# Consultation Paper by the Department of Children and Youth Affairs on preparing a Policy Approach to Reform of Guardian *ad Litem* Arrangements in Proceedings under the Child Care Act 1991

## Observations from the Ombudsman for Children's Office

**November 2015**

## 1. Ombudsman for Children's Office

Established in 2004 under the Ombudsman for Children Act 2002, the Ombudsman for Children's Office (OCO) is an independent statutory body with an overall mandate to promote and monitor the rights and welfare of children under eighteen years of age living in Ireland.

The Ombudsman for Children welcomes the current initiative of the Department of Children and Youth Affairs (DCYA) to prepare a policy approach to the reform of guardian *ad litem* (GAL) arrangements in proceedings under the Child Care Act 1991.

The Office has prepared its observations on the DCYA's Consultation Paper in light of the Ombudsman for Children's statutory functions under section 7 of the 2002 Act to:

- advise on the development and coordination of policy relation to children (7(1)(a));
- encourage public bodies to develop policies, practices and procedures designed to promote the rights and welfare of children (7(1)(b)); *and*
- provide advice on any matter relating to the rights and welfare of children (7(4)).

In preparing its observations, the Office has been mindful of the intensely serious and sensitive nature of child care proceedings. The children affected by such proceedings can be extremely vulnerable; the proceedings themselves can be long, complex and adversarial; and decisions arising from child care proceedings can have profound and lasting implications.

The Office appreciates that guardians *ad litem* are court-appointed and can provide a valuable service to the courts in child care proceedings. However, the Office is of the view that the policy approach to reform of guardian *ad litem* arrangements under the 1991 Act needs to be underpinned by a recognition of guardians *ad litem* as being primarily a service for children, where this service is a vital mechanism for promoting the rights of children in the context of care proceedings affecting them. While the DCYA's initiative in seeking to advance reform in this sensitive and complex area is welcome, it appears to the Office that elements of the policy approach currently being contemplated may be fashioned by an understanding of guardians *ad litem* as being first and foremost a service to the courts. Taking into account Article 42A of the Constitution and Ireland's international obligations to children under the UN Convention on the Rights of the Child (UNCRC), the Office's observations on the Consultation Paper propose a number of areas in which the proposed policy approach to reform of guardian *ad litem* arrangements might usefully be recalibrated or otherwise reconsidered in order to provide more fully for a child rights-based approach to reform. In accordance with the Ombudsman for Children's statutory mandate and functions, these observations are made in the interests of ensuring that the rights of children affected by care proceedings under the 1991 Act are appropriately considered, promoted and safeguarded.

## 2. Establishing a national Guardian *Ad Litem* Service

The Office welcomes the proposal to establish a unitary guardian *ad litem* service that is nationally managed and available in all child care proceedings under Parts IV, IVA and VI of the Child Care Act 1991.

The statutory principles and policies underpinning the new service will necessarily influence the extent to which the new service can be managed and delivered as an effective, credible mechanism for promoting the rights and welfare of children affected by care proceedings under the 1991 Act. The Office is of the view that the principles and policies must provide for a service that is:

- child-centred and child rights-based;
- independent;
- accessible in principle to any child affected by care proceedings under the 1991 Act;
- accountable;
- transparent; *and*
- sustainable.

The Office notes the alternative approaches to establishing a national service that are highlighted in the DCYA's Consultation Paper and the attendant point made as regards current policy being oriented towards greater streamlining of the number of existing public bodies.[1] While appreciating that a public service must be appropriately resourced if it is to be effective and sustainable and that public expenditure on any public service needs to be proportionate, the Office considers that an optimal approach to establishing a national guardian *ad litem* service that can function in accordance with the above criteria would be to establish an independent statutory body. As such, the OCO would urge further consideration to be given to whether and how such an approach might be rendered practicable.

In the event that it can be demonstrated that this approach is not practicable at the current time, the Office would encourage the DCYA to keep the matter under review and to work proactively towards the establishment of such a body in due course. If an alternative approach is required in the first instance, the Office believes that the options available need to be evaluated against the above criteria with a view to ensuring that the service, once established, can operate effectively in accordance with these criteria.

In this regard, and in line with its view that guardians *ad litem* should be understood primarily as providing a service to children and as a key mechanism for promoting children's rights in care proceedings under the 1991 Act, the Office believes that it would be preferable to position the service within the area of 'children' rather than the area of 'justice' and that doing so would support the development of a child-centred and child rights-based national service.

In relation to the principle of independence, the Office notes that it is not envisaged that the Child and Family Agency (Tusla) will "exercise any oversight, governance or like responsibilities regarding

[1] *Consultation Paper*, at p.4.

discharge by guardians *ad litem* of their responsibilities". However, the DCYA is contemplating that the Agency may remain involved for the purposes of "disbursing payments" and that any such role in "fee transactions" would be between the Agency and the national service provider.[2] On this matter, the Office is of the view that the Agency should not have any role and recommends that both funding of the national service and payment of guardians *ad litem* should be from an independent governmental source (see also section 5 below).

## 3. Appointment of guardian *ad litem*

The DCYA's Consultation Paper envisages that "legislation would offer guidance indicating circumstances for appointment of a guardian *ad litem*" in child care proceedings under the 1991 Act. It is proposed that such statutory guidance, while continuing to afford the court "a broad margin of discretion", would "indicate that appointment should be considered in all proceedings" under Part IV, IVA and VI of the 1991 Act and in particular in certain specified circumstances.[3] Moreover, in setting out the statutory principles and policies that it is proposed will underpin reformed guardian *ad litem* arrangements, the Consultation Paper indicates that the aim of these principles and policies will be to ensure that children's rights under Article 42A and the UNCRC are promoted, but also that the service will be "accessible to any child who is capable of forming his or her own views or who is otherwise deemed by a court to be in need of it."[4]

In light of Articles 42A.4.1° and 42A.4.2° of the Constitution and Articles 3 and 12 of the UNCRC, and taking into account the vulnerability of children affected by care proceedings as well as the complexity and serious implications of such proceedings, the Office believes that a guardian *ad litem* must be accessible in principle and as a matter of right to any child affected by care proceedings under the 1991 Act.

In this respect, the Office is concerned that the current Consultation Paper appears to frame the appointment of guardians *ad litem* in a way that is more discretionary and prescriptive than either Article 42A.4 or Articles 3 and 12 of UNCRC contemplate. This is not to suggest that a guardian *ad litem* should automatically be appointed in every case. However, the Office is of the view that there should be a presumption in favour of appointment in order to mitigate against variations in the practice of appointing guardians *ad litem* in child care proceedings[5] in a manner that is more fully aligned with Article 42A.4 and the UNCRC.[6] In this regard, the Office considers that case-by-case decision-making regarding the appointment of a guardian *ad litem* in care proceedings should ultimately be driven by two considerations:

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[2] *Consultation Paper*, at p.9.
[3] *Consultation Paper*, at p.4f.
[4] *Consultation Paper*, at p.3.
[5] McQuillan, Bilson and White, *Review of the Guardian Ad Litem Service: Final Report from Capita Consulting Ireland, in association with the Nuffield Institute for Health* (Dublin: National Children's Office, 2004), at p.36; Coulter, C, *Second Interim Report, Child Care Law Reporting Project* (November 2014), at p.20.
[6] In this regard, it may be beneficial to give further consideration to the approach provided for by Section 41(1) of the Children Act 1989 in England and Wales, whereby a court must appoint a guardian for a child in care proceedings "unless satisfied that it is not necessary to do so in order to safeguard his interests."

- the need to ensure that the views of any child who is capable of forming his/her own views and wishes to express his/her views are ascertained; *and*
- the need to ensure that the best interests of the child are treated as the paramount consideration.

Furthermore, the Office would suggest that in any case where a court decides not to appoint a guardian *ad litem*, it should be required to give reasons for its decision.

## 4. Children as party to proceedings

In its advice on the General Scheme of the Children and Family Relationships Bill 2014, the Office noted in respect of family law proceedings that guardians *ad litem* and legal representatives have different roles and contribute to proceedings in different ways.[7] Given that this is also the case in care proceedings and the seriousness and complexity of such proceedings, it would appear prudent to amend the 1991 Act to allow for the opportunity for a child to benefit from his/her own legal representative and a guardian *ad litem* at the same time. In the context of further developing its proposals in this regard, the DCYA may wish to give further consideration to the approach provided for under the Children Act 1989 in England and Wales, whereby in cases where a child instructs a legal representative directly, the guardian *ad litem* continues to be involved in the proceedings to represent the child's best interests.

The matter of children being made party to care proceedings affecting them appears to be addressed in the DCYA's Consultation Paper solely with reference to the consideration being given to the possibility of a child being able to have his/her own legal representation and a guardian *ad litem* at the same time. As the DCYA will be aware, the issue of party status for the child is of very considerable significance in light of the procedural rights that having party status entails. Given that the child's right to fair procedures and representation have been confirmed,[8] the complex and sometimes intensely adversarial nature of care proceedings, and the profound implications of such proceedings for the children affected by them, the Office encourages the DCYA to give further attention to the issue of party status for the child. Taking into account that it is rare for a child to be represented directly in care proceedings and the limited circumstances in which it may be appropriate for legal representation to act directly for children, particular consideration in this regard should be given to the question of the child becoming a party to care proceedings affecting him/her through the appointment of a guardian *ad litem*.[9]

[7] *Advice of the Ombudsman for Children on the General Scheme of the Children and Family Relationships Bill 2014* (Dublin: Ombudsman for Children's Office, May 2014), at p.35, para. 5.19.
[8] For example, see High Court, [2004] IEHC 151 and Supreme Court, [2015] IESC 64.
[9] For a concise analysis of and children's rights perspective on these issues, see Barrington, B., 'Child Care Law' in *Making Rights Real for Children: A Children's Rights Audit of Irish Law* (Dublin: Children's Rights Alliance & Law Centre for Children and Young People, 2015), pp.188-209, in particular pp.195-203.

## 5. Guardians *ad litem*: status, role, powers and duties, legal representation, qualifications

The Office is of the view that the status, role, powers and duties of the guardian *ad litem* need to be clearly defined in law and regulations, as appropriate. Doing so will assist with providing for consistency of practice and decision-making by promoting a shared understanding of the status and role, and corresponding powers and duties, of guardians *ad litem* among all key actors and stakeholders in care proceedings affecting children, including GALs themselves.

The DCYA's consultation paper indicates that consideration is being given to defining the status of the guardian *ad litem* as "a court-appointed adviser to assist the court's determination of the application under the 1991 Act through the provision to it of information, assessment, analysis and recommendations relating to the views and best interests of the child."[10]

It would appear, therefore, that the prospective status of the guardian *ad litem* under consideration is underpinned by an understanding of GALs as providing first and foremost a service to the courts rather than to children. As indicated in the introduction, the Office considers that, notwithstanding the fact that guardians *ad litem* are court-appointed, they need to be understood primarily as providing a service to children, where this service is a mechanism for promoting the rights of children in the context of care proceedings under the 1991 Act, in accordance with Articles 42A.4.1° and Article 42A.4.2° of the Constitution and in light of relevant provisions of the UNCRC, including Articles 3 and 12. Accordingly, the Office is of the view that the status of the guardian *ad litem* as currently envisaged in the consultation paper needs to be reconsidered.

In proposing that the status of the GAL could be that of a court-appointed adviser rather than a representative of the child, the DCYA's consultation paper would appear to elide the ambiguity that may currently exist in law as regards whether or not a child is a party to proceedings via the appointment of a guardian *ad litem* under Section 26 of the 1991 Act.[11] In this regard, the Office understands that two cases are currently being litigated in order to establish that a child is a party to proceedings through a guardian *ad litem*. It would be prudent, therefore, for the DCYA to await the outcome of the judicial review process and clarification of the law in light of Article 42A before proceeding with the current proposals.

As regards the role of GALs, the Office considers that the primary role of a guardian *ad litem* should be to represent the child by ascertaining and informing the court of the views of the child and by recommending to the court what course of action s/he believes would be in the best interests of the child, thereby supporting the court to make a decision that upholds the rights and welfare of the child.

For the purposes of providing for an appropriate definition of the role of guardians *ad litem*, it is important to bear in mind that, in addition to being substantive rights of the child, the best interests principle and the principle of hearing and taking due account of children's views are procedural rules, which are central to the realisation of children's other rights. Moreover, these principles need

[10] *Consultation Paper*, at p.7.
[11] Barrington, Op. cit. at p.200f.

to be understood as interrelated, whereby a determination of what is in a child's best interests must incorporate a consideration of the child's views in any case where a child has the capacity to form his/her own views and wishes to express his/her views. In this regard, it is worth noting the following comment by the UN Committee on the Rights of the Child on the relationship between Article 3 and Article 12 of the UNCRC:

> "There is no tension between articles 3 and 12, only a complementary role of the two general principles; one establishes the objective of achieving the best interests of the child and the other provides the methodology for reaching the goal of hearing either the child or children. *In fact, there can be no correct application of article 3 if the components of article 12 are not respected*. Likewise, article 3 reinforces the functionality of article 12, facilitating the essential role of children in all decisions affecting their lives."[12] *[emphasis added]*

This point is reiterated by the UN Committee through its observations in relation to care proceedings affecting children in its General Comment on Article 12 of the UNCRC:

> "Whenever a decision is taken to remove as a child from her or his family because the child is a victim of abuse or neglect within his or her home, *the view of the child must be taken into account in order to determine the best interests of the child.* …
>
> The Committee's experience is that the child's right to be heard is not always taken into account by State Parties. The Committee recommends that State parties ensure through legislation, regulation and policy directives, that the child's views are solicited and considered, including [in] decisions regarding placement in foster care or homes, development of care plans and their review, and visits with parents and family."[13] *[emphasis added]*

Furthermore, in its recommendations following examination of Ireland's second periodic report on implementation of the UNCRC, the UN Committee included a recommendation, which specifically references guardians *ad litem* as a mechanism for hearing the views of the child in the context of care proceedings:

> "In the light of article 12 of the Convention, the Committee recommends that the State party …[e]nsure that children are provided with the opportunity to be heard in any judicial and administrative proceedings affecting them, and that due weight is given to those views in accordance with the age and maturity of the child, including the use of independent representations (*guardian ad litem*) provided for under the Child Care Act of 1991, in particular in cases where children are separated from their parents".[14]

[12] UN Committee on the Rights of the Child, *General Comment No. 12 (2009): The right of the child to be heard* UN doc. CRC/C/GC/12, at p.15, para. 74.
[13] UN Committee on the Rights of the Child, *General Comment No. 12 (2009): The right of the child to be heard* UN doc. CRC/C/GC/12, at p.13, paras. 53-54.
[14] UN Committee on the Rights of the Child, *Concluding Observations on the Second Periodic Report of Ireland* CRC/C/IRL/CO/2 (29 September 2006), at para. 25(b).

In proposing that the role of a guardian *ad litem* should be to ascertain and inform the court of the views of the child and to recommend to the court what course of action would be in the best interests of the child, the Office is mindful that there may be cases where a GAL could make recommendations to the court on what would be in the best interests of the child, but could be precluded from ascertaining and informing the court of the child's views due to the child not having the capacity to form his/her own views or not wishing to express his/her views. These impediments to a GAL ascertaining and informing the court of a child's views should not preclude him/her from being appointed to recommend to the court what would be in the child's best interests. In this regard, the role of guardians *ad litem* might be framed as being to represent the child by recommending to the court what would be in the best interests of the child ***and*** by ascertaining and informing the court of the child's views, unless a child does not have the capacity to form a view or does not wish to express his/her views.

The powers and duties of the guardian *ad litem* will need to be clearly specified, with care taken to ensure that such powers and duties are consistent with the GAL's status and role and enable guardians *ad litem* to act as an effective mechanism for promoting children's right to have their best interests treated as a paramount consideration and to have their views heard and taken into account in the context of care proceedings affecting them.

In order that a guardian *ad litem* can act effectively for a child, it is essential that his/her independence is safeguarded. In this regard, the Office notes the following:

- While acknowledging the independence of guardians *ad litem*, the DCYA's Consultation Paper indicates that it is being contemplated that, *inter alia*, the guardian *ad litem* "would adopt an enabling approach to clarifying misunderstandings that may exist … with parties to the proceedings" in respect of the best interests of the child. The Office appreciates that the DCYA is not envisaging a "mediation role in any formal sense" for guardians *ad litem* and that it has emphasised that any role which a guardian *ad litem* might have as regards "increasing mutual understanding" would be "[s]ubject to the paramount consideration of promoting the best interests of the child".[15] Mindful of the challenges that may be entailed in delivering such an approach in the context of an adversarial system, the Office is concerned that there may be circumstances where contributing to this approach could compromise or otherwise dilute the GAL's primary role and duties in respect of the best interests and views of the child. Moreover, it is unclear from the current Consultation Paper what roles are envisaged for other actors in implementing this approach. The Office would therefore encourage further consideration to be given to this matter.

- With reference to the current role of the Child and Family Agency under the 1991 Act as regards payment of costs to guardians *ad litem*, the DCYA's Consultation Paper indicates that "the reforms to be introduced would involve no greater role for the Agency and would have the intended effect of mitigating any perceived conflict of interest relating to any role that may remain for the Agency in disbursing payments." The Consultation Paper further states

[15] *Consultation Paper*, at pp.5-7.

that any prospective "role in fee transactions that may remain for the Agency would be between it and the national service provider", whereby it is envisaged that the national service provider would be responsible for engagement with the individual guardian *ad litem* on such matters.[16] In the context of its advice on the Child Care (Amendment) Bill 2009, the Office expressed concern that "[i]n so far as it is possible that there may be a conflict between what is sought by the HSE in the course of care proceedings and what is recommended by a guardian *ad litem*, the independence of the guardian could potentially be undermined by the fact that his or her costs are also being paid by the HSE".[17] While appreciating that the DCYA's current proposals envisage introducing reforms that would mitigate against the risk of any perceived conflict of interest in this regard, the Office is of the view that the Agency should not have any role in such fee transactions and that guardians *ad litem* working in the context of a new national service should be paid from an independent governmental source.

- In relation to the matter of legal representation for guardians *ad litem*, the Office notes the the breakdown of the public expenditure on guardians *ad litem* in 2014[18] and understands the DCYA's interest in ensuring that expenditure on legal advice /representation for GALs is necessary. In this regard, one measure that the DCYA may wish to explore for the purposes of partially addressing this issue is the inclusion within the core staff of a new national service of a small number of suitably qualified legal professionals to provide legal advice to guardians *ad litem*. In seeking to delineate parameters and procedures that have the purpose of establishing the necessity for a guardian *ad litem* to have access to legal advice/representation, it will be essential to ensure that such parameters and procedures appropriately respect the independence of guardians *ad litem*[19] and in no way inhibit the capacity of a guardian *ad litem* to discharge his/her role effectively in respect of the best interests and views of the child. In this regard, the proposal to provide for a guardian *ad litem* to have access to legal advice/representation "as an exceptional matter" might usefully be investigated further in the interests of mitigating against any risk that any child in any care proceedings affecting him/her could be disadvantaged as a result of his/her guardian *ad litem* not having access to legal advice/representation.

## 6. Other matters

**A) Guardian *ad litem* qualifications and eligibility for appointment**

The DCYA's Consultation Paper indicates that a qualification in social work with a minimum of three years postgraduate direct experience in a child-related area "would be among professional requirements for appointment as a guardian *ad litem*". Consideration is also being given to "including other relevant professional disciplines for the purposes of eligibility for appointment",

[16] *Consultation Paper,* at p.9.
[17] *Advice of the Ombudsman for Children on the Child Care (Amendment) Bill 2009* (Dublin: Ombudsman for Children's Office, 2010), at p.10.
[18] *Consultation Paper*, at p.10.
[19] See *Advice of the Ombudsman for Children on the Child Care (Amendment) Bill 2009* (Dublin: Ombudsman for Children's Office, 2010), at p.10, para.3.11.

with third-level qualifications in social care or psychology being contemplated in this regard.[20] The Office appreciates that suitably qualified and experienced social work professionals may be well placed to fulfil the role of a guardian *ad litem*. Taking into account, however, that any professional should have the benefit of dedicated initial and continued professional development training in order to act effectively as a guardian *ad litem*, the Office is of the view that the parameters in respect of the professional disciplines which could be eligible for appointment should not be unduly narrow or limited. In this regard, the Office suggests that further consideration be given to the merits of providing for the development of a more holistic, inter-disciplinary guardian *ad litem* service. Such an approach would mitigate against the risk of the new national service and guardian *ad litem* practice being fashioned by the ethos and practices of one profession and anticipate any potential over reliance by a new national service on former Tusla social workers to work as GALs.

A related matter that requires consideration for the purposes of providing for the development and delivery of a high quality guardian *ad litem* service concerns performance management of GALs. Given the challenges entailed in addressing this matter, including the fact that guardians *ad litem* are court-appointed, it is desirable for a performance management and quality assurance mechanism to be delineated in the context of the DCYA's current work to develop a policy approach to the reform of guardian *ad litem* arrangements.

As regards garda vetting and clearance, it will be necessary to ensure that, once finalised and agreed, the requirements are practicable, i.e. that they can be operationalised without delay. Similarly, in respect of transitional arrangements, decision-making on eligibility criteria for persons to act as GALs will need to consider both what is appropriate *and* practicable. By way of example, it may be prudent to take into account factors such as maternity leave and extended sick leave when deciding on requirements regarding the number of occasions on which a person must have been appointed and acted as a guardian *ad litem* within a specified timeframe.

**B) Provision of a guardian *ad litem* report to the child**

In its advice on the General Scheme of the Children and Family Relationships Bill 2014, the Office welcomed the proposal at that time to allow for the capacity of the courts to provide welfare reports to children affected by proceedings under the legislation, subject to the safeguards outlined in the General Scheme.[21] The OCO notes that these safeguards are retained under section 63(5) of the Children and Family Relationships Act 2015. The Office welcomes the proposal contained in the DCYA's draft consultation paper to address the matter of a child's entitlement to receive a copy of his/her guardian *ad litem's* report in the legislation and considers that any such provision might usefully be modelled on section 63(5) of the 2015 Act, taking into account, as necessary and appropriate, the particular circumstances of care proceedings affecting children. The OCO suggests that in framing such a provision, an important consideration will be to ensure that children are appropriately supported to understand the information contained in such a report.

[20] *Consultation Paper*, at p.7.

[21] *Advice of the Ombudsman for Children on the General Scheme of the Children and Family Relationships Bill 2014* (Dublin: Ombudsman for Children's Office, 2014) at pp.35f, paras. 5.24-5.25.

**C) Publication of information by the Minister**

The Office notes that the DCYA envisages that the legislation would provide for the Minister to obtain from the national service provider and make public aggregate, non-identifying information regarding the management and delivery of guardian *ad litem* services.[22] In this regard, the Office is of the view that the type(s) of information which can be obtained and made public about the management and delivery of the service should be that which is *necessary* in order to support accountability and transparency of the service as well as the identification of improvements that might be made to the management and delivery of guardian *ad litem* services. In determining which type(s) of information to obtain and make public, as well as how and when this information should be obtained and made public, it will be essential to preclude the risk that any individual child could be identified, either directly or indirectly.

**D) Regulations by the Minister**

In its advice on the Child Care (Amendment) Bill 2009, the Office expressed concern about guardians *ad litem* operating in an unregulated environment in the arena of child care proceedings. The OCO proposed at the time that consideration should be given to establishing a regulatory framework for guardians *ad litem* that, among other things, would monitor the operation of the system over time.[23] It will be important that the new national guardian *ad litem* service is monitored and evaluated so that its effectiveness can be measured. The Office is of the view that it would be judicious for regulations by the Minister in relation to the new service to include the matter of monitoring the management and operation of the new service.

In its more recent advice on the General Scheme of the Children and Family Relationships Bill 2014, the OCO welcomed explicit provision in the General Scheme for the Minister for Justice and Equality to make regulations in relation to a range of matters concerning guardians *ad litem*. In this context, the Office proposed that it would be advantageous for the Minister to prepare draft regulations during the course of the Bill's passage through the Houses of the Oireachtas in order to inform the debate on the legislation and allow greater precision in the analysis of its impact.[24] The Office considers that a similar approach may also be merited in relation to regulations by the Minister concerning guardian *ad litem* services in care proceedings affecting children.

[22] *Consultation Paper*, at p.9.

[23] *Advice of the Ombudsman for Children on the Child Care (Amendment) Bill 2009* (Dublin: Ombudsman for Children's Office, 2010), at p.10f, paras. 3.11 and 3.13.

[24] *Advice of the Ombudsman for Children on the General Scheme of the Children and Family Relationships Bill 2014* (Dublin: Ombudsman for Children's Office, May 2014), at p.34f, paras. 5.17-5.18.