

Replies by Office of the Data Protection Commissioner:

Consultation Paper dated 12th October 2015

Policy Approach to the Reform of Guardian ad Litem

Arrangements in proceedings under the Child Care Act, 1991

- 1.1 The Office of the Data Protection Commissioner (“ODPC”) is responsible for upholding the rights of individuals as set out in the Data Protection Acts 1988 and 2003, and enforcing the obligations upon data controllers. The Commissioner is appointed by Government and is independent in the exercise of her functions.
- 1.2 The ODPC welcomes the opportunity to comment on matters which are set out in this paper and to provide information to assist the Department of Children and Youth Affairs in their delivery of reform to this very important area. We recognise and acknowledge that this is a broad consultative document and accordingly we feel it is appropriate at this juncture to generally highlight and inform the writer as to the relevant data protection issues arising.
- 1.3 It is recognised that the core legal principle for underpinning this Reform is that of the best interests of the child. It is further recognised that to achieve an appropriate level of care for children, their personal data will sometimes need to be processed extensively and by several parties. Notwithstanding, Article 16 of the UN Convention of the Rights of the Child provides that no child shall be subject to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation. Furthermore, under the Charter of Fundamental Human Rights (enshrined by the TFEU) everyone has the right to the protection of personal data concerning him or her and that such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. The Charter further provides that everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

- 1.4 It is clear from the foregoing that a number of key concepts must be adhered to in order for the legal and fair processing of personal data to occur. The processing of personal data must have a legitimate basis (such as contract, or consent, legal provision or legitimate interest). Processing must also comply with the principles/rules of data protection (such as being fair, collected for a proper purpose, being accurate, & ensuring the subject informed)
- 1.5 It is also important to note that even if a legitimate basis is found and relied upon, the proposals for reform of this service will still need to demonstrate proportionality in terms of the personal data that would be required to be disclosed by, for example, the HSE or a school to a Guardian ad Litem as well as demonstrating that such disclosure(s) are not overly prejudicial to the fundamental right of the individual to data protection. It is extremely important that this test of proportionality is conducted with due care and consideration as the data may also contain the sensitive personal data of children, parents, other family members etc. As such only necessary personal information should be provided to a Guardian ad Litem in order for him or her to fully determine the views of the child and to provide an opinion to a Court as to the best interests of the child. Therefore, if the Oireachtas are to enact legislation in this area, the Department would need to conduct a careful balancing test to ensure the right to data protection in this case must cede - in a proportionate way - to the legitimate interests of the State. Furthermore, any proposed sharing/processing of personal (and possibly sensitive) data must, in addition to having a legal basis (i.e consent, legal measure or legitimate basis which is proportionate in terms of operation), not go beyond the purpose for such processing (i.e determining the best interest of the child under child care acts). In this regard specific and clear legislative provisions as to the role and function of the Guardian ad Litem will be important to ensure that such personal data being processed is done fairly, on a legitimate basis and in line a specific stated purpose(s). Consideration must be given to the amount of information which should be provided to a Guardian ad Litem. For example, a Guardian ad Litem's unfettered access to all documentation pertaining to a child held by the HSE may not meet the proportionality test as outlined.
- 1.6 As well as meeting the requirements outlined above, any reform in this area must be cognisant of the 8 rules of data protection:
1. Obtain and process information fairly
 2. Keep it only for one or more specified, explicit and lawful purposes

3. Use and disclose it only in ways compatible with these purposes
4. Keep it safe and secure
5. Keep it accurate, complete and up-to-date
6. Ensure that it is adequate, relevant and not excessive
7. Retain it for no longer than is necessary for the purpose or purposes
8. Give a copy of his/her personal data to an individual, on request.

For detailed information on these rules please note the following link:
https://www.dataprotection.ie/ViewDoc.asp?fn=/documents/guidance/Guide_Data_Controller.htm&CatID=90&m=y

Also please note the following link for information on purpose limitation and retention:

<https://www.dataprotection.ie/viewdoc.asp?DocID=859>

- 1.7 It is this office's view that adherence to these data protection rules and principles must be central to any future reform in this area. Any proposal to share information between a national provider of a Guardian ad Litem service and the DCYA would need to be carefully considered. However if the proposal contains no personal data or the data is anonymised or is for statistical purposes only no data protection issues will arise.
- 1.8 As you will appreciate, it is difficult to provide a full assessment of all the data protection issues arising given the present position. However, please note this office is available for consultation to discuss any future iteration of the consultative document as well as being available to consult on the practical effect of any proposed legislative reform and its compliance with data protection.

Ends

2nd November 2015

