



**Submission on the
Child Care Act 1991 Consultation**

Safe Ireland

11th September 2020

Introduction – Safe Ireland

Safe Ireland is the National Social Change Agency working to end gender based violence with a specific focus on male violence against women in intimate/domestic relationships. We believe that at the root of all violence is what happens in the home and that the single biggest barrier to achieving gender equality and human rights for women is the high prevalence of gender based violence and its wider personal, family, social and economic impacts. We are working to make Ireland the safest country in the world for women and children. We collaborate closely with 39 frontline domestic violence services across communities in Ireland, state agencies, civic society organisations, business, community, and cultural organisations throughout the country. We work directly with women to bring their experiences and voices into research, policy, service development and violence prevention programmes. Our core strategic focus is to change culture and transform the response to gender based violence in Ireland and to progress towards realising our vision for a safe Ireland.

Introduction – This Submission

Safe Ireland welcomes very much this opportunity to make submissions on selected Parts of the Child Care Act 1991 (CCA 1991) as part of the process of its review by the Department of Children and Youth Affairs. We are very glad that CCA 1991 is being reviewed, as it seems to us that there is considerable potential to make it more responsive to the needs and concerns of women and children who are victims of violence in a close relationship.

Domestic violence and abuse are very prevalent in this country. Therefore, they are at the centre of many applications for orders under this Act. Domestic violence workers regularly accompany and otherwise support women and children who are victims of domestic violence and involved in CCA 1991 proceedings. Our submission is based on our expertise, the experiences of domestic violence services working with these women, and is supported by some independent research carried out in other jurisdictions.

It is vital that the rights of all victims of domestic violence and abuse, including children, are upheld at every stage: notification of concerns about a child, assessment of those concerns, any application for an order under CCA 1991, the implementation of any order made or other measure undertaken by the Child and Family Agency to ensure that the child is safe and well looked after. These rights will be upheld most effectively where all professionals concerned, that is, social workers, report writers, legal representatives and judges are trauma informed; have an in-depth knowledge and understanding of the nature, dynamics and impacts of domestic violence and abuse, including coercive control, perpetrator tactics to use legal proceedings to abuse and know how to use this to ensure that their decision making takes full account of any abuse-related issues. This understanding must encompass not only the effects of domestic violence and abuse on its victims, but also on any legal or other formal process.

This submission will focus on two distinct but related Parts of the Act, rather than on each individual order which may be sought under CCA 1991. Our view is that each one of these

Parts, Guiding Principles (New Part) and Jurisdiction and Procedure (Part V) will come into play whenever *any* provision of CCA 1991 is invoked, and therefore it makes sense to ensure that both Guiding Principles and Jurisdiction and Procedure are each formulated to address domestic violence and abuse effectively at every stage and in every kind of court application or other interaction with its victims.

Each Part is considered separately in order below. For convenience, the relevant text from the Consultation Document published by the Department in July 2020, is reprinted in full under each heading in contrasting type. Safe Ireland's Response appears under each one of the two headings at the end of the relevant extract. The submission ends with some brief Concluding Remarks at the end of the last of the Responses.

"I: NEW PART of Act - Guiding Principles

Current position

The Child Care Act 1991 currently does not contain explicit guiding principles; however, there are a number of quasi-principles, primarily in Section 3 and Section 24, with regard to the duties of Tusla and the court, respectively, towards children and their parents.

The Child Care Amendment [Guardian ad litem] Bill 2019 aims to revise Section 24 to introduce principles regarding the best interests and views of the child¹. It presents a list of factors to be considered in relation to the best interests of the child and also prescribes the duty of the court to ascertain the views of children and give them due weight. However, several stakeholders have also called for the introduction of guiding principles with a view to making the legislation more child-centred and to bring it into line with the United Nation Convention on the Rights of the Child. Stakeholders have also recommended that parental participation and the importance of family support and early intervention are given a stronger basis in the Act.

Proposal

On the basis of the consultation and scoping review, the Department is proposing the introduction of a new section on principles which would provide guidance on the implementation of the Act in its entirety. It is worth noting that several contemporary pieces of Irish legislation have incorporated guiding principles and a dedicated section on principles has been included in a number of international examples of child care legislation.

The proposed section will contain a number of principles that will apply to the revised Act. Among these, the best interests of the child will have a central role and the best interests of the child will override any other principles in cases of possible conflict. The principle will contain a list of enumerated factors, similar to the Children and Family Relationships Act 2015², but excluding the last three factors more specific to private family law. Furthermore, it is proposed that additional factors be added to the list in line with consultation findings such as timely decision-making, stability of care and

¹ See <https://www.oireachtas.ie/en/bills/bill/2019/66/> Note that this Bill has lapsed with the dissolution of the Dáil.

² See list at <http://www.irishstatutebook.ie/eli/2015/act/9/section/63/enacted/en/html#sec63>

promoting the rights and development of the child. The section will also prescribe that the views of children should be ascertained and given due weight in accordance with their age and maturity in all decisions made under the Act.

It is further proposed that a new principle addressing the importance of parental participation will be introduced. This will provide the basis for relevant operational measures, many of which are underway, which aim to ensure adequate parental participation in decisions concerning the care and protection of children. It is also suggested that rather than stating that generally it is in the best interests of the child to be brought up in his/her own family, the emphasis is given to recognising families as the preferred way to safeguard the welfare of children unless this is prejudicial to the welfare of a child. Such an approach is intended to support proportionate intervention into families provided that this does not put the child at risk. It should also recognise diverse family configurations in contemporary Irish society and allow for the involvement of the wider family in ensuring the welfare of the child.

Future position

The amended Child Care Act will contain explicit guiding principles. In all decisions under the Act the best interests of the child will be considered and their views will be ascertained and given due weight. Parental participation will be facilitated in all decisions concerning the care and protection of children as far as practicable and attempts will be made to safeguard the welfare of children within the family, including the wider family when appropriate. In cases of conflict between principles, the best interest will always be paramount.

Please provide your response to the above proposal”.

Safe Ireland Response on Guiding Principles

Trauma informed approach

The guiding principle of applying a comprehensive trauma informed approach should be included.

Implications of a guiding principle of comprehensive trauma informed approaches

- A system applying a Trauma-Informed approach fully integrates knowledge about trauma into all aspects of services and trains staff to recognise the signs and symptoms of trauma thus minimising risk of re-traumatisation.
- It appreciates the direct impact that trauma can have on access to services and responds by amending policies, procedures and practices to minimise potential barriers.³

Expert Decision Making

³ Substance Abuse and Mental Health Services Administration. (2014). Concept of Trauma and Guidance for a Trauma-Informed Care Approach. U.S. Department of Health and Human Services.

- In our view, the guiding principle of expert decision making should also be added: any professional involved in the assessment of child welfare concerns, or charged with making a decision with far-reaching implications for the safety and well-being of a child should only do so from a base of specialist knowledge, in turn based on intensive, high-quality foundation and ongoing training;

Implications of a Guiding Principle of Expert Decision Making

- Because of its great prevalence, this specialist knowledge and training should include evidence-based material reflecting best international practice on the nature, dynamics and impacts of domestic violence and abuse including coercive control;
- Decision makers in CCA 1991 proceedings cases should have access to individual and expert support, as regardless of their role, decisions about children's current situations and future welfare are emotionally as well as intellectually demanding;
- Any such training should also include expert material on how best to communicate with child victims of domestic violence and abuse;

Children are Victims of Domestic Violence and Abuse and as such entitled to Victims' Rights

- Safe Ireland's view is that there should also be a guiding principle that anyone who has suffered domestic violence and abuse as a child should be regarded as a victim of crime and therefore, in the context of assessments of child protection concerns under Section 3 CCA 1991, should have enumerated rights to certain information and support, including specialist support, analogous to the rights of victims as set out in the Criminal Justice (Victims of Crime) Act 2017. Physical assault, threats to commit serious assault and/or to kill, harassment, false imprisonment, criminal damage and coercive control⁴ are all **crimes** and anyone who has suffered harm as a result of one or more of these crimes even not yet proven, and becomes involved in any kind of formal assessment or judicial proceeding, should be accorded the same rights as they would have in criminal proceedings.

Implications of a Guiding Principle that Children are Victims of Domestic Violence and Abuse:

- Children should be informed, as far as possible and appropriate having regard to their age and maturity, about the nature of any formal process or judicial proceeding;
- Children should be facilitated to convey their own views independently of their parents or others involved in their care, to any person or court making a decision on any aspect of their future;
- Domestic violence and abuse constitute grave forms of **child abuse**;

⁴ Coercive control and psychological abuse take place in familial contexts, where children can be enrolled in coercive behaviors, used as tools to exert control, and where children can be direct victims of controlling and coercive acts (Hardesty et al., 2015)

- Anyone taking evidence from a child who is, or may be, a victim of domestic violence and abuse should do so as a specialist in the nature, dynamics and impacts of that abuse, so that their assessment of what they hear is informed by an understanding of how abuse may affect that evidence.

Proposed Guiding Principles of Timely Decision Making, Stability of Care, Promoting Rights and Development of Children, Ascertaining Views of Children and Giving Due Weight to those Views:

- Safe Ireland approves the following proposed new principles: timely decision making, stability of care, promoting rights and development of children, ascertaining views of children and giving due weight to these views, having regard to the age and maturity of the children concerned;
- Safe Ireland’s view is that it is appropriate that consideration of the best interests of any child must include consideration of a checklist of factors and circumstances similar to that cited in the Consultation Paper (to be found at Section 31 of the Guardianship of Infants Act 1964, as inserted by Section 63 of the Child and Family Relationships Act 2015, see footnote 2 above for a web-link to the full text);

Parental Participation in Child’s Life

- With regard to the possibility that parental participation should become a guiding principle, Safe Ireland respectfully submits that in the context of domestic violence and especially wherever there is a pattern of coercive control, this principle is entirely inappropriate as far as the perpetrators of that abuse are concerned. Sometimes, indeed frequently in our experience, the intention to initiate or continue abusive behaviour against a child may be disguised effectively as sincere interest in increased parental participation.
- Our view is that a guiding principle of parental participation is wide open to abuse by perpetrators determined to misuse any formal assessment process or judicial proceeding by turning it into an opportunity to mislead decision makers and thereby abuse both children and co-parents. If it is enacted, it must be qualified: there should be no universal principle that ongoing parental participation is appropriate in all circumstances including the existence of abuse, or reasonable grounds for suspecting the existence of abuse.
- Safe Ireland is also concerned that including a guiding principle of parental participation in the legislation will make it even harder for decision makers in CCA 1991 proceedings, and related formal assessment processes, to distinguish between what is often mis-identified as “parental alienation” by co-parents and their genuine, often very well-founded concerns of those parents about the safety and welfare of their children once they are in the care of the other parent, expressed as reluctance to force unwanted access on their child and/or to ensure compliance with court orders

which may have the effect of putting their child at risk. There can be no doubt that some abusive co-parents use false allegations of “parental alienation” as a means of controlling their former partners and children and our view is that a guiding principle of parental participation may increase the risk that abusive intentions will be disguised as, and accepted as, a bona fide wish to have more involvement in the life of one’s child.

- The unfortunate and avoidable consequence of failing to probe allegations of “parental alienation” thoroughly and expertly through the lens of potential abuse, is that children may be taken away from the care of the non-abusive parent, sometimes against their own wishes;⁵
- We note that where “parental alienation” is alleged, the evidence is that the voice of the child is only heeded if the child agrees that more access to and/or interaction with the parent alleging the alienating behaviour, is what he or she wants. If they express a contrary view, their voice tends to be silenced⁶. In our respectful submission, the voice of the child should always be heard, indeed listened to extremely closely and carefully, in CCA 1991 proceedings and related procedures.

“2: Jurisdiction and Procedure – Part V

Jurisdiction – operation of the courts and hearing of proceedings

Current position

Child care cases are currently heard in the general court system: District Courts hold jurisdiction in the first instance, with the exception of special care cases which are heard by the High Court, and appeals which are made to the Circuit Court. An application is made to the District Court where the child resides or where the child is currently staying. The District Court is required to hear and determine these proceedings at a different place or time from ordinary sittings of the Court. Proceedings should be heard otherwise than in public and as informally as possible; specific exceptions exist in relation to specific groups subject to certain safeguards. The Act prohibits publishing or broadcasting matters that are likely to identify a child who is the subject of care proceedings. The Act also enables the court to procure an expert report of its own motion. The details of case management are covered in District Court orders and, in Dublin, by the current Practice Direction by the Dublin Metropolitan District.

Challenges

- *Lack of specialisation and judicial variance*

⁵ See Barnett, A (2020): “A genealogy of hostility: parental alienation in England and Wales”, Journal of Social Welfare and Family Law, Vol.42:1, pp 18-29 DOI: 10.1080/09649069.2019.1701921

⁶ See footnote 3 once more

- *Insufficient case preparation and case management*
- *Under-resourcing of District Courts and related delays in concluding cases*
- *Mixing child care cases with other types of hearings*
- *Lack of flexibility in relation to local jurisdiction*
- *Adversarial proceedings*
- *Limited oversight regarding expert reports and appointment of expert witnesses*

Proposed solutions

The key recommendation emerging from consultations is the need to establish a specialised Family Court. Of relevance, therefore, is the fact, that the Department of Justice has prepared a General Scheme to establish a Family Court Division which will have specialised judges, its own rules of court and the option of issuing Practice Directions and creating a nationwide case management system. In addition, provisions concerning local jurisdiction will also be updated so that any court that the child has connection with can exercise jurisdiction. As a result, when a child is moved to a new location, cases can continue to be heard at the same local court if that is deemed in his/her best interests.

In consideration of the need to streamline hearings and enhance the inquisitorial aspect of proceedings, it is proposed to put in place enabling provisions to facilitate active case management and the introduction of alternative dispute resolution mechanisms (ADR) in child care cases where appropriate. Consideration will also be given to placing a statutory requirement on parties to hold pre-court meetings to identify issues at dispute, and providing the respondent with an opportunity to prepare a written reply to the application of an order. While ADR processes may not be suitable for deciding whether harm has reached the required threshold to take a child into care, they could be used for determining “ancillary questions” such as access to services, placement, or access to parents and family members, a mechanism which may also include supporting engagement between parents and Tusla. It is also proposed that the procurement of expert reports should be guided by a list of factors in S27 similar to private family law⁷ and that standards required of experts are set out in a Practice Direction while the early appointment of single joint experts is facilitated by the new case management system.

In addition, amending the current in-camera rule to facilitate research and consultation with children has been recommended. (Note that an amendment has already been proposed to the Child Care (Amendment) Bill 2019 to authorise the attendance of officials to assist in monitoring of the implementation of the Act, subject to necessary safeguards.) It is also proposed that social media be included in the definition of “publish” and that proportionate sanctions are outlined under Section 31.

Future position

The establishment of a dedicated Family Court Division will help to address the current difficulties in the court system around specialisation, judicial variance and resources.

⁷ See S32(3) of the Guardianship of Infants Act 1964 as inserted by S63 of the Children and Family Relationship Act 2015 <http://www.irishstatutebook.ie/eli/2015/act/9/enacted/en/print#sec63>

Child care cases will be heard separately, with specialised judges presiding over cases. The reform will also provide the opportunity to introduce concurrent jurisdiction between District and Circuit level courts so that complex cases can be transferred to the latter in a similar manner to neighbouring jurisdictions. New enabling provisions in combination with a detailed Practice Direction concerning case management (including the time frame) will facilitate effective case preparation and management and the use of ADR processes where appropriate. A nationwide case management system and ancillary services will support the implementation of those measures. The court will have enhanced oversight over the procurement of expert reports, and the appointment of expert witnesses (e.g. standards required) will be regulated through a Practice Direction combined with the future development of panels of experts”.

Safe Ireland Response on Jurisdiction and Procedure

Safe Ireland agrees with most of the proposals set out under this heading, with one significant exception which we explore further below. Our additional observations on expert witnesses are also elaborated under this heading.

Safe Ireland supports the proposals for:

- A dedicated Family Court (we understand of course that this is the remit of the Department of Justice and would also recommend the establishment of specialist domestic violence courts;
- Much more formal and strictly run truly national system of case preparation and management in CCA 1991 proceedings;
- Specialised judges to hear CCA 1991 proceedings;
- Much more flexible arrangements for shared jurisdiction between different District Courts and between District Court and Circuit Court;
- Enhanced oversight by the court over the procurement of expert reports and the appointment of expert witnesses, including the standards required, to prepare these reports;
- Adequate resources to ensure cases are heard in **timely** manner and not heard alongside other kinds of cases;
- Amendments to the in camera provisions to facilitate research and consultation with children;
- Amendments to Section 31 to include social media in the definition of “publish”.

Safe Ireland proposes that

- All specialised and other judges hearing CCA 1991 cases, all social workers, all Guardians ad Litem and all lawyers concerned in these cases, should have completed high quality training in the nature, dynamics and impacts of domestic violence and abuse, including coercive control, before they undertake this work;
- All expert witnesses chosen by the court to prepare a report in CCA 1991 proceedings should be accredited independently as experts in the nature, dynamics and impacts of

domestic violence and abuse, including coercive control before they are placed on any panel from which they may be selected to write a report;

- The Practice Direction or other instrument governing procedure in relation to the preparation of these expert reports must be drafted as tightly as possible so that the court has enough control over the whole process to ensure it is transparent and in order to make it very difficult or impossible for an abusive parent to manipulate it (e.g. by arranging private meetings with the report writer before conclusions are reached, without the knowledge or consent of CFA or the other parent – or indeed, the court).

Proposal to introduce Alternative Dispute Resolution (ADR) into CCA 1991 proceedings

- As Article 48 of the Council Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (2011), which Ireland has ratified, prohibits the use of mediation where sexual or domestic violence is indicated, and as the threshold of “harm” which must be reached routinely involves incidents of a grave and criminal nature, Safe Ireland understands the basis on which ADR procedures are proposed first and foremost on ancillary matters i.e. “access to services, placement, or access to parents and family members” while there is hesitation about extending them to determinations of whether the “harm” threshold has been reached.
- Safe Ireland’s view is that there should be no question of ADR being considered suitable as a means of determining whether the threshold of harm has been reached, given not only the prohibition in the Istanbul Convention, but also, our experience of how any ADR mechanism may be manipulated by determined abusers, causing harm to children and to co-parents. No professional should be naïve enough to think that he or she could not be manipulated in this way. Unfortunately, if matters are serious enough that some order under CCA 1991 is in contemplation, it is not likely that those affected would be willing to submit to such a process unless they were confident that they could subvert it successfully.
- For similar reasons, Safe Ireland submits that it would be unwise to allow ancillary matters to be determined by ADR. While the matters listed are described as ancillary, in reality they are of enormous importance to the parents concerned. This means that they pose a temptation to anyone engaged in domestic abuse to use these matters also as occasions of abuse. This should not be allowed to happen, not least because it could not be said to be in the best interests of the children concerned.
- It follows that in our view, there should be no question of any parent who has been subjected to domestic violence and abuse being obliged to attend any meeting at which the abusive co-parent will also be present, to discuss the issues. We think it would be safer and more appropriate for such meetings to be replaced by pre-trial hearings in front of a judge or registrar. These preliminary hearings could also be used

for case management purposes, so that directions could be made to streamline proceedings at final hearing.

Conclusion

CCA 1991 proceedings will work most effectively to further the best interests of children if they take place within a system in which is trauma informed and there is a shared universal understanding of the prevalence, nature, and impacts of domestic violence. It is also important that all professionals concerned are aware of how they themselves can be manipulated by abusive individuals (1) and how women and children affected by domestic violence can be presented, or present themselves, as somehow flawed or unworthy people whose conduct is not the result of abuse (as it so often is in reality), but a collection of character flaws which diminish or eliminate the effect of their evidence about the abuse which they suffered (2). An in-depth understanding of abuse issues will enhance decision making in these cases and thereby will help to keep children safe.



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