The Child Law Clinic

School of Law

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Submission on a 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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This submission was authored by Ms Ciara Ni Longaigh (whose LLM thesis addressed the operation of the Guardian ad Litem in Ireland), Researcher Sarah C Field and Professor Ursula Kilkelly, Director of the Child Law Clinic.

The Child Law Clinic

The Child Law Clinic is a pro bono service based in the School of Law at University College Cork. It provides student-led research services to those seeking to litigate children's issues and it also supports progressive law reform by making submissions and interventions at all levels. It is an integral part of the LLM in Child and Family Law at the School of Law, UCC although its members also include students on the School's doctoral programme as well as members of academic staff. Its director is Professor Ursula Kilkelly, who works with deputy director Dr Conor O'Mahony.

The Consultation Paper

Legislative provision for and the operation of the *guardian ad litem* (GAL) system in Ireland has been subject to much scrutiny and analysis in recent years. Notwithstanding the important work undertaken by GALs in Ireland, concerns about the lack of regulation, the cost and inconsistent operation of the GAL system and its effectiveness in delivering on the right of the child to be heard in legal proceedings have all been highlighted.[1] It is very welcome, therefore, that proposals are being considered to identify necessary reforms of the GAL system and the steps necessary to put the system on a sustainable, progressive footing. It is regrettable that this is not a wide ranging consultation process as to how best to ensure that children's views are heard in the judicial process. Rather it addresses specific questions as to the operation of the GAL system with a view to informing the proposals for reform. In this regard, the Clinic notes that Article 42A of the Constitution now requires that provision be made by law for 'securing, as far as practicable, that in all proceedings [brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or concerning the adoption, guardianship or custody of, or access to, any child] in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child. In our view, this requires a much more holistic analysis of the reform and other measures necessary to ensure that children's views are heard before the courts in such cases. Moreover, as is outlined in brief below, the structural and legal impediments to hearing those views also

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[1] See generally U.Kilkelly, *Children's Rights in Ireland: Law Policy and Practice* (Sussex [England]: Tottel, 2008); A. Parkes, *Children and International Human Rights Law: the right of the child to be heard* (Abingdon, Oxon [England]: Routledge, 2013); L.Crowley, *Family Law* (Dublin: Thomson Round Hall, 2013).

suggest that a modest reform of the GAL system will be insufficient to implement the duty now set out in the Constitution with respect to hearing the views of the child in such cases.

The Child Law Clinic has much to offer such a consultation process, given its access to extensive research, including empirical and international studies. However, in line with the narrow focus of this consultation, we have confined our submission to responding to the questions posed by the consultation document. Should further information or support be useful, the Clinic would be delighted to provide support for reform, including on a pro bono basis, in light of our particular interest in identifying the best way to ensure that children are adequately and appropriately heard in the judicial process.

Before considering the consultation questions, it is necessary to set out some broader issues concerning children and the legal system which the Clinic considers should be addressed in conjunction with any reform of the GAL system. In line with international standards, it is crucial that deficits in relation to implementation of the child's right to be heard are dealt with in a holistic manner. Article 12 of the United Nations Convention on the Rights of the Child affords to the child a right to be heard in judicial and administrative proceedings and requires that such proceedings must be child-friendly, accessible and age-appropriate.[2]

Adversarial approach

The adversarial nature of the legal system is detrimental to delivery of child-friendly proceedings. The negative impact of such a system on cases involving children has been well documented.[3] Commentators have criticised the system for its promotion of conflict and over-emphasis on gathering evidence for court proceedings rather than protecting the rights and interests of children and families.[4] The Law Society of Ireland has recommended that a less adversarial approach be taken in relation to child care and protection matters, guardianship,

[2] UN Committee on the Rights of the Child, *General Comment No.12 (2009), The right of the child to be heard, CRC/C/GC/12,* 20 July 2009, para. 34.
[3] Walsh, "Protecting Irish Children Better – The Case for an Inquisitorial Approach in Child Care Proceedings" (2005) 5(1) J.S.I.J. 136 at 137–138; Buckley, Skehill and O'Sullivan, "Protecting Children Under the Child Care Act 1991 – Getting the Balance Right" (1999) 2(1) I.J.F.L. 10; see also O'Mahony, Shore, Burns and Parkes, "Child Care Proceedings in the District Court: What do we really know?" (2012) 15(2) I.J.F.L. 49-55.
[4] Walsh, "Protecting Irish Children Better – The Case for an Inquisitorial Approach in Child Care Proceedings" (2005) 5(1) J.S.I.J. 136 at 137–138; Buckley, Skehill and O'Sullivan, "Protecting Children Under the Child Care Act 1991 – Getting the Balance Right" (1999) 2(1) I.J.F.L. 10.

custody and access.[5] Similar issues have arisen in other jurisdictions, for example the Family Court of Australia has moved towards a more inquisitorial approach through development of the Less Adversarial Trial.[6] Therefore, it is recommended that consideration be given to the developmental of an inquisitorial approach to proceedings concerning children.

Professional Training

Reform of the Guardian ad Litem system would be unworkable in practice if it were not accompanied by sufficient training of both the legal profession and the judiciary in relation to the hearing of the voice of the child. The European Guidelines on Child-Friendly Justice 2010 state at Article 44 that 'judges should respect the right of the child to be heard in all matters that affect them or at least to be heard when they are deemed to have a sufficient understanding of the matters in question.'[7] Judges who speak directly to children are in a position to make a significant difference to a child's experience of participation. However, under the current Irish legislative system, judges are under-resourced and receive no direct training dealing with issues surrounding the implementation of child participation.[8] It is recommended that comprehensive training be mandatory for members of the judiciary presiding over cases involving children and young people. Legal and other professionals working with and on behalf of children and young people should also be trained in children's rights, child development and rights-based communication with children.

Child-Friendly Environment

As noted above, the UNCRC requires court proceedings to be child-friendly, accessible and age-appropriate. The Guidelines on Child-Friendly Justice also provide that issues concerning children should be addressed in a child-sensitive and non-intimidating environment, using appropriate and accessible language.[9] Particular measures should be taken to ensure that

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[5] Family Law: Proceedings (Law Society of Ireland Submission to the Department of Justice, Equality and Defence 'Family Law- The Future') (2014) http://www.lawsociety.ie/Documents/committees/Family/FamilyLawsubmission2014.pdf (Date Accessed: 4th November, 2015).

[6] McIntosh, Bryant and Murray, "Evidence of a Different Nature: The Child-Responsive and Less Adversarial Initiatives of the Family Court of Australia" (2008) 46(1) *Family Court Review* 125-136.

[7] The 2010 Guidelines of the Committee of Ministers for the Council of Europe for Child Friendly Justice (adopted 17th November, 2010) at Article 44.

[8] Childwatch International: Children's Participation in Family Law Proceedings (Otago, May 2007). < https://www.childwatch.uio.no/projects/thematic-groups/children-law/children-law-proceedings07.pdf> (Date Accessed: 4th November, 2015).

[9] The 2010 Guidelines of the Committee of Ministers for the Council of Europe for Child Friendly Justice (adopted 17th November, 2010) at Articles 55 and 56.

children are comfortable with the court setting, such as allowing the child an opportunity to see the layout of the court and to become familiar with the roles and identities of court officials.[10] A recent study of children's involvement in civil judicial proceedings in Ireland found an absence of legal requirements or policies to ensure that proceedings involving children are held in a child-friendly, non-intimidating setting.[11] There are no requirements that court proceedings be adapted to suit the child's age, level of maturity or any communication difficulties.[12] Some specific rules exist to protect a child giving evidence, but generally there are no guidelines in place to ensure that children are interviewed or give testimony in a child-sensitive manner.[13] The Clinic submits that these issues must be addressed together with reform of the GAL system.

Undue Delay

The Child-Friendly Justice Guidelines require that the urgency principle be applied to all proceedings involving children to provide a speedy response and protect the best interests of the child.[14] In Irish law, generally there are no legislative provisions requiring proceedings to be expedited in the best interests of the child.[15] Furthermore, the absence of a legal obligation on judicial authorities to take provisional decisions or make preliminary judgments where children are concerned warrants attention.[16]

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[10] The 2010 Guidelines of the Committee of Ministers for the Council of Europe for Child Friendly Justice (adopted 17th November, 2010) at Articles 56.

[11] European Commission, Study on children's involvement in judicial proceedings- contextual overview for civil justice-Ireland, July 2014 (Research carried out between March 2013 and October 2013) file:///C:/Users/scfield/Downloads/DS0115305ENN_002.pdf (Date accessed: 5th November 2015) at page 16.

[12] European Commission, Study on children's involvement in judicial proceedings- contextual overview for civil justice-Ireland, July 2014 (Research carried out between March 2013 and October 2013) file:///C:/Users/scfield/Downloads/DS0115305ENN_002.pdf (Date accessed: 5th November 2015) at page 16.

[13] In civil proceedings concerning the welfare of a child, children may be allowed to give evidence through a live television link. When this occurs, the court may direct that a child be questioned through an intermediary if necessary, having regard to the age or mental condition of the child. See section 22 of the Children Act 1997.

[14] The 2010 Guidelines of the Committee of Ministers for the Council of Europe for Child Friendly Justice (adopted 17th November, 2010) at Article 50.

[15] It should be noted that some courts have adopted guidelines which promote the timely resolution of family law proceedings, including those involving children. See further European Commission, Study on children's involvement in judicial proceedings- contextual overview for civil justice-Ireland, July 2014 (Research carried out between March 2013 and October 2013) file:///C:/Users/scfield/Downloads/DS0115305ENN_002.pdf (Date accessed: 5th November 2015).

[16] European Commission, Study on children's involvement in judicial proceedings- contextual overview for civil justice-Ireland, July 2014 (Research carried out between March 2013 and October 2013) file:///C:/Users/scfield/Downloads/DS0115305ENN_002.pdf (Date accessed: 5th November 2015) at p. 16.

It is crucial that the above inadequacies are addressed to ensure the right of the child to be heard in judicial and administrative proceedings is effectively implemented. The remainder of this document addresses the questions posed by the GAL consultation.

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

The principles and policies are considered appropriate as it is recognised that both the best interests of the child and the rights of the child to express views are key to any decision making process in child care proceedings. It is important that the United Nation Convention on the Rights of the Child is clearly set out in the principles and policies. It is to be welcomed that the role of the Guardian ad Litem as an independent party is expressly recognised.

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

While the United Nations Convention on the Rights of the Child is given express recognition, the importance of particular articles should be highlighted by the principles and policies. Article 12 is a core general principle that recognises the child as an individual whose voice must be heard in decisions that affect him/her. Article 12 states that:

> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.[17]

The Article creates a twofold obligation, firstly that the views of the child are ascertained, and secondly that these are taken into consideration having regard to the age and maturity of the child. It is not concerned with the 'wishes' of the child per se (as appears in the legislative provisions of some jurisdictions including Ireland[18]) but rather the opinion or views of the child

[17] Article 12 of the United Nations General Assembly Convention on the Rights of the Child A/RES/44/25 20th November, 1989.

[18] See also Children Act 2004 (England and Wales) provides for 'ascertaining children's wishes' under section 53.

on the matter concerned. Thus far, there have been 'very cautious and limited' attempts to incorporate Article 12 of the CRC into Irish domestic law. Commitment to the proper enforcement of Article 12 should be set out in the principles and policies.

Ireland's failure to adequately implement Article 12 has been highlighted by the Committee on the Rights of the Child. In 1998, the Committee expressed concerns in relation to Article 12 generally,[19] while in 2006, its Concluding Observations[20] noted 'grave concerns for the lack of sufficient provision' for the use of a GAL. In anticipation of the consideration of Ireland's examination by the Committee on the Rights of the Child in January 2016, Government should act quickly to take these points into consideration in terms of improving the system.

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

The Children and Family Relationships Act 2015 provides an alternative method by which the views of the child are to be ascertained in the form of the appointment of an 'expert'. It is not clear how this fits with the role of the GAL under the Child Care Act 1991. Furthermore, the State should endeavour to ensure no lacuna results in relation to the Mental Health Act 2001.

4. Having regard to feasibility, what is your preferred approach between the stated alternatives and why? Please detail the advantages and disadvantages of each approach from your perspective.

• *direct provision through a new dedicated public body;*

A significant advantage of the above approach would be the opportunity to create a central monitoring body in terms of the qualifications required for the role.

A disadvantage which may result could be the cost element involved and potential delays in bringing the body into operation.

• *utilising existing or reformed structures in either the children or justice areas (comprehending related services such as courts and probation);*

This approach may be advantageous in that it may be more cost effective and speed up the implementation of reform measures.

[19] Concluding Observations of the Committee: Ireland UN Doc CRC/C/15/Add.85 (4th February, 1998).

[20] Concluding Observations of the Committee: Ireland UN Doc CRC/C/IRL/CO/2 (29th September, 2006).

However, in terms of streamlining an approach to representation in both the public and private sphere, it appears to be clear from the criticisms of the Committee on the Rights of the Child that Ireland's existing structures do not reach the minimum threshold of compliance envisaged by Article 12 of the CRC.

• *public procurement of such services to be engaged under contract by the Minister for Children and Youth Affairs.*

Such an approach would be cost effective and would encourage transparency in terms of the exact role of the child's representative.

However, the approach may lead to inconsistency in terms of the level of training and experience a particular child's representative has obtained. There may also exist a risk that the Minister may choose the most cost-effective applicant rather than the most suitable.

Thus, the preferred approach should be direct provision through a new dedicated public body, monitored by the Minister for Children and Youth Affairs.

5. Are there any other feasible, effective and sustainable approaches you would recommend? Please provide details and reasons.

The Scottish Children's Hearing Rules contain various mechanisms through which the child can express his/her views. These include writing, audio or video tape, through an interpreter or through the appointment of a so-called 'safeguarder'. Scotland has developed a special system of lay judges to hear children in civil cases and training is provided for these volunteers. These 'Children's Panels' seek to obtain views of the child. Children give their views prior to the hearing. If children are unable or reluctant to express themselves sufficiently, a 'safeguarder' may be appointed to report back. Some professionals consider the Scottish Children's Hearing System a good practice, because of children's active engagement and the mandatory training for professionals and volunteers.[21]

Further to this, Finnish judicial departments offer training on child issues. Furthermore, Finland offers a year-long interdisciplinary interview training programme for police and healthcare

[21] Children's Hearing (Scotland) Act 2011. See generally L. Tyler *The Children's Hearing System and the ECHR* (2003) 3 Irish Journal of Family Law 6-8.

professionals who perform child hearings. The National Police Board and the Forensic Psychiatry Centre organise the training. Most police officers and psychologists who work in criminal proceedings have attended the course and generally agree that it has contributed to child friendliness in the preliminary hearing process.[22] Bar associations sometimes offer training programmes for lawyers. In an Irish context, there is an urgent need for a multi-faceted training programme for all professionals and continuous training is needed which runs on an ongoing basis, rather a one-off short term programme.

6. What would you view as the critical elements for successful establishment and sustainable operation of a national service to be covered under each broad approach?

In order for the national service to operate effectively, there must be stringent enforcement of the qualification and training requirements for the child's representative and these must be followed by the service provider. On-going Continuing Professional Development should be provided by the national service to ensure a level of consistency across the country. While the national service should be centralised, the service must serve the entire country and thus, financial support must be spread out across the entire country.

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

Central to this arrangement is the task of establishing the weight to be attached to the views of the child in light of their age and 'understanding'. In relation to Article 12 of the CRC, the Committee has observed that 'young children communicate their feelings, ideas and wishes in numerous ways long before they are able to communicate through the conventions of spoken or written language' and for this reason 'even the youngest children are entitled to express their views under Article 12.'[23] This stance has taken root from the 'fear of placing undue psychological burden on young people.'[24] Indeed, the use of age limitations as a barrier to participation has repeatedly been criticised by the Committee who have noted that 'state parties should presume that a child has the capacity to form his/her own views and recognise that

[22] European Union Agency for Fundamental Rights: Child-friendly justice: Perspectives and experiences of professionals on children's participation in civil and criminal judicial proceedings in 10 EU Member States. (Luxembourg: Publications Office of the European Union, 2015) < http://fra.europa.eu/sites/default/files/fra-2015-child-friendly-justice-professionals_en.pdf> (Date Accessed: 2nd November, 2015) at 98.

[23] United Nations Committee on the Rights of the Child General Comment No. 7 (2005) Implementing Child Rights in Early Childhood CRC/C/GC/7/Rev1 para 4.

[24] K. Walsh *Young Children's Participation in Child Abduction Proceedings- Emerging Trends in Irish Case Law* (2013) 1 Irish Journal of Family Law 12-19 at 12.

she/he has the right to express them; it is not up to the child to first prove her/his capacity.'[25] The Guidelines on Child Friendly Justice state at Article 47 that 'a child should not be precluded from being heard solely on the basis of age'. Thus, the assessment of maturity of the child may be a more effective method of determining *the weight* to be attached to a child's views rather than an arbitrary, strict age limitation.[26] The starting point should be a presumption of capacity. From this point on, the views ascertained may be weighted in relation to different relevant factors. The forthcoming CRC General Comment on the Rights of Adolescents may have a significant impact on this area and may provide express guidance as to how the right to participation may be best realised for older children.

In relation to section 26 (4) of the 1991 Act, it is submitted that a change to the necessary qualification requirements of the *guardian ad litem* would help to address this issue.

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

Rather than a *guardian ad litem* only being appointed where 'the child being of an age or maturity to express his/her views is unable to or constrained from doing so for any reason, whether due to physical, intellectual, emotional impairment or otherwise', it could be viewed that the *guardian ad litem* may provide a suitable opportunity for all children to have their voice heard. Setting out that the *guardian ad litem* will only be appointed in the particular circumstances listed above suggests that an adequate alternative method of participation is available to children who do not fall into this category. If it is the case that the *guardian ad litem* will only be appointed in certain cases, whereas under Article 42A of the Constitution provision must be made to ensure that the views of the child are heard in all cases. This will require either the appointment of a lawyer in all such cases and/or the adaptation of judicial proceedings to enable children to participate including through the development of appropriate judicial and legal training. See further below.

[25] United Nations Committee on the Rights of the Child General Comment No.12 The Right of the Child to be Heard (2009) CRC/C/GC/12 para 20.
[26] See generally A. Smith Advocating for Children: International Perspectives on Children's Rights (Dunedin, New Zealand: University of Otago Press, 2000).

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.

If a *guardian ad litem* is only to be appointed in the above circumstances, a suitable alternative must be provided to allow the voice of the child to be heard where a *guardian ad litem* has not been appointed. The Council of Europe 2010 Guidelines state at Article 44 that 'judges should respect the right of the child to be heard in all matters that affect them or at least to be heard when they are deemed to have a sufficient understanding of the matters in question.'[27]In *AS (otherwise DB) v. RB*[28], the previous history of a judge speaking directly to children was discussed. It was apparent that significant benefits may result from a direct participation approach, provided sufficient training is in place for the judges in question. Judges who speak directly to children are in a position to make a significant difference in a child's experience of participation. Careful balancing of the competing interests have led other countries to explore the' potential for interviews as another avenue for participation'[29]. A flaw apparent in the legal system of many jurisdictions is that there is no requirement that 'the judiciary undergo any specialised training for dealing with children in cases of such a sensitive nature.'[30] Without proper and comprehensive training, judges may be unable to handle the issues which arise surrounding privacy; the right of the judge to repeat what the child has said and moreover, how to explain the decision to the child in circumstances where their views are not followed by the court. There is an inherent need to train adults to learn to listen, not just to hear what they want to hear. Without this training, some judges may decline to hear children as they feel they do not have the skills. In Ireland, some training is ongoing at District Court level at present but the details of this training are not widely available. Outside of Dublin, 'judges do not specialise in family law but instead preside in such cases as the necessity arises.'[31] The use of judicial interviews is dependent on whether the judge has the aptitude, skills and training to conduct

[27] The 2010 Guidelines of the Committee of Ministers for the Council of Europe for Child Friendly Justice (adopted 17th November, 2010) http://www.coe.int/t/dghl/standardsetting/childjustice/Guidelines%20on%20child-friendly%20justice%20and%20their%20explanatory%20memorandum%20_4_.pdf (Date Accessed: 11th September, 2015) at Article 44.

[28] (2002) 2 IR 428.

[29] F.E. Raitt *Hearing children in family law proceedings: Can judges make a difference?* (2007) 19 (2) Child and Family Law Quarterly 133-281 at 133.

[30] A. Parkes (2013) at119.

[31] Family Law: Proceedings (Law Society of Ireland Submission to the Department of Justice, Equality and Defence 'Family Law- The Future') (2014) http://www.lawsociety.ie/Documents/committees/Family/FamilyLawsubmission2014.pdf (Date Accessed: 11th September, 2015) at 1.01.

such interviews. It is regrettable that Irish judges are not specifically trained to interview children in this way, many have indicated that they would not be comfortable with this.[32] Ultimately, in the Irish context, judges feel they have insufficient training.[33] While some have acquired training, the Law Society recommends that judges who are to be assigned should be given comprehensive training in regard to issues which are particular to child care law. [34] Thus, if the appointment of a *guardian ad litem* is to be restricted to particular categories of children, legislative provision for judicial training as an alternative must be put in place.

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

While many aspects of the role are to be commended, the role as presented conveys a paternalistic mind set. The best interests of the child are key to any decision of the court, however, it must be clear that the *guardian ad litem* is listening to the views of the child on each issue, rather than making a personal assessment on what is best for the child concerned. Such a decision is for the court to make, having heard all evidence. Much greater clarity is required as to what the precise role of the *guardian ad litem* is – with proper regard for the need to represent the views of the child as part of the best interests determination. Again, the Guidelines on Child-friendly Justice are instructive here, especially with regard to the provision for a multi-disciplinary decision-making process around the child's best interests.

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?

The mediation role is more applicable to the private family law sphere. Issues may arise in relation to use of mediation in private family law proceedings and how the right of the child to be heard can be reconciled with this emerging movement towards further mediation and the movement of child law away from the court room setting. The Espoo area of Finland is pioneering an expert-assisted judicial mediation model as an alternative to civil trial in custody cases. The 'Follo-model' teams a judge with a social expert to help parents find a solution

[32] See further Current Challenges in the Family Law Courts' Mr. Justice Michael White, Chairperson of the Family Law Development Committee of the Board of the Courts Service 29th May, 2013.
[33] *ibid* at 4.
[34] Law Society (2014) at 4.3.02.

through mediation, with the child's best interests as the focus. This method helps families solve custody disputes more quickly and with less conflict. However, children are only heard if the parents decide to take the child's opinion into consideration. The hearings do, however, offer children the chance to speak about their preferences privately; as information shared during mediation, unlike in legal proceedings, is confidential. They have the right to choose what information from their hearing may be shared with their parents, and whether they would like some of it to be left out.'[35] In mediation, the voice of the child may be best heard through a properly trained and qualified professional, while bearing in mind the issues of delay and cost [36] incurred through the use of a third party expert report. The use of a group conference style approach to private family law is also an emerging practice which may have an impact on how the child is heard in private family law matters. Enthusiasm for children's participation within meetings needs to be balanced with consideration about children's motivation for attending and how they experience the meetings. In reality, such conferences are 'difficult adult meetings, so even where children were helped to express some views their participation was generally limited.'[37] Furthermore, Kirby and Laws note that 'children may not necessarily come up with solutions to their personal situation and sometimes it may only be possible or appropriate for them to tell us a bit about how they experience their lives or what they want', allowing the space for children to offer their own information rather than simply answering questions, offers great insight and can be invaluable information in the decision making process.[38]

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.

The responsibilities of the *guardian ad litem* may extend right to the end of the proceedings including the importance of explaining the court ruling to the child after decision is made. Particularly in cases where the child has expressed clear views against a certain living arrangement, the child may feel devalued and undermined if the court does not come to a similar conclusion. As Lindon noted 'it is possible especially if the family has limited or no

[35] *ibid* at 47.
[36] *ibid* Law Society (2014) at 4.1.
[37] P. Kirby & S. Laws 'Advocacy for Children in Family Group Conferences: Reflections on Personal and Public Decision-Making' in Barry Percy-Smith & Nigel Thomas *A Handbook of Children and Young People's Participation: Perspectives from Theory and Practice* (New York; London: Routledge, 2010) at 115.
[38] *ibid* at 116.

support, that children try to explain their parents reactions through what they, the children, have done, have not done.'[39]

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.

Although the question should be more properly as to how and in what form the report should be made available (ie assuming that all children have the right to the report, but the form that report takes is key in this context), if no adaption is envisaged then a test for maturity may be useful here. It is submitted that in cases where a child is deemed mature enough to have access to the report, the report should be explained to the child step by step by the guardian ad litem in line with their particular training on child interview skills.

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

It is submitted that if a *guardian ad litem* were to have a legal qualification and the child thus became party to proceedings, it would not be necessary to outline such status. (Detailed below).

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

While the qualifications required are to be welcomed, it is submitted that the additional need for a legal qualification so as to make the *guardian ad litem* the legal representative of the child would best serve the interests of the child. Garda vetting is a crucial part of the role, as is a background in social care or psychology. The provision requiring the previous appointment of the person in question may make it difficult for younger professionals to enter into the field. Further to this, the provision whereby a person who does not hold a suitable qualification but has previously been appointed may only be suitable as an interim measure and should not be permitted into the future.

Under the current system, hearing the voice of the child has been sporadic at best and has taken place on an ad hoc basis.[40] The European Union Agency for Fundamental Rights states that

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[39] J. Lindon *Understanding Children & Young People: Development from 5-18 years* (London: Hodder Arnold, 2007) at 62.

[40] This approach has been criticised by Parkes. See generally A. *Parkes Children and International Human Rights Law* (Abingdon, Oxon: Routledge, 2013).

'authorities should ensure a person of trust, independent of the child's parents, supports the child during all stages of judicial proceedings, particularly in informing and preparing the child for hearings and EU policy planning should also focus on training professionals and harmonising curricula.'[41] The *guardian ad litem* may provide the ideal opportunity to bring this provision to life in legal proceedings in Ireland.

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

The addition of a legal qualification requirement to the above list would be a welcome development. Further, a particular psychology course tailored to the representation of children should be introduced. Thus, upon qualification, professionals could complete this course in order to pursue a career as a *guardian ad litem*. Full implementation of Article 12 requires the development of awareness, skills and attitude among adults to listen to children and respect their individual points of view. Further to this, it requires adults to show patience and creativity by adapting their expectations to a young child's interest, levels of understanding and preferred ways of communicating. This involves 'active listening, including verbal and non-verbal communication and a range of approaches and methods such as play, art and the use of props and other equipment to communicate effectively with children.'[42] Herring states that 'a child's wishes are the child's voice; a child's needs are determined by others'.[43] Thus, it is important that in conveying the wishes of the child, the conveyor ensures the information is not tempered by their own personal views on the best interests of the child. In terms of choosing an appropriate medium through which the child may be heard, it is extremely difficult to establish a strict rule. Specialised training is available in the United Kingdom through the Association of Lawyers for Children which promotes justice for children and young people within the legal system of England and Wales. In fact, most professionals support the idea of 'having one specifically trained professional acting as the child's main contact person and accompanying him or her throughout the proceedings'.[44] The Scottish Children's Hearing Rules contain

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[41] *ibid* at 51.

[42] U. Kilkelly *Children's Rights in Ireland: Law, Policy and Practice* (Sussex, Tottel, 2008) [hereinafter Kilkelly (2008)] at 202.

[43] J. Herring *The Human Rights Act and the Welfare Principle in Family Law- Conflicting or Complementary?* (1999) Child and Family Law Quarterly 11 (3) 223-238 at 229.

[44] European Union Agency for Fundamental Rights: Child-friendly justice: Perspectives and experiences of professionals on children's participation in civil and criminal judicial proceedings in 10 EU Member States. (Luxembourg: Publications Office of the European Union, 2015) < http://fra.europa.eu/sites/default/files/fra-2015-child-friendly-justice-professionals_en.pdf> (Date Accessed: 11th September, 2015) [hereinafter EU Agency for Fundamental Rights] at 115.

various mechanisms through which the child can express his/her views. These include writing, audio or video tape, through an interpreter or through the appointment of a so-called 'safeguarder'. In family proceedings in many member states, children have the statutory right to counsel and representation in their own name where there are potential conflicts of interest between the child and the parents. In Scotland, children have a right to seek legal advice and a person under the age of sixteen also has the legal capacity to have a solicitor in Scotland.[45] The availability of legal aid is a key concern right across EU Member States. The European Union Agency for Fundamental Rights has outlined that EU Member States 'should provide legal aid unconditionally to all children and ensure that clear guidelines on accessing legal aid be provided to all children and their parents/guardians and that specialised child lawyers be available to represent children in both civil and criminal proceedings.[46] The notion of separate or independent legal representation in family law proceedings is far from new and has been introduced in some jurisdictions as a means of representing the voice of the child in accordance with Article 12 of the CRC.[47] However, there are no universally accepted guidelines for child legal representatives and the Committee has not expressed any views as to how children should be facilitated in exercising this right.[48]

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.

In the interim period, such individuals should be allowed to continue to practice but following a particular date, only those who are suitably qualified should be appointed as such.

18. What are your views on the approach identified?

The above approach seems suitable.

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

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[45] Section 2 (4A) of the Age of Legal Capacity (Scotland) Act 1991.

[46] *Supra* n.30 EU Agency for Fundamental Rights at 41.

[47] Rule 5.240 of the 2015 California Rules of Court.

[48] *Supra* n.26 Parkes (2013) at 103.

Moving forward, the focus should be on maintaining online databases for ease of access for those involved in a particular case.

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

Annual financial reports and frequency of appointment of a *guardian ad litem.* Provision should be made for independent monitoring and review of guardian ad litem services including feedback from children and young people themselves.

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?

Personal training and qualification records of those being appointed as guardians.

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.

Continuous Professional Development training to be monitored by the Agency on a bi-annual basis for those appointed as guardians. See also above remarks about independent review of the service.

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

The requirement of a legal qualification would resolve any issues in this area.

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.

Costs would be significantly reduced whereby instead of a traditional *guardian ad litem* and a solicitor being appointed and financed, the *guardian ad litem* would serve in a dual role.

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

The above approach is satisfactory for a defined period of time.

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.

Judicial training alongside the reform of the *guardian ad litem* is necessary. (Detailed above).

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

The guidelines implemented in 2009 relating to the appointment of a GAL may be of considerable use in establishing the necessary criteria to ensure only suitable people are appointed. The role of the GAL is set out as to 'independently establish the wishes, feelings and interests of the child and present them to the court with recommendations. This represents a dual role of a) informing the court of the child's wishes and feelings, b) advising on the child's best interests.[49] The eligibility for appointment as a GAL includes; vetting by Gardaí, a self-declared statement of fitness to practice every three years, suitable references, a third level qualification in social work, psychology or another third level qualification relevant to the role, knowledge and experience of the courts system, well developed inter-personal skills and at least five years postgrad experience of working directly in child welfare/protection systems.[50]

Similarly, these guidelines may be of use in establishing when to appoint a child representative, taking into account; 'the complexity of the case, the ability of the child concerned to express wishes and feelings and the nature of the proceedings and the implications for the child'.[51] While these guidelines are of use in establishing when a representative can be appointed, they are not exhaustive and leave a great deal of discretion to the judge.

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

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[49] Children Acts Advisory Board *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* (Dublin: May 2009) < http://www.caab.ie/Publications/PDFs---Publications/Giving-a-Voice-to-Childrens-Wishes,-Feelings-and-I.aspx> (Date Accessed: 2nd November, 2015) at 1.1.

[50] *ibid* at 1.3.2

[51] *ibid* at 1.3.3.

In the Irish context, the current absence of 'a training programme aimed at equipping professionals who are representing children…has the potential to seriously limit'[52] the extent of child participation. Clear and precise qualification and training requirements for the representative must be outlined before the current arrangement can be successful. Thus, it is key that specialised courses are put in place along with CPD requirements. Further to this, judicial training must be implemented alongside any changes to the current system to allow the greatest level of compliance with and increase understanding of reform measures in court. The system must be monitored and assessed regularly with great importance placed on Ireland's international obligations as per the CRC and developments at a regional level.

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.

The decision to introduce an 'expert' in private family law by the Children and Family Relationships Act 2015 while a *guardian ad litem* continues to work in child care proceedings will lead to a lack of clarity. The opportunity could be taken to merge the two roles into one, provided that the necessary training for each role is encompassed in a specialised training programme.

[52] Parkes (2013) at 118.