further concern is the introduction of a new subsection 12 3A which allows the HSE to apply for an order for costs from any other party to the proceedings. If the GAL is considered a 'party' to the proceedings for the purpose of this section, which remains unclear, it would be unreasonable to place personal liability on the GAL for the costs of the proceedings. Such a step could militate against people working as a GAL and consequently undermine this important service for children.

II. Best Interests of the Child

Functions of the HSE

Under section 23ND of the Bill, once a special care order has been made the HSE will be given considerable powers in relation to the child. The powers given to the HSE under the Bill appear to the group to be too far reaching. These include the power of the HSE to agree to medical or psychiatric examination, treatment or assessment and the authority of the HSE to consent to a passport application. There is no requirement that the HSE apply to the court to dispense with parental consent. These powers appear to exclude a child's own view, the child's family or a GAL in a way that could disadvantage the child. If the child has a reasonable objection to the HSE exercising any of its powers there does not appear to be any right under the Bill for the child to be heard. This is not in the best interests of the child and the child should be entitled to have a say in relation to these matters, particularly in light of the vulnerability of these children and the potential impact of such decisions on their lives.

Monitoring

The Bill provides for the dissolution of the Children Act Advisory Board (CAAB). The group believes that a checks and balances system must be put in place to compensate for any loss of monitoring functions currently provided by CAAB to ensure that the rights and best interests of children are met in relation to high support and secure care.

'Detention' language

The Bill provides for the detention of a child upon the making of a special care order. The group is deeply concerned by the use of the word 'detention' in the legislation and urges the Minister to change the language used in the Bill as a matter of priority. The word 'detention' is associated with criminal proceedings and we believe that it is not in keeping with or representative of the needs of children and young people or the services offered to them in high support care provision. The focus of this Bill must be on providing secure care (secure units) for children in care who need high levels of support. The Bill must reflect what is needed to protect and support children at risk because of welfare issues rather than criminal behaviour. The group would suggest replacing the word 'detention' with the word 'placement'.

III. Best Practice Model

The group understands that the HSE is examining how best to deliver the services provided for in the Bill for children and young people and we strongly concur that the aim of the Child Care (Amendment) Bill must be to provide for the best service model possible for children. This is undermined by the current drafting of the Bill which is based on the present service model rather than a best practice one. As of now no outcomes focused research has taken place to indicate the difference units in secure and high support care have made to the children and young people who have experienced the system. We believe that this must happen to ensure that the implementation of the legislation and service plan is fully informed by those who know best the gaps in the system. This Bill represents a crucial opportunity to review the provision of secure care as it currently operates.

The high support and secure units that seem to enjoy the most success internationally share a number of features. In these units a quality assessment takes place which informs an individualised treatment plan, which is regularly reviewed and updated by those involved in the child's care. The placement of a child in secure care only occurs when the child is at extreme risk

and is withdrawn when it is not required. A 'step down' service is integral here and is available to the child once the need for secure care has passed and the child is able to respond to the intervention. In this respect, the group welcomes Section 7 of the Amendment Bill which appears to provide for the flexibility of the system to ensure this approach.

Family work is also an essential part of the programme provided in these secure units. There is recognition of the significance of the child's family and the impact of family dynamics on the child's settings. Careful attention is also paid to the child's rights and views and the child is consulted and their wishes and feelings are given real consideration.

In best practice model units, the environment in which the child lives is created and maintained to the best possible standard. These units engage in the promotion of good citizenship, positive relationships and education alongside therapeutic treatment by a multi disciplinary team of qualified staff who themselves are well supported. The units operate in an open, facilitative manner with full regard to the rights of their residents and the staff engaged to support them.

We strongly urge Government to use the opportunity of the Child Care (Amendment) Bill 2009 to move towards the provision of high support/ secure care services that meet the above requirements in the best interests of the children subject to special care orders. There is real opportunity for these units to improve the outcomes for children's lives by providing intervention services that can support children in redressing and overcoming the difficulties they face.

IV. Aftercare

Research shows that being able to leave care on a gradual basis or staying on beyond the age of 18, having stability and continuity contribute to positive outcomes for care leavers. Whilst in care many young people will have formed significant emotional and psychological ties with their carers. These should not be severed as a consequence of the young person leaving the care system. Those leaving care need a range of practical supports including financial, accommodation, training and education, advice and information support, and it is therefore imperative that a holistic approach to aftercare linked to other supports including psychiatric and mental health support, social inclusion, and addiction services, be taken. Young people need to have access to emotional support, mentoring, and a caring adult who will keep in touch with them.

Each young person should have an identified aftercare worker allocated well in advance of leaving care. It is important that designated aftercare workers are caring for young people of 18 years plus, as opposed to general social workers who may be part of a child protection team. This would ensure that aftercare would be the focus of the worker, and would alleviate the potential for a child protection case necessarily taking priority.

Aftercare services need to be extended to those young people who are not in education and all young people should be given additional support when they are setting out on their own. Supported accommodation and outreach aftercare must be promoted, along with supported services for care leavers who are also young mothers.

Section 45 of the Child Care Act 1991 provides that where a child leaves the care of the HSE, that agency 'may' provide aftercare to the child for so long as the HSE is satisfied as to the child's need for assistance. The group believes that the legislation should require the HSE to provide aftercare services to all children who have been in care and that consequently the legislation should be changed to read 'shall' instead of 'may'. We also believe that this amendment could provide the regulatory framework for aftercare provision.

This Bill provides an opportunity to place the provision of aftercare services on statutory footing and we strongly urge Government to use the opportunity to make this vital amendment. In 2009, the Ryan Report highlighted the impact on vulnerable children of leaving the care system without proper supports and the ongoing affect this had on children's lives as they matured into adulthood. Given the risks we know face children leaving the care system – including homelessness, addiction and crime – We firmly believe that the State, acting 'in loco parentis', has an obligation not to

abandon these children once they reach 18 and to provide services to support them into adulthood, as any good parent would.

Conclusion

The Child Care (Amendment) Bill 2009 provides a significant opportunity for Government to strengthen the protection and services provided for children subject to special care orders and placed in secure care / high support units. The group believes that in its current drafting, the Bill falls far short of adequately amending the legislation in a way that will make a real difference to children's lives. In order to properly meet the needs of and ensure the best outcomes for these children, the current wording must be amended to improve and develop the system rather than cementing current difficulties and gaps in special care provision.

In particular, we urge the Government to amend the legislation to:

- Include a statutory right to representation for children, through appointment of a Guardian *ad litem* or a solicitor where the child has competency for such;
- Reform the language used in relation to special care orders to focus on service provision rather than detention;
- Provide for the development of outcomes focused on best practice models of service provision; and
- Put the provision of aftercare on a statutory footing for all children in the care system.

The achievement of these amendments would greatly improve the services and outcomes for children in secure units. Barnardos, IAYPIC and IFCA urge Government to use the significant opportunity provided by the Child Care (Amendment) Bill 2009 to make these amendments in the best interests of these vulnerable children.

If you would like further information or to discuss the issues outlined above, please contact:

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