



**UN Committee on the Rights of the Child  
2021 Day of General Discussion  
Children's Rights and Alternative Care  
September 2021**

**Submission by the Ombudsman for Children's Office  
10 June 2021**

## **1. Introduction**

The Ombudsman for Children's Office (OCO) is an independent statutory body, which was established in 2004 under the Ombudsman for Children Act 2002 (2002 Act). Under the 2002 Act, as amended, the OCO has two statutory functions:

- to promote the rights and welfare of children up to the age of 18 years
- to examine and investigate complaints made by or for children about the administrative actions of public bodies, schools and hospitals that have or may have adversely affected a child.

The OCO welcomes that the UN Committee on the Rights of the Child (Committee) is focusing its 2021 Day of General Discussion (DGD) on children's rights and alternative care. We also welcome the opportunity to make a submission to the Committee ahead of its DGD. The purpose of this submission is to provide the Committee with information on a number of issues regarding children in alternative care in Ireland that have come to the OCO's attention in exercising our statutory functions. The submission identifies examples of positive changes as well as areas of concern to the OCO in respect of children in care that we hope may usefully inform the Committee's deliberations. The submission also provides some examples of how Covid-19 has impacted children in alternative care in Ireland.

## **2. General measures of implementation**

### **2.1 Legislation**

The Child Care Act 1991 (1991 Act) is the primary legislation in Ireland that deals with children in need of the protection and care of the State and provides that the Child and Family Agency (Tusla) must make suitable arrangements for children in its care.

Notwithstanding amendments made to the 1991 Act, many of its key provisions have been in force for over 25 years. The 1991 Act also broadly provides for a welfare approach rather than a rights-based approach to the care and protection of children, preceding as it does the ratification by Ireland of the UNCRC in 1992 and the insertion of Article 42A into the Constitution, which recognises and affirms the natural and imprescriptible rights of all children.

In 2017, the Department of Children, Equality, Disability, Integration and Youth (DCEDIY) commenced a review of the 1991 Act. The DCEDIY's decision to initiate this review is a welcome development as the review presents a significant opportunity for the State to align the provisions of this important piece of domestic law more fully with the State's obligations under the UNCRC to respect, protect and fulfil the rights of children in alternative care.

Accordingly, among the recommendations that the OCO has made to the DCEDIY through our engagement with the review process is that the revised Act should:

- require all relevant bodies to recognise children in alternative care as subjects of rights and individual rights-holders
- integrate the four general principles of the UNCRC such that these principles guide the interpretation and implementation of the revised Act's provisions
- set out what the State requires and expects of Tusla and other relevant agencies as regards discharging their roles and responsibilities in accordance with children's rights.<sup>1</sup>

## 2.2 Coordination

The establishment of Tusla in 2014 was a significant development since it involved the creation of a dedicated child and family agency, which brought together key child protection and welfare services that were formerly under the auspices of the Health Service Executive (HSE) with family support services and education and welfare services.

However, despite a widespread understanding that effective coordination between Tusla and other agencies is essential to ensuring children's needs are assessed and met in an appropriate, effective and timely manner, the OCO's examination and investigation of complaints have highlighted fragmented, system-oriented practices which hinder effective coordination of services for children in care. In this regard, we have found that referrals between different services can be problematic, leading to situations in which young people needing to avail of a combination of these services are not being provided with a full 'wrap around' service.<sup>2</sup> As demonstrated by two recent OCO investigations, one area of particular concern has been deficits in inter-agency coordination regarding children with special needs requiring care (see Section 3.1). While the OCO welcomes the steps that have been taken to address the specific deficits in coordination highlighted by these investigations, we are of the view that the State should take the opportunity presented by the ongoing review of the 1991 Act to place a statutory obligation on relevant agencies with responsibilities for children and families under the 1991 Act (e.g. health services, local authorities, housing authorities, education services, and criminal justice agencies) to coordinate and cooperate with Tusla in the exercise of its duties under the revised Act. In this regard, we are of the view that this should involve legislating for corporate parenting.<sup>3</sup>

## 3. General principles

### 3.1 Article 2: Non-discrimination

Investigations by the OCO highlight that a failure to recognise and meet the specific needs of a child, or a particular cohort of children, can exacerbate the disadvantage they may experience and act as a barrier to ensuring they have access to the services and supports they need. In an investigation into

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<sup>1</sup> Ombudsman for Children's Office, [Department of Children and Youth Affairs: Review of the Child Care Act 1991. Submission by the Ombudsman for Children's Office](#) (2018); Ombudsman for Children's Office, [Department of Children, Equality, Disability, Integration and Youth Review of the Child Care Act 1991 - July 2020 Consultation Paper: Observations by the Ombudsman for Children's Office](#) (2020).

<sup>2</sup> Ombudsman for Children's Office, [A meta-analysis of repetitive root cause issues regarding the provision of services for children in care](#) (2013), at pp. 26-27.

<sup>3</sup> Ombudsman for Children's Office, *supra* note 1.

the care of a child with a disability in foster care, the OCO found that the standardised approach to service provision adopted by Tusla and the HSE did not take sufficient account of the child's additional needs, as neither agency viewed the child as a child who was both disabled and in care.<sup>4</sup> Though children with a diagnosed moderate to severe disability made up approximately 8% of the foster care population in 2015, we found that neither Tusla nor the HSE had an adequate system in place to ensure adequate supports are provided to such children and their carers. We welcome the significant commitments made by the HSE and Tusla following this investigation, including to review the supports and services for children with a moderate to severe disability in foster care.<sup>5</sup>

Another investigation into provision of services to a child with disabilities placed in inappropriate hospital settings found that a refusal by Tusla to complete an assessment of the child's protection and welfare needs, on the basis that these were issues for the HSE Disability Services and that the child did not meet its threshold for care, was unduly informed by the child having a disability.<sup>6</sup> In line with recommendations made on foot of the investigation, Tusla committed to issuing guidance to ensure referrals regarding children with disabilities are assessed and managed in the same manner as other children. Furthermore, the HSE and Tusla committed to undertaking a national review of the current need for alternative care for children with a disability in similar circumstances.

### **3.2 Article 3: Best interests of the child**

Complaints received by the OCO illustrate that the welfare and interests of children in care are not consistently treated as a primary consideration in practice. Issues emerging from complaints in this regard include:

- children having to stay in unsuitable placements due to a lack of forward planning
- children being placed at considerable distance from their homes
- children experiencing multiple placements
- children experiencing difficulties in accessing appropriate social work, aftercare support and therapeutic services.<sup>7</sup>

Accordingly, the OCO has recommended that the best interests of the child principle needs to be mainstreamed as a positive obligation in the 1991 Act so that it applies in respect of all actions and decisions concerning children under this legislation and that statutory provision should be made for the factors and circumstances that must be considered by Tusla, the courts and other bodies when assessing and determining what is in the best interests of a child.<sup>8</sup>

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<sup>4</sup> 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).

<sup>5</sup> Ombudsman for Children's Office, [Molly Two Years On: Have Tusla and the HSE delivered on commitments to children with a disability in the care of the State?](#) (2020).

<sup>6</sup> Ombudsman for Children's Office, [An Investigation by the Ombudsman for Children's Office - Jack's\\* case: How the HSE and Tusla, the Child and Family Agency, provided for and managed the care of a child with profound disabilities](#) (2020).

<sup>7</sup> Ombudsman for Children's Office, [Annual Report 2014](#) (2015), at pp. 34-35; Ombudsman for Children's Office, [Annual Report 2016](#) (2017), at p. 29; Ombudsman for Children's Office, [Annual Report 2019](#) (2020), at pp. 43-45.

<sup>8</sup> Ombudsman for Children's Office, *supra* note 1.

### 3.3 Article 6: Life, survival and development

Evidence from OCO investigations indicate that children’s health and social and educational development may be impaired by a lack of stability in their placements and the administrative arrangements in place for the provision of services.<sup>9</sup> An OCO consultation with children with experience of homelessness highlighted the adverse impact of multiple and fragmented care placements on their mental health and access to education.<sup>10</sup> Furthermore, research commissioned by the OCO showed that while children in care can have positive experiences and outcomes in education when they receive the requisite supports, they can experience multiple barriers to access, participation and attainment in education, including attitudinal barriers, placement breakdowns, inadequate care planning and review, and shortfalls and delays in assessment.<sup>11</sup> An investigation carried out by the OCO into the educational needs of a child in care aligned with these findings and recommended that the Department of Education develop a cross-sectoral action plan for the education of children in care, which recognises and addresses the additional challenges they face.<sup>12</sup> The OCO has also recommended that data is systematically gathered on the educational experiences of children in care.<sup>13</sup>

### 3.4 Article 12: Respect for the views of the child

The OCO is concerned that children’s right to express their views and to have due weight given to their views is not consistently implemented in all actions and decisions regarding their care. Complaints received by the OCO highlight children’s lack of input in day-to-day decision-making affecting them, including children not being systematically facilitated to express their views in care placement reviews and in care planning.<sup>14</sup> In this regard, the OCO has recommended that Tusla ensure that the views of children in care are heard at every stage in the care planning process, as appropriate.<sup>15</sup>

Article 42A.4.2 of Ireland’s Constitution requires provision to be made by law for children’s views to be ascertained and given due weight, in accordance with their age and maturity, in child care court proceedings affecting them. A welcome development in this regard is the proposal to establish a national guardian *ad litem* (GAL) service for children in respect of care proceedings. Through our engagement with proposed legislation concerning the appointment, role, functions and powers of GALs in care proceedings, our recommendations have focused on the need for this legislation, once finalised, to provide in a robust and equitable manner for children’s rights, including children’s right to be heard, to be fully upheld in the context of these proceedings.<sup>16</sup>

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<sup>9</sup> Ombudsman for Children’s Office, *supra* note 2, at p. 20 and p. 31.

<sup>10</sup> Ombudsman for Children’s Office, [Homeless Truths: Children’s Experiences of Homelessness in Ireland](#) (2012), at pp. 26-29.

<sup>11</sup> M. Darmody, L. McMahon, J. Banks and R. Gilligan, [Education of Children in Care in Ireland: An Exploratory Study](#) (2013).

<sup>12</sup> 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), at p. 19.

<sup>13</sup> Ombudsman for Children’s Office, [Submission of the Ombudsman for Children’s Office: Consultation Paper, Department of Education and Skills Re: Statement of Strategy 2016-2018](#) (2016), at p. 12.

<sup>14</sup> Ombudsman for Children’s Office, *supra* note 2, at p. 16; Ombudsman for Children’s Office, [Annual Report 2018](#) (2019), at p. 23.

<sup>15</sup> Ombudsman for Children’s Office, *supra* note 2, at p. 32.

<sup>16</sup> Ombudsman for Children’s Office, [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); Ombudsman for Children’s Office, [Annual Report 2019](#) (2020), at pp. 46-47.

## 4. Appropriate care and aftercare

### 4.1 Foster care

In line with the UN Guidelines for the Alternative Care of Children,<sup>17</sup> the vast majority of children in the Irish care system are in foster care, reflecting a preference for accommodating children in family settings, and in contrast with the dominant role played by residential settings prior to the 1980s.<sup>18</sup> Over 5,800 children were in care in Ireland at the end of 2020, of which 91% were in foster care and 7% were in residential care.<sup>19</sup>

Ireland has seen a particular growth in the prevalence of relative foster care, which involves placement with a friend, neighbour or relative, with whom the child has had a relationship prior to admission to care, on behalf of and in agreement with Tusla. Of those children in foster care at the end of 2020, 28% were in relative care.<sup>20</sup> In this regard, complaints received by the OCO have highlighted a lack of clarity experienced by some children and their relative carers as to whether their care arrangement is a formal or informal relative care placement and challenges in accessing associated supports from the State.<sup>21</sup>

### 4.2 Special care outside the jurisdiction

The OCO is concerned by insufficient alternative care services for children in need of special care, which is a form of secure care in which a child is deprived of their liberty because a court has determined that their behaviour poses a real and substantial risk of harm to their life, health, safety, development or welfare. The absence of specialised services has resulted in some children being placed in special care outside the jurisdiction, far from their families and communities. Although these steps are taken in light of the assessed needs and best interests of the child, it is undesirable that these children are not provided for in this jurisdiction. Furthermore, there is little information available on the impact of such placements on children and the selection and monitoring of such placements. The OCO and the Committee have recommended that the State develop its special care services to ensure the needs of such children can be addressed in Ireland.<sup>22</sup>

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<sup>17</sup> UN General Assembly, [Guidelines for the Alternative Care of Children](#) (2010), UN Doc. A/RES/64/142, at paras. 21-23 and 53.

<sup>18</sup> See further: R. Gilligan, 'The family foster care system in Ireland – Advances and challenges' (2019), *Child and Youth Services Review*, Vol. 100, pp. 221-228.

<sup>19</sup> Tusla, [Quarterly Service Performance and Activity Report: Quarter 4 2020](#) (2021), at p. 31.

<sup>20</sup> *Ibid.*

<sup>21</sup> 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); Ombudsman for Children's Office, [Annual Report 2017](#) (2018), at pp. 26-27.

<sup>22</sup> 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 p.26; Ombudsman for Children's Office, *supra* note 2, at p. 34; 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 paras. 43-44.

### 4.3 Aftercare

The OCO has consistently raised concerns regarding the provision of aftercare services and the discretionary nature of legislation underpinning aftercare.<sup>23</sup> The strengthening of legislative provisions regarding aftercare in 2015 was a welcome development in this regard. The 1991 Act now imposes a specific duty on Tusla to prepare an aftercare plan for an eligible young person at least six months before they turn 18, to assess their needs prior to preparation of a plan, and to review the operation of aftercare plans.<sup>24</sup>

The OCO is nevertheless concerned about the discretionary nature of Tusla's responsibility to implement aftercare plans.<sup>25</sup> Complaints received by the OCO highlight a varied approach to aftercare provision in Ireland, delays in planning, inappropriate onward placements, lack of provision of aftercare support and failures to allocate aftercare workers. In addition, aftercare eligibility criteria exclude young people who have been in care for less than 12 months and young people experiencing homelessness who have been provided with accommodation by Tusla, but who have not been formally placed in care. The OCO has recommended that the Government should ensure all children who are leaving care or leaving emergency accommodation provided by Tusla fully enjoy their right to access appropriate transition support and aftercare services.<sup>26</sup>

## 5. Impact of Covid-19 on children and alternative care

Covid-19 restrictions have impacted on the ability of children in care to access social work and care supports. Although independent inspections highlighted positive efforts by social workers to maintain contact with children in care, they also indicated that in some instances mandatory visits by social workers did not take place during restrictions.<sup>27</sup> Tusla reported that, as an essential service, it has continued to provide key services relating to child protection and children in care.<sup>28</sup> Guidance on visits to children in care encouraged remote meetings, but provided that face to face meetings with social distancing may take place in certain circumstances.<sup>29</sup>

Children in care have also seen a disruption to their family life during Covid-19 restrictions. In this regard, the OCO recommended in 2020 that access visits to family members in different households should be explicitly deemed essential visits for the duration of Covid-19 restrictions.<sup>30</sup> Tusla guidance emphasised the paramount importance of contact with families and set out alternative means of

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<sup>23</sup> Ombudsman for Children's Office, [Advice of the Ombudsman for Children on the Child Care \(Amendment\) Bill 2009](#) (2010); 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 Second Report to the Committee](#) (2006), at p. 33.

<sup>24</sup> Child Care Act 1991 (as amended), s 45, 45A, 45B and 45D.

<sup>25</sup> *Ibid.* s 45(5).

<sup>26</sup> Ombudsman for Children's Office (2015), *supra* note 22, at p. 27; 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), at p. 21.

<sup>27</sup> HIQA, [Service Area Inspection](#) (2021), at p. 38; HIQA, [Statutory foster care service inspection report](#) (2020), at pp. 19-20.

<sup>28</sup> Tusla, 'Covid-19', [www.tusla.ie/covid-19](http://www.tusla.ie/covid-19).

<sup>29</sup> Tusla, [Covid-19 Guidance Note for home Visits for Children at risk of Serious Harm and Children in Care](#) (2020).

<sup>30</sup> Ombudsman for Children's Office, [Submission by the Ombudsman for Children's Office to the Special Oireachtas Committee on Covid 19 Response](#) (2020).

supporting continued contact, including via letters and phone or video calls.<sup>31</sup> Independent inspections indicate that alternative arrangements were made for children to maintain contact with families, such as through video calls and outdoor visits.<sup>32</sup> However, some children reported facing barriers to contact with their families due to poor access to the internet or ICT devices.<sup>33</sup>

In line with OCO recommendations that children who are due to leave care should be permitted to remain in their existing care placements or non-institutional aftercare options,<sup>34</sup> Tusla guidance provided that young people would be supported to remain in their placements for an extended period of time after turning 18.<sup>35</sup> It also stated that aftercare supports due to end during the period of restrictions would be extended.

In May 2020, the DCEDIY introduced temporary emergency regulations to facilitate foster care placements during Covid-19 restrictions.<sup>36</sup> These measures were extended every three months up to May 2021. The regulations included provision for the establishment of an emergency placement panel of foster carers and an associated approval process. Requirements that social workers visit children were temporarily suspended and replaced with a requirement that a child be contacted at regular intervals determined by the date at which they were placed in care. In this regard, the OCO emphasised the importance of having due regard to the best interests, safety and welfare of children placed in foster care under the temporary regulations. The OCO also recommended that the DCEDIY monitor implementation of the temporary regulations to address any adverse effects arising from the changes on children and/or on services' capacity to safeguard children's welfare and best interests and that such monitoring should feed into reviews of the operation of such regulations.

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<sup>31</sup> Tusla, [Covid 19: Updated Advisory Notice relating to Family Contact \(access\) for Children in Care](#) (2020).

<sup>32</sup> HIQA, [Statutory foster care service inspection report](#) (2020), at p. 21.

<sup>33</sup> EPIC, [A Survey of Children's Residential Care Services in Ireland during the Covid-19 crisis](#) (2020); HIQA, [Report of a Children's Residential Centre](#) (2021), at p. 6

<sup>34</sup> Ombudsman for Children's Office, *supra* note 30.

<sup>35</sup> Tusla, [Guidelines for Covid-19 for young adults in receipt of an aftercare service](#) (2020).

<sup>36</sup> [Child Care \(Placement of Children in Foster Care\) \(Emergency Measures in the Public Interest - Covid-19\) \(Amendment\) Regulations 2020](#) (S.I. No. 170/2020); [Child Care \(Placement of Children with Relatives\) \(Emergency Measures in the Public Interest - Covid-19\) \(Amendment\) Regulations 2020](#) (S.I. No. 171/2020).