

Children's Rights Alliance Submission to the Legal Aid Board in relation to its Corporate Plan 2003-2007

August 2002

1. Introduction

The Children's Rights Alliance welcomes the opportunity to make a submission to the consultative process in relation to the Legal Aid Board's Corporate Plan 2003-2007.

The Children's Rights Alliance is a coalition of 70 non-governmental organisations concerned with meeting the needs and safeguarding the rights of children in Ireland. The Alliance works to secure the full implementation in Ireland of the principles and provisions of the UN Convention on the Rights of the Child, to which Ireland has been a State Party since 1992.

2. UN Convention on the Rights of the Child

The UN Convention on the Rights of the Child recognises and stipulates children's basic human rights, including their civil, political, economic, social and cultural rights and their right to protection from abuse and exploitation. The Convention sets forth the minimum standards necessary for the well-being of every child. The Convention also imposes obligations on the ratifying States Parties to undertake specific actions to ensure the full realisation by children of the rights stipulated in the Convention.

Four principles are basic to the implementation of the Convention:

- Respect for the best interests of the child (Article 3)
- The right of all children to life, survival and development (Article 6)
- Participation: the right of all children to express their views freely on all matters affecting them (Article 12)
- Non-discrimination: the right of all children to enjoy all the rights in the Convention without discrimination (Article 2).

3. National Children's Strategy

The National Children's Strategy was launched by the Government in November, 2000 to advance the implementation in Ireland of the UN Convention on the Rights of the Child. The Strategy lays out a set of objectives and commitments to improve the quality of life for all children in Ireland over a ten-year period. The Strategy aims to achieve the following three National Goals:

1. Children will have a voice in matters which affect them and their views will be given due weight in accordance with their age and maturity.
2. Children's lives will be better understood; their lives will benefit from evaluation, research and information on their needs, rights and the effectiveness of services.
3. Children will receive quality supports and services to promote all aspects of their development. The Strategy recognises that all children have a basic range of needs and that some children have additional needs.

Under the National Children's Strategy all departments must identify the impact of their policies on children when seeking a government decision. Departments are also required to include child impact analyses in their Departmental Strategy Statements. This practice is to be extended to state agencies. In the view of the Children's Rights Alliance to conform with the National Children's Strategy the Legal Aid Board should take into account the impact of its policies on children whilst devising its Corporate Plan.

4 Recommendations in relation to the Corporate Plan 2003-2007

The Children's Rights Alliance acknowledges the importance of the work undertaken by the Legal Aid Board and commends the skill and dedication of the Board's solicitors. The Board offers a vital service to children and their families who otherwise would be unable, due to financial constraints, to access legal advice and aid and thus ensure that their rights are vindicated.

4.1 Establish a Certified Children's Law Training Course

A large portion of the Legal Aid Board's work involves family law cases related to children. Article 3 of the UN Convention on the Rights of the Child states 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 shall be a primary consideration.

Article 3 is in line with the principle of 'paramount welfare of the child' in any relevant proceedings as established by the 1964 Guardianship of Infants Act.

Work on cases which impact on the welfare of children is a specialised field. As with other areas of specialisation, such as asylum law, there is a need for additional specific training.

The Alliance calls on the Legal Aid Board to allocate budget resources to enable solicitors, who work in the area of child and family law, to avail of professional certified training courses on children's rights.

A focus of the training should include the UN Convention on the Rights of the Child and other international and European instruments which have a bearing on the welfare of children. This proposal would be in line with recommendation 33 of the UN Committee on the Rights of the Child's *Concluding Observations* (1998) on Ireland's implementation of the UN Convention. The UN Committee recommended that:

...comprehensive training programmes on the Convention [on the Rights of the Child] should be conducted for professional groups working with and for children such as judges, lawyers, law enforcement personnel....

The training course should equip solicitors to interview children, identify the potential impact of a case on a child and assess what, if any, measures are needed to safeguard the child's welfare and rights, such as a guardian *ad litem* service and/or separate legal representation. Such training would improve the quality of service being provided to children and young people.

Training is needed to gain a full understanding of the complex dynamics of family relations and family loyalties, especially in cases of familial abuse, custody and access disputes and where a child may have been 'coached' by an adult. Professionals working with children must be familiar with such dynamics in order to

ensure that children are provided with an environment in which they can freely express their views.

4.2 Set up a Child Law Unit within the Legal Aid Board

The Alliance calls on the Legal Aid Board to establish a Child Law Unit within the Board. The Child Law Unit should focus exclusively on public law in relation to children, covered in the main by the Child Care Act, 1991 and on child abduction cases.

The Unit would enable the Board's to dedicate a group of solicitors to specialise and gain expertise in the field of child related public law and in the area of child abduction cases. These fields of law are due to grow ever more complex with the introduction of new legislative provisions, such as Section 16 of the Children Act 2001, and European regulations, such as the Brussels II regulations (EC Regulation No. 1347).

4.3 Review Necessary Amendments to the Civil Legal Aid Act, 1995

The Alliance calls on the Legal Aid Board to establish a Committee to review the legislation covered by the Civil Legal Aid Act, 1995 and to make recommendations on any areas which impact on children which are not at present covered or are excluded by the Act. For example, Circuit Court President Mr Justice Esmond Smyth recently highlighted the need for the provision of legal aid to local authority tenants in danger of losing their homes (Irish Independent, 11.07.02). Tenants, often families with children, can be evicted "*for reasons of good estate management*" under the Housing Act 1966 often propelling the family into the growing homeless population.

Another area of particular concern to the Alliance is Section 16 of the Children Act, 2001 which is due to come into effect in the near future. This section will amend the Child Care Act, 1991 by providing for the granting of Special Care Orders by the courts in circumstances where

the behaviour of the child is such that it poses a real and substantial risk to his or her health, safety, development or welfare, and the child requires special care or protection which he or she is unlikely to receive unless the court makes such an order.

The Alliance is concerned about the lack of safeguards in place under Section 16. The legislation does not define the boundaries under which such an order can be granted. There is no definition of the health, safety, development or welfare of the child. There is a danger that in order to access suitable accommodation a child's behaviour may be defined in terms which will allow for the court to grant such an order and detain the young person.

There is no provision in the 2001 legislation for the child to have the right to a solicitor or the right to representation at reviews. Given the gravity of the judgement, that a non-offending child will be deprived of his or her liberty, it is imperative that all such children have the right to legal representation.

In order to safeguard the rights of children who appear before a court in association with the granting and review of Special Care Orders such children must be guaranteed full legal aid. The Alliance calls on the Legal Aid Board to seek an amendment to Section 28 (5) of the Civil Legal Aid Act, 1995 by inserting a subsection granting express provision for the appointment of a solicitor in cases arising under Section 16 of the Children Act, 2001.

4.4 Increase Children's Representation in Judicial Proceedings

Goal One of the National Children's Strategy provides that:

Children will have a voice in matters that affect them and their views will be given due weight in accordance with their age and maturity.

This is designed to progress implementation of Article 12 of the UN Convention on the Rights of the Child which recognises the child's right "to express [his or her] views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."

Article 12 specifically emphasises the right of children to be heard in judicial proceedings:

For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rule of national law.

In many family law cases, in particular cases involving custody and access, the best interest of the child may not necessarily coincide with the interests of either or both parents. In these cases there is a need for separate legal representation in order to ensure that the independent rights of the child and the principle of 'paramount welfare of the child' are upheld.

The Child Care Act 1991 provides for the appointment of separate legal representation for children, the appointment of a guardian *ad litem* at the discretion of the court where the child is not party to the proceedings and provides for a child to be joined as a party to proceedings in family law disputes. Under Section 28 of the Children Act 1997, where the interests of the child differ from those of either parent an application can be made to the Court either to appoint separate legal representation for the child or to appoint a guardian *ad litem*. This section of the 1997 Act has not as of yet come into force. To date, the practice of appointing guardians *ad litem* and separate representation for children under the Child Care Act, 1991 has been discretionary.

The Alliance calls on the Legal Aid Board to encourage the use of mechanisms which uphold the child's right to representation in judicial proceeding directly affecting them, such as the appointment of a guardian *ad litem* and/or separate legal representation. Through the proposed training programme (see 4.1), the Board's solicitors would be made aware of the importance of bringing to the attention of the Court the need for separate legal representation for the child, where it is considered that this is in the best interests of the child.

The Alliance urges the Legal Aid Board to call on the Minister for Health and Children to establish an independent guardian *ad litem* service on a statutory basis and to draw up best practice guidelines such as what qualifications are needed to be guardian and what duties and level of independence are involved. In the interim a panel should be established of suitably qualified professionals available to act as guardians *ad litem*.

4.5 Ensure Adequate Resources to Improve Service Quality and Reduce Delays

Given the importance of the work undertaken by the Legal Aid Board it is imperative that the Board receives adequate funding to carry out its work and provide a quality service to its clients.

a). Quality of Service

The Alliance calls on the Board to ensure adequate resources are sought to enable solicitors to consider each case without the pressure of competing demands, to consult properly with their clients and to commission any necessary expert reports. Improved remuneration for legal aid solicitors would assist the effort to retain experienced solicitors. The improved resourcing of the service would foster a culture among professionals and the public in which civil legal aid is recognised as an essential tool to enable people on low incomes to realise their rights and where the service is on a par with that which is available to those able to pay for private legal assistance.

b). Delays in the Judicial System

The Alliance commends the Legal Aid Board for its policy of providing a priority service in the allocation of solicitor appointments on a range of issues which include domestic violence, child care and child abduction.

The effort of the Legal Aid Board in recent years to reduce waiting lists is acknowledged. The Board's annual report 2000, however, noted that Clondalkin continues to have an eleven and a half month wait for an appointment with a solicitor, with Tallaght and Finglas experiencing ten and a half month waits¹. The Alliance calls on the Legal Aid Board to further extend the remit and usage of private practice solicitors in an effort to decrease the current waiting lists.

The Alliance urges the Legal Aid Board to support all reasonable efforts to reduce delays, including delays within the Board due to insufficient resources, delays in attaining Section 20 reports from the health boards and other court related delays.

Delays experienced within the judicial system may be extremely damaging and the maxim 'Justice delayed is justice denied' has particular significance for cases involving or impacting on children, and most particularly in custody cases. The sentiments expressed by Justice Denham in relation to a three year delay in the *Eastern Health Board v MK and MK* case highlight our concern (Supreme Court, January 29, 1999 in Shannon, G. forthcoming²)

Time is of the essence in child custody cases. Childhood exists for only a short and finite time. Custody and care arrangements of themselves create dynamics which have a profound effect on children and their families. The long-term effects can be immense.

Extensive delays may be in breach of Article 7 of the European Convention on the Exercise of Children's Rights 1996 which requires that

[I]n proceedings affecting a child the judicial authority shall act speedily to avoid any unnecessary delay and procedures shall be available to ensure that its decisions are rapidly enforced.

¹ Taken from the Legal Aid Board Annual Report 2000. Figures for December 2000.

² Shannon, G. (forthcoming) "Family and Child Law" in *Human Rights and Family Law*, Oxford University Press.

The European Court of Human Rights ruling on *Glaser v UK* (19 September 2000) stated that it is essential that custody and access cases be dealt with speedily. The Court ruled that neither the volume of work nor a shortage of resources will justify excessive delay (Shannon, G. forthcoming).

4.6 Develop Child-Focused Information Material

To ensure that children understand the work of the Legal Aid Board and the functioning of the judicial system there is a need for child-focused information material. The Alliance recommends that the Board's range of information leaflets should be extended to include resource material specifically written for children and young people.

Using age appropriate language, the material should outline children's legal rights and entitlements and the court process. The material could define key elements of family law which impact on children and young people such as access, guardianship, custody, joint-custody, guardian *ad litem* and separate legal representation.

The Board should also create a child-focused section within its website. The website of the Children's Law Centre in Northern Ireland is a good example of a child-friendly site.

5 Conclusion

The Children's Rights Alliance urges the Legal Aid Board to support the recommendations outlined above and to provide for their incorporation in the Board's Corporate Plan 2003-2007. We believe these recommendations, if implemented, will serve to promote the rights and welfare of children and will help improve the quality of legal representation offered to children in Ireland.

Summary of Recommendations

1. Allocate budget resources to enable solicitors who work in the area of child and family law to avail of professional certified training courses on children's rights.
2. Establish a Child Law Unit within the Board to focus exclusively on child abduction cases and public law in relation to children.
3. Establish a Committee to review the Civil Legal Aid Act, 1995 and make recommendations on any areas which impact on children which are not at present covered or are excluded by the Act.
4. Seek an amendment to the 1995 Act to include the appointment of a solicitor in cases arising under Section 16 of the Children Act, 2001.
5. Encourage an understanding and use of the guardian *ad litem* and/or separate legal representation for children.
6. Call on the Minister for Health and Children to establish an independent guardian *ad litem* service on a statutory basis and to draw up best practice guidelines.
7. Ensure adequate resources are sought to enable solicitors to provide a quality service to their clients.
8. Further extend the remit and usage of private practice solicitors in an effort to decrease the current waiting lists.
9. Produce child-focused information resource materials including website information specifically prepared for children and young people.