Barnardos

Response to Department of Children and Youth Affairs Consultation Paper on Preparing a Policy Approach to the Reform of Guardian Ad Litem Arrangements in Proceedings under the Child Care Act 1991

Barnardos

9th November 2015

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Introduction

1.1 This submission is made by Barnardos in response to the consultation document published by the Department of Children and Youth Affairs in relation to reform of the Guardian ad Litem arrangements. Barnardos provides critical services to thousands of children and families living in disadvantage throughout Ireland, and is also the leading Children's Charity and largest provider of a Guardian ad Litem Service in Ireland. Barnardos has offered a Guardian ad Litem service to children and the courts since 1997. Barnardos welcomes the initiative for reform of Guardian ad Litem arrangements and has long campaigned for such reform.

1.2 We believe that children benefit from active participation at an age appropriate level in proceedings that affect them, and that children benefit from an independent assessment of their interests.

1.3 In 2014 the Barnardos Guardian ad Litem service worked with 814 children in courts throughout Ireland with 32 practitioners, working to well-developed standards, policies and procedures. The majority of the work is with children who are going through Care and related proceedings, where the District Court is deciding whether a child should be placed in the care of the State, or where the Court is examining areas of the care arrangements for the child or their ongoing relationships with their parents and family members. A significant portion of the work is with children who are in one of the State's three Special Care Units, where they are detained for their own safety and welfare and where they receive specialist support, or where they have recently left such provision.

1.4 We believe passionately in achieving best outcomes for children. Children whose future comes before the courts for decisions are already significantly disadvantaged. The threshold to make a Care Order under Section 18 of the Child Care Act 1991 is that the child has been or is being assaulted, ill-treated, neglected or sexually abused, that their development and welfare has been or is being avoidably impaired or neglected, or that the child's health, development or welfare is likely to be avoidably impaired or neglected.

1.5 Thus the children with whom the Guardian ad Litem works are likely to have complex needs which require thorough assessment. The Guardian ad Litem must be able to comment on the care planning and how the needs of the child will be met. The separation of a child from his parent should be considered as one of the most far reaching interventions by a statutory agency. It is

essential that the court has a thorough independent assessment which is informed by the views of the child and which is clear about their interests, and how the child is going to maintain a relationship with their loved ones in the future. If a child is going to return home or be placed with family, there must be a comprehensive assessment of the child's wishes and needs and an assurance that good supports are in place.

1.6 On a daily basis Guardians ad Litem are working with children who, within their own families, have suffered serious and life threatening injuries, children who have been emotionally, physically and sexually abused, and children who have been abandoned or neglected. We also work with children who have suffered harm – not because a parent has intentionally abused them – but because their own needs and problems have been insurmountable, despite the best efforts to offer them support. We work with children who have strong ties and loyalties to their families and who need help in maintaining relationships with them.

1.7 The Guardian ad Litem works with the children alongside family, social workers, carers and therapists. They have a unique and distinct role, different from any of the above. It is a role that is limited to the court proceedings and is not designed to monitor, manage or control any of the other agents.

1.8 Yet there is no formal definition of the role. In the absence of regulation or statute, there is a lack of agreement and indeed of understanding of the role and the task of the Guardian ad Litem and of its benefit to the child. Is it the role to report only the views of the child? How does the concept of *hearsay* affect the work of the Guardian ad Litem? Can the Guardian ad Litem see the child's health records or information relating to foster carers? Is it possible to use disclosures made by children to their Guardian ad Litem to inform whether they recommend that a child remains in care or returns home?

1.9 Barnardos is not the sole provider of Guardian ad Litem services in the state. There are a number of persons who either as a group, or as individuals, act as Guardian ad Litem. The system is not subject to any regulation as regards to who can act in this role and whether they need to go through any selection, registration or vetting processes. The courts appoint persons to act as Guardians ad Litem on the basis of their self-reported information. Within the sector, there is no externally audited system of checking or monitoring and no agreed complaints or dispute resolution

mechanism, or performance management. Reform is necessary to increase public confidence and to ensure that children are properly safeguarded.

1.10 Barnardos has raised issue with the lack of statutory regulation regarding the role and operation of the Guardian ad Litem, the potential conflict of interest inherent in the fact that at present it is the duty of the Child and Family Agency (TUSLA) to pay the costs of the Guardian ad Litem, the ad hoc nature of appointments, the lack of accountability and the perception that the Guardian ad Litem is a high cost service.

1.11 We believe that the current consultation provides the opportunity to bring clarity to the role, to place a better framework around operation of the Guardian ad Litem service and will lead to greater confidence in the work. It has the potential to improve the standing of the Voice of the Child in Public Law Proceedings in line with the Constitutional Referendum and Article 12 of the UN Convention on the Rights of the Child. It also has the potential to make significant savings through better management of resources.

2 Principles and Policies

2.1 The consultation paper states that the objective is to provide for an effective nationally managed and delivered unitary service that is available in all child care proceedings under Parts IV (Care Proceedings), IVA (Children in need of Special Care or Protection) or VI (Children in the Care of the Child and Family Agency) of the 1991 Act.

2.2 It sets out a number of principles and policies to underpin the reformed service, and invites comment on the questions below.

Consultation Questions:

1. Are the principles and policies identified the appropriate ones? Please provide the reasons for your response.

2. Are there other principles that you consider should be included? Please provide details and reasons.

2.3 Barnardos welcomes in broad terms the policies and principles and suggest some revisions that are listed below. We suggest that a clearly understood definition of the role is necessary at the outset of this process.

2.4 We believe that a National Unitary Service rather than multiple service providers would improve the opportunities for children to meaningfully participate in proceedings that affect them and assist in ameliorating and addressing many of the perceived inadequacies of the current system. We believe that a National Unitary Service would offer the opportunity to bring clarity to the work and would help to standardise practice within the courts and bring consistency and continuity to this service for children.

2.5 The advantage to a Unitary System is that it would allow:

- a transparent system for formal entry to the work;
- a system for quality standards, training and support;
- proper governance, accountability and value for money;
- development of shared knowledge, learning and support;
- a clear and fair referral and workload system;
- an ability to negotiate on a meaningful level with the key stakeholders, including courts, TUSLA and family groups in order to give and receive feedback and to develop mutually agreed protocols;
- an ability to contribute constructively to the understanding of the needs and interests of vulnerable children in order to improve outcomes for them.

2.6 The consultation paper refers to a number of areas which have already examined Guardian ad Litem provision in this country, including the Capita Report[1] in 2004, the CAAB Guidelines of 2009[2] and the Special Rapporteur Reports[3] of Geoffrey Shannon.

[1] Review of the Guardian Ad Litem Service Final report from Capita Consulting Ireland, in association with the Nuffield Institute for Health. 2004 (available DCYA website)
[2] Giving a voice to children's wishes, feelings and interests Guidance on the Role, Criteria for Appointment, Qualifications and Training of Guardians ad Litem Appointed for Children in Proceedings under the Child Care Act, 1991 (available CAAB website)
[3] http://www.dcya.gov.ie/documents/publications/SeventhSpecialRapReport2014.pdf

2.7 In considering the statutory principles and policies it is first necessary to reach an agreed definition of the role of the Guardian ad Litem. While we expand on this later in this document it may be helpful to outline at the outset our view of the function of the GAL as being:

1. To represent the best interests of the child, as independently assessed by the Guardian ad Litem, in the specified proceedings.
2. To involve the child, taking into account their age, understanding and interests, in the proceedings that affect them.
3. To ascertain as far as is practicable given the age and understanding of the child, the child's views, wishes and feelings.
4. To represent, in the court proceedings, the views, wishes, and feelings of the child.

2.8 In achieving this, the principles underpinning the reformed service should be the following.

- The best interests or welfare of the child should be the primary consideration in accordance with the Child Care Act, 1991, Section 24, the Constitution of Ireland, Article 42A and the United Nations Convention on the Rights of the Child, Article 3.

- The rights of children and young people to express their views and to have due weight given to such views, should be promoted in accordance with the Child Care Act, 1991, Section 24, the Constitution of Ireland, Article 42A and the United Nations Convention on the Rights of the Child, Article 12.

- The Guardian ad Litem at all times assists the Court in ensuring that the best interests of the child who is the subject of the proceedings are served.

- The service is accessible to all children who are the subject of proceedings under the Child Care Act 1991.

- The Guardian ad Litem is, and is seen to be, independent from all parties to the proceedings.

- The service is effective: providing good quality assessment and representation which is in the interests of children and meeting the needs of the court.

- The service is efficient: able to deal with the anticipated workload and deliver within agreed timescales in order to avoid delay in outcomes for children and to assist the courts and other agencies in managing their resources.

- The service is sustainable: managing within parameters which ensure cost efficiency and value for money.

- The service is consistent: ensuring that the courts and other stakeholders know what to expect from the service and from the individual work of the GAL.

- The service is transparent: recruitment, support, operational standards and finances are clearly visible.

2.9 Our experience is that where used, the Courts value the expertise that the Guardian ad Litem role brings to the proceedings and this is outlined in various sources including the Capita report, and in more recent research carried out by Corrigan[4]. The Guardian ad Litem role as it is currently practiced in Ireland essentially conflates Articles 3 & 12 of the UNCRC where both the child's views and their interests are represented and to this end, Barnardos advocates that every child who is the subject of such proceedings should have representation by a Guardian ad Litem, unless the court is satisfied that it is not their interests to do so.

2.10 The Consultation sets out that the court retains a key function in deciding whether and when a Guardian ad Litem appointment will be made. The Child Law Reporting Project[5] sets out the regional differences in the courts in child care practice and in the use of Guardians ad Litem. For example, the report published in 2014 stated:

> *"One of the most striking variations we saw was in the engagement of guardians ad litem (2.5). They were much more likely to be appointed in Dublin than in most other cities and towns, with 68 per cent of all cases in Dublin involving GALs. In Dundalk over 80 per cent of cases had GALs, in Drogheda it was 68 per cent and in Limerick 50 per cent. That contrasts*

[4] Carmel Corrigan: The Construction and Impact of Children's Participation through the Guardian ad litem in Child Protection Cases: The Views of District Court Judges, Guardians ad litem and children.

[5] http://www.childlawproject.ie/wp-content/uploads/2014/10/Interim-report-2-Web.pdf

with only 27.3 per cent in Cork, 17.9 per cent in Clonmel and 36.6 in the rest of the country. In Waterford 44 per cent of the children had a GAL".

2.11 The consultation document proposes that there will be greater engagement with the judiciary in setting out the circumstances of appointment of a Guardian ad Litem as it is important that the service is consistently available to children. The document does not discuss how such consistency will be achieved.

2.12 Throughout our response to this submission, we will look at a meaningful participation for children and how this works in practice. We argue that the work of a Guardian ad Litem is valued, not just for representing the child's wishes, but for the ability to bring impartial expertise to a child's situation and that this is relevant just as much for the infant as it is for the adolescent and irrespective of their developmental capacity. There is a wealth of scholarly articles on children's rights and models of participation, and it is beyond the scope of this submission to examine these in detail. We would however argue strongly that the contribution of the Guardian ad Litem in the course of Court proceedings is equally necessary for children across the whole age range irrespective of their capability to verbally give their own account of their views, wishes and feelings.

2.13 It is important to acknowledge that the CFA social worker has a positive responsibility to identify and promote the best interests of the child and in doing so to give expression to their wishes and feelings – fundamentally, the social worker and the GAL have a common purpose. However, the exercise of the social worker's responsibility is necessarily subject to the legal, financial and operational parameters of the CFA. The Court proceedings have profound consequences for the child and the Guardian ad Litem is charged with providing an independent view and representation, "at arm's length" from the primary child protection and welfare system, to give assurance that fullest consideration possible of the child's circumstances has been carried out.

2.14 A Guardian ad Litem usually is appointed to work with a child who is unable to remain in his family of origin for a variety of reasons. However despite the adversity faced by the parents and extended family members it is the experience of the Barnardos Guardian ad Litem service that family play a significant role in ensuring the voice of the child is heard by the court.

2.15 The Guardian ad Litem should be able to assure the court of their impartiality within the process. A key skill for a Guardian ad Litem is to establish a rapport with the child to ensure that they are

afforded a meaningful opportunity to articulate their wishes and feelings. This can include assisting the child to attend court and address the judge directly, where appropriate.

2.16 The independence of the role is crucial to its effective functioning. The need for greater clarity in order to facilitate the Guardian ad Litem to carry out their functions is welcomed and may bring to an end some of the present debates such as those around access to records and other information held by TUSLA.

3 Amendment of existing legislation.

3.1 The proposal for reform states that Section 26 of the 1991 Act (Appointment of Guardian ad Litem for a child) will need to be repealed in its entirety and replaced by substantial provisions, primarily relating to the areas identified in this paper and that amendments will have implications for the Mental Health Acts 2001.

Consultation Question:
3. Do you have any observations on this approach? If so, please provide details and reasons.

3.2 This submission is being made from a service perspective. We are not experts in the Constitution or the Law and there will be other more expert submissions that will inform the consultation.

3.3 The consultation document covers a wide range of areas encompassing legislation, regulation, guidance to the courts, nature of service management, integration with other agencies and bodies, and practice and approach. Legislation is required to enable a single unitary service to be established and to ensure that entry to the service is limited to practitioners who are engaged with the service and that proper professional standards and safeguards are in place.

3.4 The greater the detail in the legislation, the more prescriptive and restricted the service could become, with the possibility of unintended and unforeseen consequences. The more complex the legislation, the more likelihood it can be delayed or challenged. While Barnardos accept the need for primary legislation, we favour an approach where the amendments to legislation are as brief as possible, with the detail contained in ministerial regulation.

3.5 Issues concerning the practice and the approach of the Guardian ad Litem we recommend are best addressed through the establishment and management of a national unitary service. Such service would build links with others such as the Courts Service and the CFA in relation to service delivery and go a considerable way to resolve some of the inevitable issues and tensions that arise in day to day practice (see Capita page 13 for a further discussion on this issue). We recommend that issues concerning practice should be left to the properly accountable management and administration of a National Service.

3.6 In the interim period, we urge that all possible steps should be taken towards the establishment of a National Unitary Service while legislation and regulation is prepared. We believe that considerable progress could be made without the need for new legislation.

3.7 The present ad hoc situation cannot be allowed to remain.

3.8 In respect of the representation of children under the Mental Act 2001; Birmingham in XY[6] indicates that the District Court in acting in the child's interest, should consider how the child's voice will be heard and whether the child should be appointed a Guardian ad Litem or made a party. It should be noted that there are a number of cases where only the HSE are involved in cases where young people enter Mental Health facilities both in this country and abroad, and the CFA plays no role. Guardians ad Litem are appointed in such cases.

3.9 A reformed Section 26 of the Child Care Act could strengthen the representation of children in proceedings under the Mental Health Act.

4 Establishing a nationally organised, managed and delivered service.

4.1 The proposal suggest three broad alternative approaches as are outlined below. Respondents are asked to consider the advantages and disadvantages of the alternative approaches outlined within the proposal. It is important that the establishment of any new service is able to utilise the wealth of experience that already exists both within Barnardos and with other established practitioners.

[6]X.Y. (a minor) -v- Health Service Executive: 2013 4413 P: 11/07/2013: High Court: Birmingham J

4.2 ***Direct provision through a new public body***

- Direct Provision through a new public body would establish a single national agency which would give a level of authority that other options would not. Examples of establishment of a Single National Agency has both been successfully achieved and has been met with challenges in neighbouring jurisdictions.
- NIGALA is the Northern Ireland Guardian ad Litem Agency. This agency came into existence in 1995 and is on a statutory footing with clearly understood standards and protocols. NIGALA was established as the sole national service provider at the outset of the provision of Guardian ad Litem services in Northern Ireland, and has built a reputation for quality and efficient service.
- In the UK CAFCASS was established in 2001 by bringing together 114 already established existing Local Authority panels together with the Probation Service Family Law Reporting function and the Wards of Court function of the Official Solicitors Office. Difficulties in the establishment of CAFCASS led to the diminution of service, delays in appointing Guardians for children and the widespread loss of expertise.
- We are aware that a new dedicated public body would present challenges to the established policy on greater streamlining of the number of existing bodies. It would require considerable investment and long period of time to establish. It may struggle to provide the level of flexibility, given the different levels of service required in different areas of the country.

4.3 ***Utilising existing or reformed structures***

- Barnardos has advocated for widespread reform of the Child and Family Courts System and in particular, the establishment of a properly established and resourced Child and Family Court Support Service, assisting children and their families on a number of levels, including those in Private Family Law disputes. Such service could include provision for the voice of the child in access and custody disputes, and supporting families with post separation access disputes by offering Contact Centres.
- Guardian ad Litem work could be located in such an integrated service. However we recognise that the need for reform of the Guardian ad Litem service is more urgent that the time that would be taken in implementing the widespread and complex reform that such a service would require.
- The Courts Service would seem to be an obvious service within which to place a Guardian ad Litem service, but it is not a children's service provider and does not have experience of

management of a child care professional service. There could be an emphasis on the aspect of the service provision for the court, rather than the child.

- The Legal Aid Board has very successfully taken over management of the Family Mediation Service, but it is strongly identified with parents' representation. While this agency capably manages a dedicated team of legal and mediation professionals, it is not a child care based agency.
- The Probation Service is now far removed from family law reporting and child care proceedings, having withdrawn from this work in the 1990s. Other than the short lived Family Law Assessor Project from 2008 - 2011 which used a group of retired probation officers and a number of Barnardos Guardians ad Litem, there is now little Family Law experience within the Probation Service. That said, Probation Officers generally hold the NQSW or equivalent, and in this jurisdiction, unlike the UK, this is still a generic qualification in which graduates are trained in all areas of social work.
- The Ombudsman for Children's Office has a strong track record in independently promoting and safeguarding children's rights and welfare. However service provision such as Guardian ad Litem is outside of its statutory function.

4.4 ***Public procurement under contract***

- Public procurement would allow for a tender for service. This could permit the continued contribution of existing established service providers with well-developed policies and procedures, within not for profit organisations that can offer flexible resources. It would allow the service to scale up and scale down in response to cyclical demand, and be managed by means of Service Level Agreements that could govern the quality assurance and response times, and ensure accountability and value for money.
- It would be necessary, if the required management resources and structures are to be put in place that a tender would be offered for a reasonable period of time – say five years. A short-term tender could make it less attractive to persons wishing to enter the field as there may be little security in the continuance of the work. It may also be considered desirable that a tender would include a requirement for "in-house" legal resources, in order to manage and reduce associated legal costs, and this would have to be built in to the initial costings.
- The approach of public procurement would be the most straightforward in achieving reform in the short to medium term. Clearly the design of the tender would have to include safeguards to ensure the highest standards of accountability and a real focus on quality to meet the needs of children.

Any of the suggestions above will present challenges in bringing all the existing practitioners in and this may not be achievable. However it is essential that there is reform and change as the current system is unsustainable.

5 Children who are made a party to proceedings

5.1 Section 25 of the 1991 Act, allows for a child to be joined as a party to the proceedings. Section 26(4) of the 1991 Act provides that where a child is made a party to proceedings, any order appointing a Guardian ad Litem shall cease to have effect. This means that currently a child cannot have his/her own legal representative and a Guardian ad Litem at the same time. A change to enable the Court to exercise its discretion in such circumstances is under consideration.

Consultation Question:
7. What are your views on retaining or altering the existing arrangement? Please give details and reasons.

5.2 It can be argued that given the profound significance of Child Care proceedings in respect of the child's interests, that the child should be a party to the proceedings in all cases. This approach ensures to the greatest possible extent the vindication of the child's rights.

5.3 If the child were to be made party to the proceedings in all cases the option would exist for the child to have legal representation and a Guardian ad Litem – this would of course require legislative change (see below). If this were to be the case then a novel relationship would be created between the child, the lawyer and the Guardian ad Litem. The lawyer would take instructions primarily from the child but mediated by the Guardian ad Litem, with the relative influence of the Guardian ad Litem at it strongest in the case of younger children. In all cases it would be the responsibility of the Guardian ad Litem to establish the best interests of the child and to safeguard these interests, with the assistance of the child's legal representative, in the course of the proceedings. There is an example of such a system established in Northern Ireland where the Guardian ad Litem appoints and instructs a solicitor on behalf of the child – a system of tandem representation.

5.4 *Case Example: B was made subject to a Care Order when aged 13. A Guardian ad Litem was subsequently appointed when S47 Directions were sought over a proposed change of placement*

that B did not want to happen. The matter was later reviewed by the court in relation to aftercare planning as B turned 17. B was considered competent to instruct a solicitor and to be made a party. However B did not wish to pursue this option as he did not have the knowledge of the available services or of his rights in relation to aftercare provision, and he was nervous about attending court, yet he wished to be heard directly. The Guardian ad Litem applied for B to attend court in accordance with Section 30 (2) of the Child Care Act and B did so with her support and that of the social worker. The removal of the bar between Section 25 and 26 would have enabled B to play a full part in the proceedings and maintain the assistance of his Guardian ad Litem.

6 Appointment of guardian ad litem

6.1 The consultation document envisages that appointments will remain at the discretion of the court, with guidelines indicating circumstances for appointment. A number of criteria to be considered are set out. Circumstances where the appointment would cease are discussed. It is envisaged that only persons operating as part of the National Service would be eligible for appointment.

Consultation Questions:

8. What are your views on the envisaged approach as outlined? Please provide reasons for your response.

9. Are there any additional matters you would recommend for inclusion as regards the basis, or envisaged guidance, for appointment of a guardian ad litem? Please give details and reasons.

6.2 If the child is to be fully represented in accordance with international best practice we argue that the appointment of a Guardian ad Litem should be the accepted norm for **all** children in **all** primary proceedings under the Child Care Act. The main arguments that we have found against this is one of cost and availability. We are of the view that a national and more streamlined service would go a long distance towards managing the issue of costs.

6.3 The inclusion of guidance criteria for the appointment of a Guardian ad Litem will be open to interpretation and could result in uneven application across different Courts with the result that experiences of children in Child Care proceedings will be inconsistent and unequal.

6.4 At present, a Guardian ad Litem appointment will cease on the refusal of the orders of an interim care order or care or supervision order, unless an alternative order is sought, as there are no longer proceedings in being and the child is not in the care of the CFA and therefore the provisions of Part IV and Part VI of the Act do not apply. There does not need to be change in the legislation to facilitate this.

6.5 We do not agree that the appointment of a Guardian ad Litem should cease on the making of a Special Care Order. This order will be made at the beginning of a period of the restriction of liberty of a young person. All Special Care Applications are heard by the High Court which considers the detention of minors under the Inherent Jurisdiction of the High Court.

6.6 Because of the urgent nature of many of these placements, a Guardian ad Litem may not be appointed until after the Special Care Order has been made and the child has actually been placed. Therefore there would be no opportunity for the child to be represented or have any voice in such a serious matter resulting in the loss of their liberty.

6.7 The Guardian ad Litem fulfils the role as laid out in MacMenamin in DK[7] throughout the child's detention and beyond to their discharge into the community:

> *"A duty of a Guardian ad Litem is to ensure compliance with the constitutional rights of a minor. For this purpose, the Guardian ad Litem should ensure that there is provided to the minor a means of making his or her views known. "*

6.8 Furthermore the Child Care (Special Care) Regulations 2004 S.I. No. 550 of 2004 provide for an ongoing role for the Guardian ad Litem throughout the Special Care Placement. Therefore we recommend that where a child is subject to Special Care Order that the Guardian ad litem should be retained until such time that the Special Care Order has been discharged and there are no further proceedings before the Courts.

6.9 It is crucial that the child who may be placed outside the state has the opportunity of a strong voice and an independent assessment of their interests and their rights, and the ongoing monitoring of their welfare and wishes, especially in preparation for their return. The role of the Guardian ad

[7] D.K. Judgment (2006 No. 1974P) 18/07/07 Mr. Justice J. MacMenamin

Litem is essential in this regard and should continue following the granting of the appropriate orders.

6.10 We agree with the proposal that a Guardian ad Litem should be considered where the child is an unaccompanied minor; to this we would add, that a Guardian ad Litem should be considered where is no parent willing or able to participate in the proceedings for example because of serious incapacity, long term serious mental health or addiction difficulties, or where the parents are deceased.

6.11 The issue of the cessation of the appointment warrants detailed consideration. Practice varies greatly between District Courts – see reference above to the Child Care Law Reporting Project which outlines different court practices throughout the country.

6.12 The Barnardos service generally favours the withdrawal of the Guardian ad Litem following the granting of Care Order or Supervision Order, unless there are significant unresolved issues that remain before the court in respect of the Care Plan, including access arrangements.

6.13 If the matter is re-entered at a later stage to consider an issue of the child's care or access arrangements, the Guardian ad Litem should be reappointed, and where possible, this should be the same person in the interests of continuity for the child and efficiency of the service.

6.14 In many courts the practice has arisen that reviews of the care arrangements take place under Section 47 of the Act. In some District Courts, the practice has developed where the Guardian ad Litem is re-appointed some six weeks before the date of review.

6.15 There are occasionally exceptional and highly complex cases which are kept before the court for frequent review and where the court's power to make or vary directions or orders under Section 47 is invoked. In such circumstances the Guardian ad Litem should remain appointed. If the Guardian ad Litem is discharged, the child's voice in the ongoing proceedings would be absent and there would be no mechanism for the Guardian's independent view of the child's interests to be provided.

7 Role of guardian ad litem

7.1 The consultation document proposes that the role of the Guardian ad Litem should be to ascertain the views of the child and inform the court of same, to answer specific questions of the court, to provide assessment and analysis as requested by the court and present recommendations in the interests of the child.

Consultation Questions:

10. What is your view of the description of role of a guardian ad litem? Please provide reasons for your response.

11. While a mediation role in any formal sense is not envisaged for the guardian ad litem, what opportunities, if any, would you consider exist for a guardian ad litem to contribute to increasing mutual understanding between the parties to the proceedings and between any of the parties and the child?

12. Are there other matters that you consider to be fundamental to the role of a guardian ad litem that you would recommend for inclusion? If so, please provide the necessary details and reasons.

7.2 The description contained in the consultation document contains aspects of role, legislative imperatives, and approach of the work the Guardian ad Litem. As stated elsewhere in this document we propose a definition of role as follows:

1. To represent the best interests of the child, as independently assessed by the Guardian ad Litem, in the specified proceedings.
2. To involve the child, taking into account their age, understanding and interests, in the proceedings that affect them.
3. To ascertain as far as is practicable given the age and understanding of the child, the child's views, wishes and feelings of the child.
4. To represent, in the court proceedings, the views, wishes, and feelings of the child.

7.3 In exercising their role, the Guardian ad Litem will have regard to the principle that it is generally in the best interests of a child to be brought up in his/her own family (s. 3(2)(c) of the 1991 Act).

7.4 There is a duty under (s. 9(2) of the Child and Family Agency Act 2013) to regard the best interests of the child as the paramount consideration in the performance of its functions in respect of an individual child under the 1991 Act.

7.5 Section 24 of the Child Care Act sets out the duty of the court as follows: 24.—*In any proceedings before a court under this Act in relation to the care and protection of a child, the court, having regard to the rights and duties of parents, whether under the Constitution or otherwise, shall— (a) regard the welfare of the child as the first and paramount consideration, and (b) in so far as is practicable, give due consideration, having regard to his age and understanding, to the wishes of the child.*

7.6 Therefore it follows that the Guardian ad Litem will recognise the statutory and constitutional obligations and rights of all stakeholders in the process.

7.7 The professional duty and acknowledged field of competence of all professionals providing evidence in the proceedings, including the Guardian ad Litem, should be acknowledged.

7.8 Barnardos welcomes that legislation would provide a framework for the Guardian ad Litem's enquiries and their work with the child, in order to report to the court the relevant information, assessment, analysis and recommendations. In this respect there has already been substantial work by the Children Act Advisory Board and this could form the template for this framework and any regulations that the Minister may make under the discretion that is proposed.

7.9 The consultation paper outlines that the Guardian ad Litem may make applications to obtain directions on any matter necessary to the continued performance of his/her functions or to safeguarding the best interests of the child. The standing of the Guardian ad Litem to make such applications will depend on their status and their access to legal expertise, and this is discussed below.

7.10 The consultation paper proposes the following:

> *Where, in the course of the proceedings, a guardian ad litem is concerned that a significant shortcoming exists regarding the care being provided to, or proposed for, the child by the Child and Family Agency, he/she should attempt to resolve the issue of concern by way of discussion and agreement with the Agency in the first instance, and where concerns are not resolved to inform the court. Where, in the view of the*

guardian ad litem, his/her concerns are not resolved or likely to be resolved in early course he/she would be required to inform the court of the matter as soon as possible.

The guardian ad litem should bring to the attention of the Child and Family Agency any risk(s) which he/she believes may have a serious adverse effect on the best interests of the child and which the guardian ad litem considers are not being sufficiently addressed or mitigated. If not satisfied with the response provided by the Agency, or in the absence of a response being provided within a reasonable time by reference to the nature of the risk, the guardian ad litem would be required to bring the matter to the attention of the court.

7.11 These approaches follow the principles outlined in CAAB and in MacMenamin in DK[8] and should be the current established practice among Guardians ad Litem.

7.12 The Guardian will have the duty, as any professional to report child protection concerns directly to the CFA using the procedure outlined under Children First. There may need to be further consideration of how this process will work in tandem with the obligations to the courts.

7.13 We accept that it is not envisaged that the Guardian ad Litem would have any formal mediation role in the proceedings. It has been our experience in the main that a collaborative approach with all involved in the proceedings leads to the best outcome for children.

7.14 Court proceedings are adversarial by their nature. Even the best prepared professional witnesses often find giving evidence and cross examination difficult. Parents who may lose the right to look after their children will often seek to challenge the evidence on which the CFA case is based. The court process may reveal that evidence is sound and incontrovertible, or alternatively that it has not been carefully and expertly gathered, or that care plans are not sufficient to meet the needs of the child. This can lead to acrimonious proceedings where there is a risk that the child's interests can be lost.

7.15 It will not be possible for the Guardian ad Litem to mediate and to reach agreement in all cases; we have had many experiences, where, despite our best efforts, conflict has remained intractable. However through a collaborative approach Guardians ad Litem will identify areas of agreement and dispute and outline these to the court so that the court can focus on the key issues that relate

[8] D.K. Judgment (2006 No. 1974P) 18/07/07 Mr. Justice J. MacMenamin

to the child. Differences of opinion are likely at times and it is important that these are managed respectfully by all involved.

7.16 There is already helpful information in the CAAB[9] Guidelines which state that the Guardian ad Litem should "seek to achieve an appropriate outcome based on the wishes, feelings and interests of the child through adopting a partnership approach and consulting and involving all parties. S1.2.2 P 3. These guidelines state that the Guardian should "try to resolve any perceived difficulties in a non-adversarial way through discussion and negotiation… while not becoming involved in the management of the case." S3.2.4.3 (o) P14.

7.17 "Where difficulties remain unresolved following discussion and negotiation, be in a position to inform the court with recommendations and/or possible solutions." S3.2.4.4 (e) P15.

7.18 We believe that this approach should underpin the work. The establishment of a single provider of services will enable this to be effected across the agency to ensure as far as it possible a uniformity of approach in practice. It must always be noted however that the best interests of the child is the paramount consideration and the DK principles as set out above in the proposed approach will allow the Guardian ad Litem to bring serious issues to the court in the interests of children, taking a solution focussed approach.

8 Possible provision of the guardian ad litem report to the child

8.1 The legislation may address the matter of the child's entitlement to receive a copy of the guardian ad litem report.

Consultation Question:
13. What is your view regarding possible provision being made for a copy of the guardian ad litem report to be made available to the child or have you any alternative arrangement to suggest? Please provide reasons for your response.

[9] CAAB Guidelines

8.2 The question of the child's entitlement to receive a copy of the Guardian ad Litem report brings into focus the 'rights' and 'best interests' debate.

8.3 The report of the Guardian ad Litem should contain, without interpretation, the wishes of the child. We submit that the child should have full access to this information, and to the Guardian ad Litem's view about their welfare. This will take place during ongoing communication and consultation between the Guardian ad Litem and the child. It is often the practice within the Barnardos service that the Guardian ad Litem will encourage a child to write a letter to the court which is then submitted by the Guardian ad Litem. This provides tangible evidence to the child of their views being represented in writing.

8.4 The provision of the other sensitive information contained within the reports is a different matter and would require detailed guidance which should be included as part of the operations manual of a national unitary service, with reference to criteria such as those set out in Section 32 (5) of the Child and Family Relationships Act 2005.

8.5 Difficult information can be shared with children in an age appropriate way but the Guardian ad Litem report to the court is not necessarily the best way of doing so. The child's age, stage of development and best interests must be the primary consideration. The report will, of course, be accessible to the child on request once s/he attains their majority.

9 Status of the guardian ad litem

9.1 The consultation envisages that the Guardian ad Litem would be a court appointed advisor to assist the court's determination of the application through provision of information, assessment, analysis and recommendation relating to the views and best interests of the child.

Consultation Question:
14. What is your view on the status envisaged? Please give reasons for your response.

9.2 Currently, in carrying out their functions in the course of the Court proceedings, the Guardian ad Litem's role has elements of *party, witness, advisor, representative and advocate.* The role is

unique and the relationship of the Guardian ad Litem to the Court has not been clarified in statute or in practice. In carrying out their role, the actual standing of the Guardian ad Litem within the proceedings has been uncertain and varies across different Courts. In some Courts the Guardian ad Litem is afforded significant agency to engage directly with the proceedings, address the Judge and negotiate with the legal representatives of the parties without being legally represented themselves. In other Courts, the Guardian ad Litem's involvement, and by extension the interests of the child, is significantly constrained in the absence of legal representation.

9.3 A determination of the appropriate status of the Guardian ad Litem within the proceedings can only be achieved in the context of agreement about their functions. We propose above that the Guardian ad Litem should have a fourfold function centred on *the representation of the child's best interests within the Court proceedings.* If this definition is agreed then it follows that the Guardian ad Litem's status within the proceedings should be such as to ensure that this function can be carried out to the fullest extent possible within the parameters of Court protocol and procedure.

9.4 The status of the Guardian ad Litem within the proceedings is inextricably linked to the status of the child. We have proposed above that the child should have equal standing to all other parties in the proceedings and in all cases have a Guardian ad Litem and where necessary a soicitor. In all cases it would be the responsibility of the Guardian ad Litem to establish the best interests of the child and to represent these interests, with the assistance of the child's legal representative, where appointed, in the course of the proceedings.

9.5 If it is not agreed that the child should be joined as a party in all cases then we recommend that the Guardian ad Litem should be joined as a *party* where the child is not. This would ensure that the Guardian ad Litem would have the necessary agency to purposively engage in the proceedings.

10 Qualifications & eligibility for appointment

10.1 The consultation sets out that social work would be among the professional requirements for appointment, and that social care and psychology would also be considered, with a minimum of three years direct post graduate experience in a child-related area. Transitional arrangements are outlined.

Consultation questions

15. What are your views regarding appropriate qualifications and professional experience for appointment as a guardian ad litem? Please give reasons for your response.

16. Do you have any alternative or additional qualifications/criteria to suggest? If so please give details and reasons.

17. What are your views and/or recommendations regarding the transitional provisions envisaged for qualifying those who have recent experience of acting in the capacity of guardian ad litem but do not meet the envisaged qualification and professional experience criteria? Please give reasons for your response.

10.2 The CAAB guidelines at 2.4.1 outline the *experience based qualifications* necessary to fulfil the role of Guardian ad Litem:

- Minimum of five years' postgraduate direct experience in child welfare and/or protection work.
- Knowledge and experience of the court system.
- Relevant experience of child welfare/child protection systems.

10.3 We believe that these are appropriate criteria but strongly recommend that a minimum five years' postgraduate experience in child welfare **and** protection (rather than *and/or*) should be the minimum requirement.

10.4 It has been our experience within Barnardos that the appropriate knowledge, training and skills base for a Guardian ad Litem has been that of NQSW or equivalent qualified Social Worker, and we would propose that this is the accepted entry criteria for Guardian ad Litem. As the Social Worker is now a protected title, this will have the added benefit of the CORU standards in relation to the adherence to clearly defined professional code for conduct and ethics, Continuous Professional Development, and a Fitness to Practice structure in addition to any complaints mechanism that the Guardian ad Litem Unitary Agency will have in place.

10.5 In addition it is essential that a rigorous recruitment process is followed including:

- CV appraisal;
- written submissions;
- interviews;

- written references;
- oral references;
- Garda vetting, overseas police vetting and clearance by the national service provider.

10.6 While we support the principle of transitional arrangements for existing practitioners who do not hold an appropriate qualification and suggest that persons with a non-social work but related **professional** qualification should be enabled to transition into the new service where they **have acted as Guardian ad Litem in a minimum of 10 cases during each of the previous two years.**

10.7 We do not believe that it is appropriate for a person without a professional qualification who has previously acted as a Guardian ad Litem to transition to the new service.

11 Access to records, records management and information provision

11.1 The Consultation sets out the envisaged approach which is an entitlement to access to relevant case records and to receive information as soon as possible about any change in circumstances.

Consultation Questions:

18. What are your views on the approach identified?

19. Are there additional matters you would recommend for inclusion? If so, please provide details and reasons.

20. What type of information do you consider should be publicly available regarding the management and delivery of guardian ad litem services?

21. In your view and/or experience, what type of information should be available to the Minister to enable effective monitoring of the quality of guardian ad litem services?

11.2 **Access to records.**

- The Guardian ad Litem should have access to **all** of the CFA case records regarding the child to whom the Guardian ad Litem has been appointed except where the particular record is subject to legal privilege. The relevant records will include the records of the Fostering Department pertaining to the child's placement, previous or proposed placement, and the

records pertaining to the child held by private providers working on behalf of the CFA such as residential care and foster care providers.

- During the course of the Guardian ad Litem's appointment, they should be consulted in respect of changes to the child's circumstances. This goes further than the right to be provided with information, and reflects that the child or their representative would have input into the process, while respecting the CFA's role in making decisions about the child.

11.3 **Administration of records**

- The service provider should implement a rigorous record management policy in accordance with international best practice and Irish law regarding access, storage and exchange of personal information held by public bodies. The policy will include material held physically and digitally.

11.4 **Provision of information and data**

- The national service provider should develop a framework that enables the routine provision of service data to the Minister (with a view to dissemination to the general public) regarding service activity and finance. The service provider should be required to produce an annual report that includes detailed service information and analysis across a range of categories.
- The national service provider should engage with research institutions to develop measures in respect of the impact of the Guardian ad Litem's involvement on outcomes for the child.

12 Role of the Child and Family Agency & payment for Guardian ad Litem services

12.1 This consultation does not deal with the payment arrangements, this will be determined by the arrangements made within the establishment of a national unitary service. It is proposed that the CFA will continue to pay the costs as it currently provided under S26 of the Child Care Act. Reforms would be intended to mitigate any perceived conflict of interest.

Consultation Question:

22. If involvement by the Child and Family Agency is to be retained strictly for the purposes of making payment in respect of guardian ad litem services, are there particular safeguards in addition to those indicated that you would wish to see implemented? Please give details and reasons.

12.2 We do not have access to the rationale behind the provision in Section 26(2) CCA 1991 that the Health Board (now CFA) will pay the costs incurred by the Guardian ad Litem. It seems reasonable to assume that the provision was inserted to ensure that the Guardian ad Litem costs would be discharged from public funds with a clear mechanism for payment. However the provision has created an anomaly whereby the imperative that the Guardian ad Litem is, and is seen to be, independent is compromised by fact that the major institutional stakeholder in the child care proceedings, the CFA, is responsible for paying the costs of the Guardian ad Litem.

12.3 The relationship between the CFA and Guardian ad Litem should be characterised by collaboration and mutual respect in the best interests of children and their families. However there will frequently be differences of opinion in respect of legal and clinical decisions that require continual debate and negotiation. It is at times necessary for the Guardian ad Litem to hold the CFA to account in respect of the provision of services to children and their families. In these circumstances there is an obvious potential conflict of interest in the relationship.

We are not aware that any arguments have been made in support of the current provision. It is in nobody's interests that the current arrangements should continue and we would propose that rather than develop additional safeguards the situation should be remedied by the immediate amendment of the legislation to facilitate a funding stream through the DCYA independent of the CFA. Any new arrangement should, of course, should include a rigorous system of financial oversight.

13 Engagement of legal representation

13.1 The consultation proposes that Guardians ad Litem would have access to legal advice/representation as an exceptional matter, where the need is expressly established and required in order for the effective discharge of the role. Potential circumstances would include Special Care Orders, overseas proceedings, complexity, or irreconcilable differences with a significant issue of care requiring articulation before the court. The Guardian ad Litem would be required to apply to the court stating the issues.

Consultation Questions:

23. What is your view regarding the envisaged approach? Please give reasons for your response.

24. Are there alternative or additional measures you would recommend to support sustainability, transparency, accountability and value in the expenditure of public funds in this area? Please give details and reasons.

13.2 Barnardos fully appreciate that the costs associated with legal representation and consultation must be managed in accordance with the fiscal principles that apply to all public services. However, we suggest that the appropriate way to ensure value for money is by means of rigorous management of tenders, contracts and expenditure rather than by the arbitrary restriction of legal services to Guardians ad Litem charged with safeguarding the best interests of children in Court proceedings. The establishment of a single national provider will be of significant assistance in this regard, especially if it is tasked with responsibility to account for legal costs associated with its work.

13.3 We have argued international best practice which is that the child should, in every case, be made a party to the proceedings and be afforded representation by a Guardian ad Litem, and where necessary, a solicitor. In this case it would be envisaged that the Child's solicitor would assist the Guardian ad Litem in engaging with the Court procedures bearing in mind that both the Guardian ad Litem and the solicitor are representing the child's interests.

13.4 If it is not agreed that the child will, in every case, be made a party to the proceedings then we propose that the Guardian ad Litem should be made a party in order to place the child on an equal footing. We recommend that in this case, i.e. where the Guardian ad Litem is joined as a *party* and the child is not, the decision by the Guardian ad Litem whether to seek legal advice should be informed by service guidelines and it would be a matter for the Guardian ad Litem to convince the service managers that such advice is necessary. Following are circumstances likely to give rise to the need for a solicitor:

- application for a Special Care Order;
- the circumstances of the case involve another jurisdiction;
- there is an irreconcilable difference of opinion between the Guardian ad Litem and the CFA;
- the case involves uncommon legal complexity;

- the integrity or competence of the Guardian ad Litem have been challenged in the course of the proceedings.

13.5 If it is not envisaged that the Guardian ad Litem will be joined as a party to proceedings then the question of legal representation for the Guardian ad Litem will be a matter for the Court and the Guardian ad Litem will be required in each case to convince the Court as to the need for representation taking account of the criteria above.

13.6 We strongly recommend that whatever model is adopted in respect of the status of the child and the status of the Guardian ad Litem in the proceedings, the principle of the right to legal representation for the Guardian ad Litem in order to place the child on an equal footing should be clearly outlined in any new guidelines or legislation.

14 Transitional provision

14.1 It is envisaged that a guardian ad litem who was appointed in proceedings under the 1991 Act before the coming into force of a nationally managed and delivered service would be entitled to continue to act in that capacity for the purpose of the specific proceedings concerned as if the appointment was made in accordance with the new arrangements. Such continuation would be subject to the guardian ad litem being in possession of a current Garda Vetting clearance.

14.2 It is further envisaged that in such circumstances, legal representation already engaged by a Guardian ad Litem would also continue until those particular proceedings are concluded.

Consultation Question:

25. What are your views and/or recommendations regarding the envisaged transitional approach?

14.3 Where a Guardian ad Litem has been appointed in respect of proceedings prior to the establishment of the new service, we agree that it is appropriate that they be enabled to continue in that capacity **for the duration of the proceedings** and with the following conditions:

- they are subject to Garda vetting, overseas police vetting and clearance by the national service provider;

- that if the appointment continues for a period exceeding six months following the establishment of the new service then the Guardian ad Litem should be appraised by the service provider and subject to ongoing supervision in accordance with the general supervision policy of the service provider.

15 Regulations by the Minister

15.1 The Minister would have the power to make regulations ancillary to the legislation as necessary in relation to the general management and operation of guardian ad litem services.

Consultation Question:

26. Other than as indicated in this paper, are there other aspects of reformed arrangements you consider would necessitate the Minister making regulations and what do you consider to be the essential components of same? Please provide details and reasons.

15.2 It will be important to find the optimal balance between Legislation, Ministerial Regulations and service policies, procedures and practice guidelines. This will require further consideration.

16 Conclusion

16.1 In addition to the specific consultation questions set out above, the Department would welcome any other information/views/recommendations you may wish to provide concerning necessary fundamental reform in this area.

General Consultation Questions:

27. What are the elements of existing service arrangements that warrant retention and strengthening in a reformed service? Please provide details and reasons.

28. What do you consider to be the priority matters to be addressed in reforming current arrangements? Please give details and reasons.

29. Have you any further information, views or recommendations to convey that would assist the Minister in devising policy proposals for an effective and sustainable national system to manage and

deliver guardian ad litem services under the 1991 Act? If so, please provide details and reasons, as appropriate.

16.2 The submission above outlines the key elements of a Guardian ad Litem service for children subject to proceedings pursuant to the Child Care Act 1991. In presenting the submission we have focussed on the following areas:

- Legislative provision;
- Underlying principles;
- Guardian ad Litem functions;
- Model for service administration and delivery;
- Qualifications and recruitment process for appointment;
- Appointment of Guardian ad Litem;
- Status of children in proceedings;
- Status of Guardian ad Litem in proceedings;
- Legal representation;

16.3 In making recommendations we have attempted to remain cognisant of the necessary limitations of financial provision for public services. We have proposed a **national service**

- founded on **clear principles**;
- **accessible** to all children who are subject to proceedings;
- with a **clear statement of function** in regard to the Guardian ad Litem role**;**
- **consistent application** ensuring **equality of service;**
- **rigorous** service and financial management;
- **public accountability** and **transparency** in its operations.

16.4 While the full implementation of our proposals would require legislative change, we believe that it is possible to achieve significant reform within the context of the current legal framework by establishing a national service in advance of changes to the law.

16.5 Finally, our proposal has been developed, as requested, with a view to public law proceedings. We would like, however, to take this opportunity to highlight the fact that much of the proposal has profound significance for a range of private law proceedings that impact directly on the best

interests of children. We look forward to engaging in consultations in the future about achieving clarity, consistency and best practice in this area of law.

ENDS