CONSULTATION PAPER

On

Preparing a Policy Approach to the Reform of Guardian *ad Litem* Arrangements in Proceedings under the Child Care Act 1991

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The writer is a solicitor and mediator practising in family and child law acting as solicitor in legal proceedings under the Child Care Act 1991 and proceedings arising from the inherent jurisdiction of the High Court concerning the welfare of children. The writer has legally represented Guardians in such proceedings and also acts directly as solicitor for children in child care proceedings under section 25 of the Child Care Act 1991.

General comment on the consultation paper presented

Ireland's obligations under the United Nations Convention on the Rights of the Child, in particular Article 12, have since 1991 created obligations on the state to afford all children the right for their views to be heard and taken account of in decision-making affecting the child and also to afford that child the right to meaningfully participate in that decision-making process.

Following the "Children's Rights" constitutional referendum of November 2012, the Constitution of Ireland has been amended to include the new provisions of Article 42A, imposing constitutional obligations on the state to introduce laws to provide that the views of all children are heard in public and private law proceedings concerning the child. Now, in 2015, we as a state must appropriately conduct a comprehensive review of the manner in which children's views are currently heard in Court proceedings affecting the child and determine how, in light of our international and constitutional obligations, our laws are to be amended to give effect to the rights of children to have their views heard and to meaningfully participate in decision-making processes.

Regrettably, this consultation paper as presented focuses only on redefinition/restrictions to the standing and role of the Guardian *ad Litem,* a current medium of expression of children's views in child care proceedings. It appears to be the case that the consultation paper is presented not as part of an overall assessment of the delivery and representation of children's views in relevant Court proceedings, but rather in response to concerns on the financial cost of the Guardian *ad Litem* service, to include legal representation.

At present our child care Court system is the subject of many appropriate and well-founded criticisms to the point that the system itself is identifiably in need of urgent review and reform. This consultation paper, referring to reform of the single limited area of the role of the Guardian *ad Litem* in isolation, does not address the current imperative on the state to assess and revise our child care decision-making process and plan how we are to hear the views of children and allow for their participation in that process. Furthermore, proposed reforms of the Guardian *ad Litem* system should not now be measured to fit within the limitations of our current inadequate system as to do

so would be to perpetuate current difficulties, without reform of this critical area of social and legal practice.

As a very general comment, the writer's experience has been that an element of the confusion and lack of understanding of the role of the Guardian *ad Litem* derives from the title "Guardian *ad Litem*" itself – perhaps consideration in any reform proposals should be given to an alternative plain English title for the role – say "child welfare advocate" or "child interests representative"?

Due to time constraints, limited submissions of the writer on the 29 questions posed in the consultation paper as presented are as follows –

Principles and policies

1 – The rights of children and young people, as referred to above, include both the right to express their views and to have due weight given to such views and the right of meaningful participation in the decision-making process, under the terms of That 12 of the United Nations Convention on The Rights of the Child 1989 and under the child's general constitutional rights to fair procedures, and others, under article 42A1 of the Constitution of Ireland as recently amended.

2 – The constitutional rights of the child to fair procedures, to effectively participate in the decision-making process – to be appropriately informed, consulted, supported and afforded an opportunity to participate is a principle forming part of the background of the definition and role of the Guardian *ad Litem* service.

Amendment of existing legislation

3 – The reform objective must be broader than the amendment or replacement of section 26 of the Act 1991. Indeed the question arises whether the nature of our child care decision-making process itself needs to be addressed. A comprehensive approach to the participation of children in childcare proceedings affecting their welfare must be undertaken.

Children who are made a party to proceedings

7 – The current mutual exclusivity between children being made party to proceedings, or alternatively having a Guardian *ad Litem* appointed, should be discontinued.

As of right, a child who is capable of expressing his or her views should be a party to Court proceedings concerning their welfare and should appropriately be afforded legal advice and representation and/or a Guardian *ad Litem* and/or such other representative service as is deemed appropriate by the Court.

This matter should be a subject of a broad and general review of children's participation in our child-care decision-making processes. To honour our international obligations and afford children meaningful rights to have the views heard, we must consider the supports necessary to the child in formulating and expressing those views. Our obligation has evolved from the simple task of hearing a child's "wishes". Now, "views" identifies a process of consultation which at first and in a child friendly manner, requires information and alternatives to be informed to the child, the child's views to be appropriately heard and conveyed in a suitable manner to the decision-making process and for

the child to be then afforded the opportunity to respond to and add further to the process, as may be required in the circumstances of individual cases.

The supports that may be required to be available to the child in this process may variously be a legal adviser/representative, a Guardian *ad Litem*, an advocate or other professional as the circumstances require. At present the restriction between the provisions of sections 25 and 26 of the Child Care Act 1991 serves only to deny services to the child and options to the decision-making process.

Appointment of Guardian *ad Litem*

8 – Pending further necessary review of our child-care decision-making processes and the obligations on the state to provide laws to ensure that all children's views are heard in the decision-making process and that children are afforded a meaningful right of participation, the discretion on the appointment of a Guardian *ad Litem* to a child in childcare proceedings should remain with the presiding Court.

The appointment of the Guardian *ad Litem* cannot be determined by statute to cease on the granting of the Care Order or Secure Care Order – in many cases the operation of the order will require review by the Court and such proceedings will necessarily involve the role of the Guardian *ad Litem*. The Guardian *ad Litem* should continue in role for so long as the Court proceedings concerning the child continue.

Also, on the making of a Court Order, in which process the child has been asked to express his or her views, it is appropriate and necessary that the person who has informed, taken and conveyed the child's views should also return to the child to explain the decision made and the response given to the child's views as expressed. The strict termination of the role of a Guardian *ad Litem* on the making of a Court order would prohibit the completion of this necessary function.

Role of the Guardian *ad Litem*

10 -The definition of the role of the Guardian *ad Litem* as set out is similar to the common current understanding of the role. At present, in general terms, the Guardian *ad Litem* reports the child's views to the Court and also, following assessment, makes recommendations to the Court as to the child's best interests. This latter function is now of added significance following the amendment to Article 42A of the Constitution requiring that the best interests of the child are to be the primary consideration in Court decision-making processes.

Note that currently the Guardian *ad Litem* does not advocate for the child's views and that the child is not afforded legal advice at the point of formulating and expressing their views.

The definition of the Guardian *ad Litem* role speaks of the role of the Guardian *ad Litem* to inform the Court of unresolved concerns concerning the care being provided to, or proposed for, the child. In practical terms, this will require the Guardian *ad Litem* to make application to the Court under the terms of the Child Care Act, to re-enter Court proceedings and or make Court application, on notice to all parties, seeking Court resolution of the unresolved concern. This role, set in our current adversarial child care proceedings, will require that the Guardian *ad Litem* has the facility of legal advice and representation.

11 – Reference in the consultation paper to an informal mediation role for the Guardian *ad Litem* could be translated as a requirement or objective of the Guardian *ad Litem* to work collaboratively with other parties/professionals concerned with the child's care. It is to be expected that this manner of approach, prioritising the child's best interests, would be the principle to be adopted by all professionals.

The distressing and often traumatic circumstances of child protection based childcare proceedings create, in many cases, a difficult environment for collaborative work. An entire review of our child-care decision-making processes should focus on the training, obligations and practices of all professionals to identify measures to afford the great degree of collaboration achievable.

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

13 – If the child is to be afforded a genuine opportunity to have their views heard, then such views must be informed by relevant information, the care options, the other views held etc.

The Guardian *ad Litem* report to Court is intended to represent the conclusion of the Guardian's assessment and recommendations incorporating a record of the child's views. The Guardian's Report itself, in the sequence of events to a Court determination, will necessarily follow the child's expression of views.

The provisions of the Children and Family Relationships Act 2015, adapted to child care proceedings, can thereafter provide guidance to the Court on the publication of the Guardian *ad Litem* Report to the child.

A general principle in this area is that a child has a right to all relevant information in the decision-making process, concerning them, subject to the Courts consideration of the age and maturity of the child and the child's best interests in this regard.

Status of the Guardian *ad Litem*

14 – The consultation paper notes that the approach being considered is that the status of the Guardian *ad Litem* would be that of "*a* Court *appointed adviser to assist the* Court*s determination*". There is an evident inconsistency between this role, akin to a role previously played by the Probation and Welfare Service in the provision of reports to Court in family law matters, and a role as Guardian or advocate of the child's welfare, services et cetera and as potential applicant to Court in respect of matters of concern, referred to above.

Referring to the general points made at the outset of this submission, our international and constitution obligations require that the child is appropriately informed and advised, is afforded appropriate opportunity to express views, have those views heard and to meaningfully participate in the decision-making process.

At present the Child Care Act 1991 affords the child the right of legal representation or the appointment of Guardian *ad Litem*. To date, the Guardian *ad Litem* has conveyed the child's views and acted as a participant in the decision-making process advocating in respect of the child's best interests. Due to the nature of our adversarial child-care Court proceedings, the Guardian *ad Litem*, in the promotion of the child's best interests, in many cases has needed to step forward in Court and

present as a party to the proceedings. A determination now that the continued role of the Guardian *ad Litem* is as a Court appointed adviser would represent a reduction in the role and capacity of the Guardian *ad Litem* to advocate for the child's best interests in our child care Court proceedings as currently constituted.

Relegating the Guardian *ad Litem* to the status of a Court appointed adviser, without addressing the necessary resources to ensure the child's rights to views and participation, is a step out of place with our developing Convention and Constitutional obligations and appears determined by short term financial considerations only.

The position of the Guardian *ad Litem* as a party in Court proceedings concerning the welfare of the child must be addressed in the overall context of the child's rights to have the views informed, ascertained and presented and the child's additional right to participate in the decision-making process.

Role of the Child and Family Agency and Payment for Guardian *ad Litem* Services

22 – An annual budget for the Guardian *ad Litem* service should be set appropriate to the anticipated cost. It is inappropriate that this budget should be managed by the Child and Family Agency. The budget would more properly fall within the budget of the Department of Justice or the Department of Children and Youth Affairs.

Engagement of Legal Representation

23 – This represents the second key focus of this consultation paper.

The figures for public expenditure in respect of the Guardian *ad Litem* service for 2014 and for the eight months to the end of August 2015, to include legal advice and representation, illustrate a substantial reduction in expenditure in respect of sums paid to Guardians *ad Litem* and to legal representatives in 2015 in comparison with 2014.

The potential circumstances envisaged in the consultation paper as warranting an application in respect of legal advice and representation are extraordinarily restrictive.

There is no doubt but that the Guardian *ad Litem* should be afforded legal representation in respect of the special care order and in respect of proceedings involving the law of another jurisdiction.

Beyond that, to limit the Guardian's right to legal representation to the requirement of the irreconcilable difference between the Guardian of the Child and Family Agency and/or and uncommon legal complexity, would serve to deny the Guardian *ad Litem* the right of legal representation in the majority of contested detailed childcare proceedings where the Guardian's expression of the child's views, and recommendations in respect of the child's best interests may be under sustained and direct attack from solicitors and counsel separately engaged by both parents and perhaps also by the legal representation of the Child and Family Agency. Again, what does the proposed removal of a required resource to the Guardian *ad Litem* in Court proceedings say for our intention to afford a right of participation to the child and the child's views in the decision-making process?

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