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Mr Fergal Corcoran
Administrative Officer
Family Functioning and Children Rights Policy Unit
Department of Children and Youth Affairs
43 Mespil Road
Dublin 4

02 Nov 2015

Dear Mr Corcoran

RE: REFORM OF GUARDIAN AD LITEM SERVICES UNDER THE CHILD CARE ACT 1991

I refer to the above and ***enclose*** my submissions.

I would be happy to meet to discuss any issues arising from the enclosed paper, or any other matter pertaining to the proposed reforms.

Yours sincerely

Geraldine Keehan
AUGUSTUS CULLEN LAW

Submission for Consultation Paper

Consultation Questions

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

It is agreed that the objective 'to provide for an effective nationally managed and delivered unitary service that is available in all child care proceedings' is the appropriate and necessary objective of reform. I have been calling for reform in this area for many years.

It is essential that 'purpose of any service must benefit the child by supporting the court to make decisions in child care proceedings which have the best interests of the child as the paramount consideration' in order to comply with International and Constitutional standards. The promotion of the rights of children to express their views and to have due weight given to such views; and having the service be 'accessible to any child who is capable of forming his/her own views or is otherwise deemed by a court to be in need of it', are necessary outcomes of the reform of Guardian ad Litem services in order to protect this fundamental right of children, as protected under the Constitution and the UNCRC.

In relation to the desired outcome that 'the discretion of the court regarding the appointment of the Guardian ad Litem is central and clearly set out', I question whether the Court should be afforded absolute discretion no matter the circumstances of the case.

It is not appropriate in my view to enshrine in legislation that the appointment of a Guardian ad Litem for a child the subject of court proceedings is to be made wholly at the discretion of the Judges. In my experience over the past 15 years, the disparity in the views of the Judges concerning the appointment of Guardian ad Litem and the necessity for same would lead to children being prejudiced by virtue of the individual opinion of Judges. This cannot serve of any of the parties to the proceedings, the administration of justice, let alone the best interests of the child.

It is agreed that the outcome of providing a high quality service to assist the court in making the appropriate decision for the care of the child is vital, but I would stress that in order to provide such a high quality service, it is imperative that intervention occur as early as possible.

It is undisputed that the independence of the Guardian ad litem is vitally important. It is also the case in my view that the Guardian ad Litem must work in accordance with the best interests of the child and advise the court accordingly.

In order to meet the needs of the children, it is imperative that the Guardian ad Litem is enabled to fulfil his/her role and that the service is as effective, efficient, sustainable, consistent and transparent as possible.

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

In my view there ought to be an automatic appointment of a Guardian ad Litem for all children subject to court proceedings where either an Emergency Care Order or Interim Care Order is granted by the court. Such appointment would ensure that at an early stage, the Guardian's ad Litem Report could illuminate for the court the main issues which the court should consider and propose a time scale wherein such issues should be addressed.

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

Under s25 of the Mental Health Act 2001, a Guardian ad Litem may be appointed where the Court is satisfied that it is necessary in the interests of the child and in the interest of justice to do so, subject to s26 of the Child Care Act 1991.

It is unavoidable that the repeal of s26 will have an effect on s25 of the Mental Health Act 2001, and this effect is not necessarily undesirable. The Guardian ad Litem service has been subject to extensive criticism, including in relation to children with cognitive disabilities.[1] The main criticism is that the Guardian ad Litem service is not used in a consistent manner. Reform of this area should be a welcome development. Reform focuses on improving access to justice for all children, including children with cognitive disabilities.

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

Approach 1: Direct Provision through a new dedicated public body

Approach 2: Utilising existing or reformed structures in either the children or justice areas

Approach 3: Public Procurement of such services to be engaged under contract 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.

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 answer to questions 4, 5 & 6, Approach 1 & 3 in question 4 are not mutually exclusive. Whatever structure comes into play, it should be transparent, and the Public Procurement option would assist in ensuring same. See also answers to questions 8, 12 and 27.

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

I think it would be worth considering the approach adopted in the UK under the Children Act 1989 where the Guardian ad Litem works in tandem with the solicitor appointed to represent the child. The value of the tandem approach has been endorsed by several UK Judges.

[1] J. Kline and E. Flynn, Access to Justice for Children with Cognitive Disabilities: Ireland Country Report (National University of Ireland Galway: Centre for Disability Law and Policy, 2015).

Thorpe J. stated in *Mabon v Mabon* [2005] EWCA Civ 634 that the tandem model of having a Guardian ad Litem and a solicitor to represent the child(ren) was the "Rolls Royce" of children's representation and that it was "the envy of many other jurisdictions".

McFarlane J in *R and others v Cafcass* [2012] EWCA Civ 853: stated that "the immense importance of the role of a children's Guardian…in each such case is hard to understate. Without, I hope, stretching the metaphor beyond its tolerance: in the tandem model it is the children's Guardian, rather than the child's solicitor, who steers the course for the child's representation in the proceedings."

Given the positive affirmations of both Judges mentioned above, it would be extremely valuable for the adoption of a similar approach to be considered in Ireland.

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

Whilst it is positive that it is envisaged that more guidance be afforded to the Court in exercising its discretion as to whether or not a Guardian ad Litem should be appointed, I am of the opinion that the approach does not go far enough in ensuring that a Guardian ad Litem is appointed when circumstances necessitate it. I am of the view that a Guardian ad Litem should be **automatically** appointed where:

- There is an international element;
- There are jurisdictional issues;
- There is alleged physical/sexual abuse;
- There are overseas placements, for example in High Court cases where children reside abroad;
- There are mental health issues-either children or parents are suffering from mental illness;
- A child has no parents or where the parents are not actively involved in proceedings;
- There is a significant lack of agreement between parents and the CFA;
- There are immigration/refugee issues;
- There are abandoned children;
- There are unaccompanied minors;
- A case involves child abduction.

With regard to the appointment of a Guardian ad Litem ceasing upon:

- An interim care order being refused;
- A care order, supervision order or a special care order being granted or refused
- Other relevant applications (access, appeal, vary, discharge, directions) provided for under the 1991 Act being granted or refused;
- Court order being made

I am of the opinion that such an approach could operate to frustrate the rights of children of access to justice. It would be more appropriate for the cessation of the appointment of the court to be made at the discretion of the court, with particular regard to the above circumstances. This approach would enable the appointment of Guardians ad Litem to be ceased where

appropriate but avoids the situation where the appointment of a Guardian ad Litem is ceased only because of a line drawing effort on the part of the legislature.

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.

See answer to Question 8.

What is your view of the description of the role of a Guardian ad Litem? Please provide reasons for your response.

The description as set out does not sufficiently and clearly describe the role of a Guardian ad Litem. Please see answer to Question 12 below, for a comprehensive description of the role of a Guardian ad Litem.

10. 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?

A Guardian ad Litem should consult with the other parties including social workers, carers, parents and any other person as is appropriate to assess the child's situation, outline the child's views and wishes and give his/her opinion/recommendations in relation to the care of that child. A Guardian ad Litem should also attend case conferences, reviews and any other meetings where his/her presence would be relevant and appropriate.

A Guardian ad Litem should provide information to the child, explain the role of his/her family members, carers, social workers etc. in the context of the court process.

A significant role of the Guardian ad Litem is to prepare a report on the child's situation, his/her feelings and wishes and the Guardian's ad Litem own opinion and recommendations.

In effecting these functions, there are ample opportunities for a Guardian ad Litem to greatly contribute to increasing mutual understanding between the parties to the proceedings and between any of the parties and the child. In my experience the practice of the majority of Guardians ad Litem whom I represent try and effect a consensus between the parties in the court proceedings unless it is not possible to so do. The term 'mediation' could lead in my view to confusion and misunderstanding and effect fundamentally the role of the Guardian ad Litem which is to provide the court with a detailed analysis of the main issues concerning the child in the context of the child's family/social circumstances. An independent Guardian ad Litem cannot in effect also be a mediator.

11. 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.

I am going to take this opportunity to outline comprehensively what the role of a Guardian ad Litem entails.

- The Children Act Advisory Board (CAAB) defines the role of a Guardian ad Litem as to 'independently establish the wishes, feelings and interests of the child and present them to the court with recommendations'. There are several matters which are fundamental to the execution of this role:
- GAL must meet the child regularly in order to establish accurately what the child's wishes and views are in relation to the case at hand;
- GAL must inform him/herself of the child's history, in relation to his/her relationship with his/her family; and/or his/her engagement with social services and where appropriate the Gardaí Síochána; and his/her level of education etc.
- In order to comply with the child's Constitutional right of having his/her views heard, the GAL must ensure that the child is capable of having his/her views made known.
- GAL must report to the court on the child's welfare and represent the child in court.
- GAL must prepare a report when the child's case is listed for hearing.
- Where the GAL is concerned that a risk exists which may adversely affect the welfare of the child, he/she must bring this to the attention of the CFA and where the GAL is not satisfied with the CFA's response, he/she must notify the court of the risk.
- Where there is an issue of conflict between the CFA and the GAL, the GAL should seek to resolve the matter with the CFA directly. Where this is not possible, the GAL should report the matter to the Court
- In relation to case conferences, the GAL should be present at each meeting (where possible), state his/her views on the child's care and be aware of the decision reached at such meetings.
- The GAL should regularly meet with the child's parents, carers, social workers etc in order to be aware of their views/opinions regarding the child's care.

12. <u>What is your view regarding possible provision being made for a copy of the Guardian ad Litem report being made available to the child or have you any alternative arrangement to suggest? Please provide reasons for your response.</u>

I would be open to a copy of the Guardian ad Litem report being made available to the child concerned, provided certain safeguards, similar to those in relation to the furnishing of a report written by an expert, are put in place.

In considering whether or not a copy of Guardian ad Litem report should be furnished to the child concerned, the court and the parties to the proceedings shall have regard to:

- The age and maturity of the child;
- The capacity of the child to understand the report;
- The impact on the child of reading the report, including the effect it may have on his/her relationship with his/her parents and/or Guardian ad Litem;
- The best interests of the child

The Judge, together with the CFA, GAL and any expert appointed should be employed by the court to determine what the likely impact of reading the report would be on the child and his/her relationships.

13. <u>What is your view on the status envisaged? Please give reasons for your response.</u>

I agree with the status of a Guardian ad Litem being that of a 'court appointed adviser'. The reinforcing of this status by enabling the Guardian ad Litem to make an application to the court in relation to certain matters is a positive envisaged reform. In permitting Guardians ad Litem to make applications to the court, the views of the child and his/her best interests would be heard and represented expeditiously and would allow intervention where the Guardian, (who is arguably best placed to know what the child wants and needs) deems fit.

14. What are your views regarding appropriate qualifications and professional experience for appointment as a Guardian ad Litem? Please give reasons for your response.

I agree with the requirement of holding a qualification in social work. The skills and knowledge obtained through this degree are invaluable in the work of Guardians ad Litem. I also agree with giving consideration to other relevant disciplines such as a third-level qualification in social care/ psychology, as they would also offer invaluable skills, providing that the disciplines overlap significantly with social work.

The Garda vetting of Guardians at Litem is essential in order to protect the children who will be represented by Guardians at Litem.

I consider that 3 years postgraduate direct experience in a child-related area is insufficient. Please see my alternative proposal below.

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

I am of the view that all Guardians ad Litem should:

- Be Team Leaders and Principal Social Workers with a minimum of 7 to 10 years' experience working for the CFA;
- Have specific skills and qualifications in interviewing children;
- Be on a panel and registered;
- Be Garda vetted;
- Be insured and be Tax compliant;
- Be supervised;
- Be independent of the CFA;
- Obtain regular annual CPD points;
- Have a knowledge of the complexities of family procedural law as it relates to children;
- Have a knowledge of the social and psychological background of children, for example cases where there is abuse, neglect, sexual exploitation, fostering, adoption, separation and divorce;
- Have a basic knowledge of developmental psychology;
- Be familiar with and have a knowledge of resources provided by the CFA, private and voluntary organisations.

It is arguable that the greater the specialist skills of the Guardian ad Litem, the more productive the outcome for children and families. The more skilled the intervention, it is arguable also that the proceedings would shorten and thus the financial costs would diminish for the State.

16. 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.

The value of the transitional provisions in permitting current Guardians ad Litem with extensive experience in the area is obvious. It permits Guardians ad Litem with extensive experience of the Guardian ad Litem service to remain providing the service. It is positive that they will be required to be Garda vetted and have a minimum level of experience. However, I would recommend that they should also be required to:

1) Be insured and be Tax compliant;
2) Be on a registered panel
3) Be supervised
4) Be independent of the CFA

And that they should, if they don't/have not already, promise that going forward they will:

1) Obtain regular annual CPD points;
2) Gain the necessary skills and qualifications in relation to interviewing children;
3) Familiarise themselves with the complexities of family procedural law as it relates to children; the social and psychological background of children, for example cases where there is abuse, neglect, sexual exploitation, fostering, adoption, separation and divorce; developmental psychology; and the resources provided by the CFA, private and voluntary organisations.

These requirements are not unduly harsh and they will ensure that the welfare/best interests of children and their views are protected and represented to the highest level possible.

17. What are your views on the approach identified?

I would welcome provisions which provide that Guardians ad Litem are to have access to relevant case records of the CFA (those not subject to legal privilege) and be entitled to receive information from the CFA, as soon as possible concerning any change in the child's circumstances. Both of these provisions would be essential to a Guardian ad Litem being able to provide his/her services to the best of his/her ability.

I also agree with a provision being introduced which requires the national service provider and individual Guardians ad Litem to ensure safe-keeping and proper management of all records and information created/obtained by them. The information being obtained and created by the national service provider and Guardians ad Litem is extremely sensitive and there should be no question that it would not be treated with the upmost respect and confidentiality.

I have no issue with the Minister having access to non-identifying information relating to the management and delivery of Guardian ad Litem services. The provision of Guardian ad Litem services has long been criticised for its ad hoc delivery and its lack of transparency. The Minister should be provided with such information in order to oversee the delivery of Guardian ad Litem services and to compile relevant data on its service delivery.

I also agrees with the Minister being able to publicise non-identifying information in order to inform the public on the provision of the Guardian ad Litem service in a transparent way.

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

See answers to questions 8 & 9.

19. What type of information do you consider should be publicly available regarding the management and delivery of Guardian ad Litem services?

The percentage of Guardians ad Litem being appointed in child care proceedings; the outcome of such proceedings compared with those where no Guardian ad Litem was appointed; public expenditure on Guardian ad Litem services, percentage of cases where Guardian ad Litem was legally represented; percentage of cases where Guardian ad Litem was denied access to legal representation; the views of children who were appointed a Guardian ad Litem;

20. 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?

See answer to question 20 above.

21. 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.

There is a fundamental immediate and obvious conflict of interest if the CFA is to continue paying the fees associated with Guardian ad Litem services. It is imperative that the Guardian ad Litem services are not only deemed to be but are in effect independent of the CFA. There is a need for transparency, and in those circumstances it is not appropriate for the CFA to continue paying for the Guardian ad Litem services in circumstances where it could be deemed to influence the recommendations of the Guardians ad Litem.

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

I disagree with the envisaged approach and is of the opinion that such an approach-where 'Guardians can obtain legal advice/representation as an exceptional matter and where the need for such support is expressly established and is indispensable to the effective discharge of the Guardian's ad Litem role- is unduly harsh, unfair and frustrates the child's right to be heard and to have his/her best interests be the paramount consideration for the court.

Obtaining legal advice/representation should not be an exceptional matter. The presumption/starting point should not be that a Guardian ad Litem is not permitted to obtain legal advice/representation. Child care proceedings are of a highly complex nature and have the power to completely change the life of a child permanently. The law that is involved in child care proceedings can be highly technical even to trained solicitors and barristers. Guardian's ad Litem should not be expected to navigate the legal proceedings blindly whilst at the same time trying to discharge their extensive role and duty as a Guardian ad Litem, thereby potentially making a mistake which has an adverse effect on the life of the child who is at the centre of the proceedings.

The envisaged approach has specified certain circumstances which would warrant an application to the court. The circumstances listed are limited and line drawing efforts in these circumstances are arbitrary and run the risk of legal advice/representation not being sought and obtained in circumstances where it undoubtedly should have been

In order to obtain legal advice/representation, the Guardian ad Litem would have to specify to the court:

- The particular circumstances that warrant the application; and
- Compelling reasons as to why granting the application is necessary to the performance of his/her functions as regards the views and best interests of the child; and
- Issues regarding which legal advice and/or representation are required.

These requirements are unduly onerous and would work to intimidate the Guardian ad Litem from seeking permission to obtain legal advice/representation where such advice/representation is needed to protect the welfare of the child.

Finally, the envisaged reform that the court may give directions as to the performance of the solicitor's duties, which may include, if necessary, directions in relation to the instruction of counsel is wholly inappropriate. The court should not be acting as watchdog for Guardians ad Litem and their legal representation, whose main priority is ensuring that the proceedings and the outcome of such proceedings are child centred and reflect the views and best interests of the child concerned.

23. 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.

It is imperative that the CFA produce an annual report with comprehensive information on public expenditure in relation to Guardian ad Litem services and compare these figures with the public expenditure on children who come into contact with children's services in general. This is to ensure that the figures produced in the report are not regarded as being extortionate when viewed in isolation.

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

I agree wholeheartedly with the envisaged transitional approach in order to ensure that current child care proceedings, the provision of Guardian ad Litem services and their legal representation are not unduly constricted and that access to justice is not frustrated.

25. 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.

The Minister should have power to review and research the impact of the appointment of Guardians ad Litem in court proceedings.

General Consultation Questions

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

The existing service arrangements in place on an informal basis by Barnardos, the Children's Charity, could be a model upon which to base any future professional service, i.e. Barnardos have a panel of experienced Teams Leaders with additional post graduate qualifications; they

are Garda vetted; they have detailed references; they are supervised on a regular basis and they undertake ongoing professional training.

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

Matters of priority include, providing legislative guidance on:

- The appointment;
- The role and function of a Guardian ad Litem; and
- The necessary qualifications/criteria to be satisfied in order to be a Guardian ad Litem.

Without the basics of the system being made legislatively clear, the services of Guardians ad Litem will continue to be inconsistent and unambiguous, therefore attracting extensive criticism. The value of Guardian ad Litem services cannot be overstated. In order to ensure that their full value is effected and recognised, it is necessary for the above to be given clear statutory guidance.

28. 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.

It is critical that the Guardians ad Litem are appointed in all cases where Emergency Care Orders and Interim Care Orders by a court.

In relation to Article 42.A.2, if Guardians ad Litem are not appointed in court proceedings concerning children, there is a very real possibility of a Constitutional challenge – see general comment number 12 and 14 of the Committee on the Rights of the Child.

Geraldine Keehan
AUGUSTUS CULLEN LAW

02nd Nov 2015