Gallagher Shatter

Solicitors

Your ref. Our Ref.

Mr. Colm Keenan,
Principal Officer
Department of Children and Youth Affairs,
43, Mespil Road,
Dublin 4.

13th November, 2015

Re: Consultation paper on reform of Guardian *ad litem* arrangements under the 1991 Child Care Act (as amended)

Dear Mr. Keenan.

I firstly wish to say that I very much welcome the issuing of a consultation document and in particular, appreciate that you have forwarded a copy giving me the opportunity to respond directly.

Before I address the questions specifically set out in the document, I would firstly like to make a few general points.

Fundamentally I believe that the document should be re-constituted to look at the child's perspective.

In the first instance it is notable that the legal context in which this debate is being had, has substantially changed from the last time the issue was visited in draft legislation. There is now, as a result of the hard work done both by the previous Minister for Children and also your own Department, a changed constitutional context, with additional rights for children and additional obligations for the State in terms of vindicating those rights. Thus any changes regarding their representation must be made in compliance with these welcome enhanced rights and responsibilities.

The whole premise of any proposal for development of a structured guardian *ad litem* (hereafter GAL) service, must begin by working out how best to vindicate the child's rights in proceedings. Then, just as in any other circumstances where a citizen's constitutional rights are being curtailed; the citizen is entitled to active and constitutionally compliant consideration of that fact. This includes determination of what

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part of what right is being limited, how and why that is being done and there must a rigorous and accountable process, with due regard to the child's constitutional entitlements, in addition to the State's obligations. In other words, in my view the proposal is back to front.

The starting point must be identification of the child's constitutional rights and how they will be vindicated, rather than how the role of their now representative can be limited. These are entirely different premises on which to have a debate and I would respectfully suggest that the latter is not only more appropriate, but is the only way in which any system can have a sound constitutional basis.

It is clear that the document is about better organisation of the present system, rather than starting afresh in developing a best practice system of representation for children. I believe the question of how to achieve the best result possible for the child, has to be addressed before any framework can be constructed. I have always acted on the basis that I represent the child through their GAL. The GAL envisaged in the document clearly has a very different role. If this shift occurs, I think it will inevitably give rise to the construction of some other form of robust representation for the child (not just legal). The question arises, in order to ensure vindication of the child's right to effective participation; if the GAL is not to be the advocate for the child, then who or what will be; and how or can that fit with the model of GAL as proposed.

It is my view that the document reflects the debate had in 2010/2011, regarding the role of the guardian *ad litem*, in the context of the Child Care (Amendment) Act, 2011. Some of the measures currently proposed – for example in relation to legal representation, were proposed at that time, but withdrawn. In a sense it could be said that unless a parallel system of representation is intended, that the thinking in this document is out of date. It provides for the continuation of a debate, already parked and without due acknowledgement to the passing of the children's rights referendum and the changed context under Article 42A.

There is no doubt but that the current system is not fit for purpose and reform and regulation are very much welcomed. Children are entitled to the highest standards. There is both scope and an obligation, in the context of the new Article 42A to set up a system that will facilitate vindication of children's rights to have their best interests considered as paramount and meaningfully give them a voice in proceedings. In order to do this, I believe we need to stand back and re-evaluate the entire system.

There is both an ethical and legal obligation on us to create a system which is the gold standard for vindication of children's rights. Anything less is a statement that the passing of the referendum was itself the end and not the change it legal entails. In fairness I do not think the document sets out to do this deliberately, but I cannot stress enough, that there is not sufficient recognition that the proposal presents a radical interference with and curtailment of, substantial constitutional rights of the child. These include not only the right to be heard and have their best interests determined as paramount, but also their right to representation (both by GAL and lawyers) and ultimately their fair procedure rights.

Worryingly for me, there is no acknowledgement in the proposal that it is the child's right to representation that is being discussed. It must be must appreciated that any attempt to interfere with or limit the rights of vulnerable children at a particularly vulnerable time for them; must have a basis in law and must be proportionate. Given that the proposal puts children at a clear disadvantage in respect of the other parties, it would be very hard indeed in my view to argue that what is proposed is constitutional.

The model raises very serious questions regarding access to justice and equality before the law, for children. In my view, it also raises serious ethical, constitutional and practical difficulties for both representation for and representatives of children in proceedings - some of which will be addressed in greater detail later on. The very fact there are criteria the child must satisfy to achieve implementation of basic constitutional rights that others do not, automatically places the child in a lesser position.

I do not propose to recite in detail Article 42A, the UNCRC, the D.K. judgment or European Convention, as I know those working on this document are already familiar with all of these. However I think at this stage, it is worth re-stating the following from the decision of Mr. Justice Mac Menamin in the case of CFA v O.A. [2015 IESC 52], at paragraph 3, where he sets out the constitutional rights involved in child care cases.

> *"Among these are, first, a child's right to have decisions made with his or her welfare as a paramount consideration; second, the rights of both parents...and of children themselves, to be properly represented in proceedings where the outcome can be truly life-changing for all concerned".*

The decision was written before the enactment of Article 42A, which raises further the status of the child in the proceedings 42A.4.1

> *"Provision shall be made by law that in the resolution of all proceedings....the best interests of the child shall be* ***the*** *paramount consideration" [emphasis added]*

There a numerous superior court judgments which identified even before the enactment of Article 42A, that the child has rights as a citizen in their own right, starting with the seminal case of G v An Bord Uchtala. I do not propose to go through the case law, but it is clear that the child has a series of rights which require the strongest protection available.

Key for ventilation and vindication of the child's rights, is the appointment of an advocate for them in proceedings. The diminishing of the role of the GAL, is confusing in light of the heightened constitutional obligations since Article 42A was enacted. As the child must have their right to effective participation vindicated, they must have access to someone who will be able to advocate for them.

THE PROPOSAL:

Principles and Policies:

The starting point must be that a rights based service must be established for children. It is a strange position to adopt whereby a court would effectively have the benefit of a service that child would not. This should be the other way around as the likelihood of achieving even a vicarious benefit to the child in the current proposal is questionable.

If the Department accepts – as I think it must - the child is entitled (in its broadest sense) to be represented in proceedings, then it must be accepted that enactment of this proposal in its current form would be incompatible with the State's constitutional obligations to the child.

Establishing a nationally organised, managed and delivered service:

I think that the first is the best approach. The organisation must operate a rights based system. Importantly it would provide a fresh start.

Expertise from an established body should be utilised. This includes mandatory supervision and C.P.D. with clear and established policies and procedures for example on data protection, however any model will have to re-worked to reflect the principles above.

Key to the new entity in terms of successful establishment and sustainable operation, will be its ability to advocate for children and in a sense to advocate for itself – particularly in terms of ensuring from government it has adequate resources to enable it to operate effectively.

Children who are made a party to proceedings

At the moment there is a marked division on the approach to be taken regarding s. 25. I have concerns about current use of this. For example, a child who had been in care and was sent home on foot of a bad decision. When siblings came back into care in distressing circumstances, one child was made a party to proceedings by the Judge who made the original order against the recommendation of the child's then GAL. The child had to sit in court with the parent (represented by both solicitor and counsel), alleged to have caused the child harm. The child did have the benefit of a solicitor, but we are not, as a profession, qualified to assess what is in a child's best interests.

Appointments in such circumstances will hinder if not preclude entirely meaningful participation. In cases such as this where the Judge clearly made an error in the first place, it should be even more worrying that such responsibility was put on the child where the Judge chose not to re-appoint the professional who had strongly and correctly advocated a contrary position on the child's behalf.

There may be very limited circumstances in which this is the best approach for a particular child, but it is suggested they would be very limited indeed and would require very careful consideration, with a number of stringent checks and balances put in place.

Appointment of guardian *ad litem*

The only way to properly vindicate the rights of vulnerable children that is consistent

with Article 42A, is to ensure that each child is appointed a GAL where a judicial decision is being made about their future. If not there will be no reality to any accountability if a Judge is making a bad decision, as no-one would even be there to advocate for the child and it may suit both the CFA and parents not to have the child represented.

To discriminate against children who are not in secure care, fails to recognise the global applicability of Article 42A and again in my view is highly unlikely to be constitutionally compliant.

The creation of tests, as set out, in reality constitute hurdles which inevitably hinder vindication of a child's rights.

I have been involved in cases, where children have been left at home in circumstances where they clearly should not have been. A parent may have convictions for sexual abuse of other children and their own are presenting with worrying signs that this may also have happened to them. A new social worker may be appointed who wishes to make applications for ICO's due to concerns, but the Agency may be concerned about the fact action was not taken sooner and the court may not be given the full picture. Unless the court has access to full social work file, minutes of meeting etc, a judge is simply not in a position to know the full history and in any event is not in a position to identify and analyse the complexity of it.

Equally regarding disputes over care plan, the only party who could raise this is the parent.

Role of guardian *ad litem*

The role of the GAL must be to represent the child, not advise the court. Essentially the GAL must be accountable to the child and not the court.

The role as envisaged on page 5 can be summarised as follows:

1. Ascertain the views of the child, as far as practicable...and inform the court of same

2. Provide the court with the answers to any specific questions it *[presumably the court]* has raised etc
3. Provide the court with such assessment and analysis of the child's situation as it *[again presumably the court]* requests etc
4. Formulate and present recommendations to the court as to the course of action **generally available** etc [emphasis added]

The result of a GAL's role as reflected above, will be to give statutory power to a district court judge to limit and even deprive the child of their rights in circumstances where there is no accountability and on occasion odd views among a small few in the judiciary hearing these cases. No other party to proceedings has their rights – and in particular – fair procedure rights, limited in this way.

In relation to mediation, while it should always be the case that professionals operate in a non-adversarial manner, there are very real dangers attached to the notion we can mediate our way out of child protection concerns. This again is something which has gained traction among certain members of the judiciary, but in my view represents in all but the most exceptional of cases, a misunderstanding of the dynamics involved in child protection cases. One of the obvious difficulty arises in that again, there is no-one there to mediate on the child's behalf.

This is not to say the GAL is entitled to operate in a hostile manner to either professionals or parents, and just because we have an adversarial courts system, in reality does not licence hostility, nor does it permit professionals to be unnecessarily difficult.

Status of the Guardian *ad litem*:

The correct question here should be - what is the status of the child? The child must enjoy at the very least the same rights as others, with the added protection of their best interests being paramount. Status in proceedings matter. Not to allow the child to be a party through their GAL, is fundamentally unfair and can have devastating consequences for children and I refer back to the O.A. decision. and the applicability of the constitutional status and intimate connection tests. The child must have the ability to test evidence, bring evidence, make legal submissions, bring applications and appeals; and in general, enjoy the same rights as others.

I have been involved in cases where the ability to do the above has proved crucial to protecting a child from harm. This has arisen in a number of situations. Often not only Judges, but sometimes social workers have difficulty in accepting that mothers perpetrate sexual abuse. Because it is in a sense, seen as the ultimate taboo, sometimes such abuse is not identified, categorised or acted upon or used as a ground for an ICO/FCO application. In one such case the GAL had an extremely difficult time indeed in trying to get others to see what she could. This had implications for access arrangements and in the course of an application brought by the GAL, evidence was elicited which grounded the GAL's concerns and access was stopped to allow the child avail of services including appropriate assessment. If the GAL was not allowed to do any of the items identified in the paragraph above, or if the child did not have a GAL, that child would still have unsupervised access with a mother who had sexually abused him/her.

The leading case on fair procedures is that of In Re Haughey[1] where what was at stake was Mr. Haughey's good name – no criminal sanction or civil liability could be imposed by the Oireachtas Committee. The Supreme Court outlined minimum protections which he should be afforded by the State, including being furnished with a copy of the evidence which reflected on his good name; allowed to have counsel cross-examine on his behalf, be allowed to give rebutting evidence and that he should be permitted to address the Committee through counsel in his own defence. Where the stakes are so much higher for children in child care proceedings, they simply must have access to these rights, which, it should be remembered inhere by virtue of Article 40 and are enhanced by the enactment of Article 42A.

It has been said that the CFA are advocates for the child but this cannot be the case. The CFA must consider resource implications of decision-making. There is no doubt but that while the social worker can advocate for the child, they cannot because of their constraints as part of the Agency, be the child's advocate.

Additionally, a parent would in the ordinary way, act as advocate for their child. However, the reality in child protection cases must be acknowledged, namely that these cases necessarily involve an assessment that children are suffering harm at the hands of those ordinarily charged with determining what is in their best interests. The result of this is that clearly the child cannot be reliant on their parents in these type of proceedings to progress what is in their best interests. This is particularly the case where parents are

[1] [1971] IR 217

trying to cover up what is happening and protect themselves from any prosecution. The very nature of these families is that they are closed and that children have very few people that they can trust. Experience has taught us that very often parents have turned their children against Social Work Departments or have made them so afraid of revealing anything, that they do not trust the Social Workers with any information or disclosures.

It may be said that the Court is in a position to determine what is in the child's best interests and in a sense this is the obvious requirement in terms of the Court making Orders or not. Clearly it would be completely inappropriate and constitutionally dubious for a court to assume the role of an advocate.

I find it difficult to reconcile the benefit accruing to the court in the proposed model and absence of benefit to the child, with the State's obligations under Article 42A.

Qualifications and Eligibility for appointment:

In my view the GAL should have at least 8 years PQE. They should have a social work qualification, with at least 7 years working consistently in the area of child protection and preferably with management experience. Practitioners need to have not only maturity, but also an in depth knowledge of systems and services, including child protection court applications. They need to be able to recognise difficult dynamics and understand them. They need to be able to identify risk, know strategies for dealing with same and understand and identify/or be able to identify who might identify; what type of services would best promote the child's best interests.

While I do not have a difficulty per say with looking at the discipline of psychology - that qualification is in and of itself, insufficient and the requirements above must also apply. I am extremely concerned at the proposal that a social care worker with 3 years PQE might be considered adequately qualified to become a GAL.

In terms of the exceptional transitional arrangements, this should apply to very few people. I have great difficulty with point 'b'. It is probably because of such a person's lack of qualification that they felt able to accept not less than 35 appointments in the last 2 years. This is extremely problematic. Clearly their time being so limited, they would not be able to do the key things they need to do, primarily build a relationship of trust with the child – which takes time; attend child in care reviews and professionals meetings, liaise with the social workers and other professionals, meet the parents, observe

access etc., you simply would not have time to do all of these things and the quality of representation for the child would suffer as a result. I would have substantial concerns about anyone who worked in this way.

The Garda vetting requirement is crucial.

Access to records, records management and information provision:

I revert to In re. Haughey and the child's entitlement to fair procedures. In addition it is crucial the GAL has access to all information relevant to informing and advocating for the child's best interests. This includes relevant case records, but also any external reports and other documentation. Essentially the GAL should have access to everything the CFA has.

The data protection measures proposed would be very much welcomed. In terms of public information. I think that the public are entitled to transparency.

Role of the Child and Family Agency & payment of guardian ad litem services:

The debate on the role of the GAL has undoubtedly been coloured by the argument that the costs of some guardians *ad litem* are taking away from services for children. As long as the CFA are liable for GAL costs, this will remain. There appears to be an incorrect view that it is the GAL's right to use money from the CFA for themselves as an entity, rather than the child. This is in my view, one of the greatest sources of confusion in the debate, in that it fails to recognise that it is the child's right to effective participation that requires to be vindicated. Indeed it is hard to see any circumstances in which this right could legitimately be curtailed or dispensed with. The rights at issue are both rights of the child. Setting up one right of the child against the other, is not appropriate. Both require recognition and vindication.

It also clearly the case that the CFA's obligation to fund representation for the child, on the face of it, creates a conflict of interest and unfortunately there have been times when this conflict has existed to the detriment of children. The child has a right to have their advocate appointed independently and on merit. They are also entitled to have confidence that their advocate will act in their best interests with no ties to any other party in the proceedings.

For or all of these reasons the CFA must have no role whatsoever in the new Agency.

Engagement of Legal Representation:

The O.A. decision as previously referred to, determined that a parent's right to be legally represented arose, 'not only by virtue of their constitutional status, but also because of their close and intimate connection to all child-welfare questions'. It is absolutely clear that the child must be entitled to legal representation. To do otherwise in my view would breach the fair procedure, equality and effective participation rights of the child.

It should be pointed out that some of the tests set out are very obviously unfair and I would go so far as to say they would act as a barrier to justice for the child.

It is hard to see why children are discriminated against in this way, given that no other party to proceedings has to jump through the hoops set out on page 10. If the Department accepts – as I think it should - that the GAL is the child's representative in proceedings, then in my view if this proposal were to be enacted in its current form, it would be incompatible with the State's constitutional obligations to the child.

There are substantial access to justice and equality issues arising from the proposal and like the appointment issue, the test is back to front. The presumption must be that the child is entitled to a GAL and a solicitor.

I should say that I do agree with the concerns over cost of legal services, I have written to HSE/CFA solicitors over the years in circumstances where I had concerns about unnecessary costs being generated by an overly adversarial approach. I also wrote to two Ministers setting out my concern at the failure to address the 8 day ICO issue, which I indicated at the time was driving up costs as cases were returnable on a weekly and not monthly basis. Failure to address that issue in a timely way led to the accruing of the substantial costs recorded for 2014. I operate on a policy of not using counsel, save where necessary. Thus even in the High Court, I have represented GAL's without counsel. However, as a practitioner, it is extremely important that I do have access to counsel when necessary on the child's behalf.

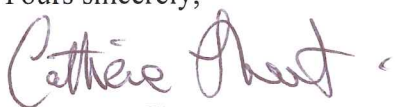
Regarding alternative or additional measures to support sustainability, transparency, accountability and value in the expenditure of public funds in this area, lawyers for the child, must be subject to the same scrutiny as CFA lawyers and legal aid board personnel.

CONCLUSION:

I hope this letter has been of some assistance. Ultimately I would suggest that what is required is the comprehensive identification of children's rights and needs in the context of child care proceedings. A template should then be constructed that is a best practice model for vindication of those rights. This particular document should be re-written with 'child' in mind.

At the crux of this is the fact that children, and in particular those who we know to be extremely vulnerable, are simply not in a position to vindicate their own rights and are dependent on the State to ensure others can achieve that on their behalf.

Yours sincerely,



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