

## CELBRIDGE COUNSELLING & GUARDIAN AD LITEM SERVICE

Department of Children and Youth Affairs  
43, Mespil Road,  
Dublin 4.

8<sup>th</sup> November 2015

Dear Mr Keenan,

I acknowledge receipt of your letter dated 12<sup>th</sup> October requesting feedback regarding the consultation paper which the Department has issued in relation to the reform of Guardian ad Litem services under the Child Care Act, 1991.

I have read through the consultation paper and have the following submission to make.

In my view the role of the Guardian ad Litem is to

- a) Independently establish the wishes, feelings and interests of the child and present them to the court with recommendations and
- b) To advise and advocate in the child's best interests

The purpose of a Guardian ad Litem Service is to benefit the child by presenting their wishes, feelings and best interests and thereby assisting the court to make decisions in childcare proceedings which have the best interests of the child as the paramount consideration.

To achieve this goal it is important that the independence of the Guardian ad Litem is safeguarded. The role of the Guardian ad Litem should not be restricted in anyway that could hinder the Guardian ad Litem in bringing issues relevant to the child to the attention of the Court.

The children whom Guardians ad Litem represent are the most vulnerable in our society and require every support to ensure that they are given every opportunity to reach their full potential and to assist them to become fully independent members of our society.

### **Consultation – Key Aspects of a Reformed Guardian ad Litem Service**

The focus of the Guardian ad Litem is to ensure that the child's voice is heard in the proceedings and to achieve the best outcome for the child. The Guardians ad Litem client is and always should be the child. The status of the child should be equal to that of the respondent parents/guardians in Childcare proceedings. In acting for the child and bringing forward important information, insights and suggestions the Guardian ad Litem is benefiting the child and ensuring that the child's voice is heard and the child's interests are promoted and protected.

A child has the same right to fair procedures as an adult. In ordinary civil law – a child cannot be sued directly but must be sued through their next of kin/guardian, as they

lack legal capacity. Section 25 is an exception to this lack of capacity – one I believe should be used very sparingly, given the potential for further trauma to the child.

Obviously in child care proceedings it is not an option to have parents represent children as they are likely to be respondents and there is potentially a conflict of interest. The child must therefore defend the proceedings through their Court appointed professional Guardian ad Litem. Were we to substitute the word Guardian ad litem with the word “child” in this consultation paper it would read very differently and would be considered highly inappropriate.

How can a Guardian ad Litem fully benefit the child if they are not a party to the proceedings and therefore do not have standing to bring any number of important applications in respect of the child, including applications for directions aimed at the welfare of the child pursuant to Section 47 of the Child Care Act 1991.

If a Guardian ad Litem cannot issue these applications then who will? It is my experience that the Social Worker on the ground often appreciates a direction as it assists them obtain the services the child requires. This independence is essential to the exercise of the role of the Guardian ad Litem in securing such directions as are necessary to protect and promote the welfare of the child. In my opinion the consultation paper seeks to constrict the Guardian ad Litem in his/her role to seek what is in the best interest of the child. It is my view that this would be a step backward and would have a negative impact on the child.

The consultation paper speaks of a service that is accessible to any child who is capable of forming his or her own views or who is otherwise deemed by a court to be in need of it.

Pre-verbal and profoundly disabled children cannot and should not be discriminated against. There are many different ways to establish the “voice” of the child including presentation, observation of the child in their environment and obtaining feedback from the people involved in their life and it is only one part of the dual role of the Guardian ad Litem. It is my opinion that the service should be available to all children whose cases are before the Court. The decision to appoint a Guardian ad Litem should be made by the Court.

### **Establishing a national organised, managed and delivered service**

In establishing a service it is my view that we need to be mindful of the following:

Direct provision through a new dedicated public body is counter to government approaches streamlining of public bodies. The rationale for such streamlining in the broader sector apply to this service with equal force.

Utilising existing or reformed structures to manage and deliver services attracts many of the same issues as direct provision in a new body.

Both direct provision through a new body or the extension of an existing structure for “management and delivery” effectively extend the public service into an arena now in the private sector. This is counter to the strategic approach for the development of the public sector. It also has particular implication for competition, effectively removing

any potential competition (in terms of costs, but particularly in terms of quality of service to the court), by imposing a monopoly.

As presented in the document, this change to “manage and deliver” the service is presented as a singular decision. Consideration should be given to extending the role of existing structures in justice areas to manage policy development and policy implementation, with management of the service being contracted by them to a number of organisations (so providing competition in price and quality, risk reduction of single point system failure, and breadth of expertise). Delivery of the actual Guardian ad Litem service should allow for individual and grouped service providers to offer services. The principles of this operation should see operations at different levels

1. Policy development and policy oversight, and strategic operations (contracting of management service providers)
2. Service management (provision of services maintain registers, provide training and provide availability of Guardians ad Litem to Courts.
3. Delivery (individual and group operators)

Stratified in this way the service can provide centralised oversight, effective co-ordination of management services while retaining competition.

Maintaining the maximum decentralisation in this way, balanced with central structures avoids the potential for monopoly or cartel activities.

### **Children who are made a party to proceedings**

The consultation paper refers to making a change to Section 26(4) of the 1991 Act to enable a child to have his/her own legal representative and a Guardian ad Litem at the same time.

It is my view that it should be possible for a child to be made a party to the proceedings. It is my opinion however, that there are only a very limited number of occasions when a subject child should be made a party. The role of a Solicitor representing a child is clearly defined and they can only repeat the views of the child and are obliged to act on those instructions. A Solicitor would not be allowed to comment on welfare/interest issues.

In my opinion it is rarely appropriate for a child to take part in child care proceedings of which they are the subject. In circumstances where it is deemed appropriate then it would be important for the child to have both a Solicitor and Guardian ad Litem. It is my opinion that a child taking part in child care proceedings could be open and vulnerable to further manipulation and trauma from their parents. It is my opinion that one should be mindful of the fact that it could also have a detrimental impact on any possibility of rebuilding fractured family relationships.

### **Appointment of Guardian ad Litem**

It is my view that every child involved in any childcare case before the Court should be appointed a Guardian ad Litem.

The decision, and the timing of any such decision, to discharge a Guardian ad Litem should be left to the Judge. There are circumstances where it is necessary for the Guardian ad Litem to remain on after a Care Order, ICO, Supervision Order or Special Order are granted.

### **Role of Guardian ad Litem**

The role of the Guardian ad Litem should be an active role and include the full range of procedural rights of a party in a Court context including the right of access to documentation, the right to question witnesses in order to ensure that the rights of the children are protected and their welfare is promoted in the best way possible and the right to appeal decisions adverse to the welfare of the child. These rights are clearly protected under Irish, European Court of Human Rights and international human rights law and there is no basis to deprive children and their representatives of them.

The Guardian ad Litem should have the right to bring Section 47 application.

Parents have the right to be vocal and fully participate in the proceedings. The child's voice should not be silenced or controlled and should have the same right as parents and Social Worker. It is my opinion that the proceedings are rendered fundamentally unfair if the Guardian ad Litem acting on behalf of the child is stopped or silenced from actively pursuing what is in the best interest of the child.

These proposals create an inequality of arms in circumstances where the Guardian ad Litem is the only party not to be represented in the proceedings such that it raises fundamental questions as to the constitutionality of the proposals and their compliance with the European Convention on Human Rights. Article 42A of the Constitution and the other personal rights enjoyed by children are clearly engaged by the proposals as are Articles 6 and 8 of the European Convention on Human Rights which protect the right to a fair trial and the rights to private and family life. In addition, international human rights standards such as the UN Convention on the Rights of the Child and the European Convention on the Exercise of the Rights of the Child envisage participation by children in proceedings affecting them not just consultation.

### **Possible provision of the Guardian ad Litem report to the child**

It is important that the views of all parties and others of significance are taken into account and that the Guardian ad Litem report is discussed and shared with the relevant parties involved. I am of the opinion that the Guardian ad Litem needs to take account of the age and/or level of maturity of the child and using professional judgement to consider whether it is in the child's best interest to share all or only part of the contents of his/her report with the child.

The Guardian ad Litem would need to be mindful that some information in the report could have a devastating impact on the child and could completely fracture the relationship between child and their family.

### **Status of Guardian ad Litem**

The child is dependent on the Guardian ad Litem to ensure that their voice is heard and the best outcome is achieved. It is my opinion in order to achieve this for the child the role needs to be more than a court appointed adviser. Parents and Social Workers

have full voice in the court and fully participate in the proceedings. The child should not be discriminated against because they are not present and not a party.

It is not always in the child's interest to be a party to proceedings and therefore they are reliant on their Guardian ad Litem to put their case forward and ensure that their rights are protected and progressed. It is my view that in order to fulfil the role of the Guardian ad Litem and ensure the best outcome for the child it is necessary and vital that they retain the power to participate fully in the proceedings and retain the right to cross examine and to bring any number of important applications in respect of the child, including applications for directions aimed at the welfare of the child pursuant to Section 47 of the Child Care Act 1991.

In order to ensure fair procedure to all parties it is vital that the Guardian ad Litem is an active participant.

### **Qualifications & eligibility for appointment**

It is my opinion that Guardians ad Litem should meet certain standards in order to qualify for the role. I do not believe that it should only be restricted to Social Work. It is my opinion that a broader range of qualifications should be available and allowed for eligibility, such as postgraduate qualifications in therapeutic fields such as psychology and psychotherapy particularly those focussed on family and children.

This could be combined with a requirement for subsidiary competency assessment, in for example family law. Such a service assessment could be contracted for delivery to an agency. In broadening the qualification one broadens the range of expertise, perspectives, cultures and knowledge available to the Courts. The Courts have discretion to appoint, so eligibility does not lead to automatic appointment.

The consultation paper refers as an exceptional transitional matter, persons would be deemed eligible for appointment if on the date of the publication of the reform legislation they complied with certain criteria.

In the transition period under Section A the consultation paper refers to a broad range of qualifications through which providers have come to the service (e.g social care or psychology if these are not included as core relevant qualifications)...

The phrase in Section A which states "has been appointed and acted as a guardian on not less than 20 occasions" is unclear. Appointments provide no basis for assessment of experience or activity. It is possible that Guardians ad Litem involved in complex cases may have few if any appointments in a period of years. The number of times a Guardian ad Litem acted (specified as interacting with the child, agencies, families and Courts while appointed) would be more appropriate

"Not less than 10 of those appointments occurred in the preceding 12 months"

It would be most unusual for a Guardian ad Litem to be appointed this many times in a 12 month period in circumstances where they currently hold a case load of extremely complex cases. Many Guardians ad Litem would hold only 3 – 10 cases and appointments may be spread across many years. It would not be unusual for a Guardian ad Litem to go over 12 months without appointment.

Individual Guardians ad Litem may not “hold” Garda clearance under current legislation. Garda clearance is only provided to an organisation. The responsible organisation should be specified.

For the transition arrangement in cases where an existing Guardian ad Litem does not meet the strict numerical requirements (perhaps for example in the case of recent illness) there should be an opportunity to apply to have a qualitative assessment of competence by an expert panel.

### **Access to records, records management and information provision**

Part of the role of the Guardian ad Litem is to review the Social Work file. The consultation paper refers to the “*access to relevant case records of the Child and Family Agency*”. It is my opinion that the Guardian ad Litem should have access to all case records in relation to the Child in order to ensure that a full assessment is carried out in the best interest of the child.

### **Engagement of Legal Representation**

In order to ensure the best outcome for the child I am of the opinion that the Guardian ad Litem should have access to legal representation. It is my opinion that the necessity of engagement of legal representation should be a decision made by the Guardian ad Litem. Any attempt to interfere in this process is highly problematic as it effectively interferes in the lawyer/client relationship and significantly interferes with the independence of the Guardian ad Litem.

Parents and Social Workers have legal representation and an uninterfered with right to engage that representation. It is my opinion that it would not constitute fair and proper procedure if the Guardian ad Litem acting on behalf of the child is denied legal representation.

Parents and Social Workers are not constrained by criteria as to when they can access legal representation and it is my opinion that the Guardian ad Litem should not be prejudiced because they are acting on behalf of the child. Children should not be discriminated against just because they are under the age of 18 and have a Guardian ad Litem representing their wishes and interest. The consultation paper envisages serious interference with a child’s access to justice in the context of child care proceedings.

### **Regulations by the Minister**

It is acknowledged that the Minister may need to make regulations ancillary to the legislation as necessary in relation to the general management and operation of Guardian ad litem services. It is my opinion that this should be done in consultation with relevant agencies involved in the area.

Submission of  
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