1. INTRODUCTION

The Council of The Bar of Ireland welcomes the opportunity to make submissions to the Department of Children and Youth Affairs regarding the Guardian *ad Litem* ("GAL") system in Ireland.

The Council of The Bar of Ireland is the representative body for the barristers' profession in Ireland. Barristers provide specialist advocacy and advisory services in a wide variety of areas and in many different types of forum, including the courtroom, and in other dispute resolution forums such as arbitration and mediation. Barristers are trained to be both independent and objective. The Bar of Ireland has a number of functions, among them being to consider, report upon and make representations as it considers necessary in matters affecting the administration of justice in Ireland.

This paper has been prepared with the assistance of practitioners with extensive experience of proceedings involving Guardians *ad Litem*. Practitioners with expertise and insight from the perspective of having represented the Child and Family Agency, the Health Service Executive, parents, wider family members, Guardians *ad Litem* and children have informed the process of preparing this draft. Experience of Administrative Law, Public Law, Constitutional Law and International Human Rights Law is drawn upon. The Bar of Ireland is keenly aware of the necessity to regulate and to some extent, reform the existing arrangements for Guardians *ad Litem* in Ireland. This must be achieved in a manner which does not offend against domestic constitutional and international legal standards.

It is acknowledged that the expertise of barristers may not extend to all matters contained in the Consultation Paper such as the form and design of a national service and matters concerning qualifications and eligibility for appointment. Therefore, it is not proposed to address each of the points contained in the Consultation Paper, but rather refer to matters which it is believed are relevant insofar as they impact upon the administration of justice. These will include issues around:

- The appointment of a Guardian *ad Litem* to a child in the context of proceedings pursuant to the Child Care Act 1991, as amended, at the discretion of the Court.
- The status of a Guardian *ad Litem* and the potential risks of diminishing the role from being a party to the proceedings to being a court-appointed expert.
- The entitlement of the Guardian *ad Litem* to legal advice and/or representation including the potential risks of it only being available on an exceptional basis and on application to the Court and that the Court would decide whether to permit such advice/representation and appoint a solicitor giving directions as to the performance of the duties of the solicitor, including directions as to the instruction of Counsel.

At the heart of these issues is the qustion of whether a Guardian *ad Litem* is necessary in all cases and whether in a case in which a Guardian *ad Litem* is necessary these is an entitlement to legal representations if the Guardian wishes.

Significant issues arise in respect of the proper administration of justice in the context of these proposals as well as considerations as to their compliance with the Constitutional, European Convention and international human rights of the child the subject of the proceedings concerned.

It is noted that the feasibility of proceeding with each aspect of the proposed reforms contained in the Consultation Paper *"will be subject to the necessary clearance from the legal and legislative drafting perspectives"*. It is submitted from the outset that there are significant risks that the envisaged measures will breach constitutional and administrative legal principles. In this regard, extreme caution is urged upon the Department of Children and Youth Affairs in proceeding with these measures for the reasons outlined herein.

2. LEGAL PRINCIPLES WHICH NECESSITATE AN EFFECTIVE GUARDIAN *AD LITEM* SYSTEM

2.1 The right of children to participate in and be heard in proceedings that involve their welfare has long been a feature of international law, which has been recognised in Ireland for some time. The insertion of Article 42A into the Constitution strengthened and underscored the rights of children. There is now a constitutional imperative that the best interests of the child shall be the paramount consideration and where a child is capable of forming his or her own views, these views shall be ascertained and given due weight having regard to age and maturity of the child. It is arguable that these rights will be breached by diminishing the status of the Guardian *ad Litem* and inhibiting their right to legal representation. If there is any question that the Guardian *ad litem*, and thus the child they are representing is to be deprived of legal representation – the child's access to justice and their rights enshrined in Article 42A are breached. This is a breach that will occur *simpliciter*; any attempt to define categories of cases that should or should not engage legal representation immediately offends the principles established in Article 42A.

2.2 Article 42A provides:

> *1 The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.*
>
> *2 1° In exceptional cases, where the parents, regardless of their marital*

status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

2° Provision shall be made by law for the adoption of any child where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child and where the best interests of the child so require.

3 Provision shall be made by law for the voluntary placement for adoption and the adoption of any child.

4 1° Provision shall be made by law that in the resolution of all proceedings -
i 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
ii concerning the adoption, guardianship or custody of, or access to, any child, the best interests of the child shall be the paramount consideration.

2° Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section 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.

2.3 Article 12 of the United Nations Convention on the Rights of the Child provides 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.

2.4 Thus Article 12 effectively establishes that not only does a child have a right to express views freely either directly or through a representative or an appropriate body, but also that they should be heard and given due weight. It is difficult to see how this can be achieved other than by the appointment of a Guardian *ad Litem.* To adopt any rule or approach that presumes that the majority of cases will not require a Guardian *ad Litem* and that such appointment will only be required in exceptional cases falls foul of Article 12. The only means of ensuring compliance with both Article 42A of the Constitution and Article 12 of the UNCRC is to ensure that there is uniformity in the treatment of all cases involving the welfare of children. In this paper, we propose to set out how that means that it is necessary that Guardians *ad litem* are appointed in all but exceptional cases and that where they are necessary they have an automatic right to legal representation, except perhaps in exceptional circumstances.

2.5 Alistair MacDonald QC states[1] that the implementation of Article 12 requires more than paying lip service to the principles enshrined in the Convention on the Rights of the Child. The Committee on the Rights of the Child observes that:

"...appearing to listen to children is relatively unchallenging; giving due weight to their views requires real change. Listening to children should not be seen as an end in itself, but rather as a means by which states make their interactions with children and their actions on behalf of children ever more sensitive to the implementation of children's rights." [2]

2.6 The UNCRC makes clear that children are to be viewed as active individuals in a position to have as full an input as possible into matters affecting them.[3] Article 12 of the UNCRC (cited earlier) provides that the child who is capable of forming his or her own views has the right to express those views freely in all matters affecting them and that due weight should be given to those views in accordance with the age and maturity of the child. Article 12(2) provides that, in particular, the child shall be provided the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

2.7 The importance of Article 12 as a guiding principle of the Convention, closely allied to the Child's right under Article 13 to freedom of expression and required for the purpose of the realisation of the other rights under the Convention has been articulated by the Committee on the Rights of the Child in General Comment No. 12 on the Right of the Child to be heard.[4] In relation to the

---

[1] *The Rights of the Child – Law and Practice* (Jordan Publishing, 2011) at 6.14

[2] Committee on the Rights of the Child General Comment No 5 *General Measures of Implementation of the Convention on the Rights of the Child* HRI/GEN/1Rev. p.391

[4] Committee on the Rights of the Child, General Comment Number 12 (2009) *'The Right of the Child*

capability requirement the Committee have stated that this is not to be interpreted as a limitation but rather *"an obligation for States Parties to assess the capacity of the child to form an autonomous opinion to the greatest extent possible"*[5]. In essence therefore, it is not for the child to first prove his or her capacity but rather a presumption that the child has the capacity to form his or her own views should operate.

2.8 The committee underlines that *"full implementation of Article 12 requires recognition of, and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding, choices and preferences".* [6]

2.9 The standards therefore support the participation of the child in proceedings and this right should be extended to every child in all proceedings affecting their welfare. In terms of mechanisms by which a child should be heard the committee recommends that where possible, the child should be given the opportunity to be heard directly and if not, the child's views must be transmitted correctly to the decision maker by the representative. It is also recommended that codes of conduct be developed for representatives who are appointed to represent the views of the child.

2.10 As noted by MacDonald *"the qualification contained in Article 4 in relation to economic, social and cultural rights, that States parties shall undertake implementation of those rights "to the maximum extent of their available resources" does not apply to civil and political rights, including those enshrined in Art 12. Accordingly, implementation of Art 12 should not be dependent on the availability of resources".*[7] The suggestion therefore that resource issues should guide legislation or policy in this area is unsustainable.

2.11 The Committee on the Rights of the Child, has in the context of General Comment No. 12, emphasised the interaction between Article 12 and Article 5 of the UNCRC, which deals with the evolving capacity of the child. The mechanisms by which a child will have his/her right to participate given effect may differ according to age and maturity but this can be addressed by virtue of the option of appointing a guardian *ad litem* to the child and facilitating the child in directly participating in the proceedings by instructing their own lawyer. As addressed elsewhere in this document, there is no support in the constitutional or international human rights framework for discriminating between children as to the right to legal representation. The General Comment to Article 12 of the UNCRC also clarifies that in circumstances where the right of the child is

---

to Be Heard' CRC/C/GC12

[5] *Ibid*

[6] *Ibid*

[7] Alistair MacDonald QC, 2014 *'The Rights of the Child; Annotated Materials'*. (Family Law Jordan Publishing 2014) 32.

breached with regard to judicial and administrative proceedings, the child must have access to appeals and complaints procedures which provide remedies for rights violations. [8]

2.12 Children's rights to information and representation were further set out in the European Convention on the Exercise of Children's Rights (1996) which Ireland has signed but not yet ratified. This Convention is primarily concerned with procedural rather than substantive rights such as accessing information and participating in proceedings concerning the welfare of the child. To that end, Article 3 provides for a child's entitlement to receive all relevant information, to be consulted and to be permitted to express his or her views. Article 4 provides that a child has the right to apply in person or through another for a special representative in judicial proceedings. Again, the focus is on participation to the greatest possible extent.

2.13 Disputes about child custody in respect of which there is an EU dimension and to which EU Regulation 2201/2003 of 27th November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, known as Brussels II Revised, applies requires the Court to hear the voice of the child before making orders pertaining to the child's welfare and custody. This is mandated by the terms of the Regulation itself. The Regulation applies to public law proceedings.

3. THE RIGHT OF THE CHILD TO HAVE A GUARDIAN *AD LITEM* APPOINTED.

3.1 The appointment of a guardian *ad Litem* at the discretion of the Court only is not in line with the Article 42A protections and international human rights law. Each child in care, and certainly those in respect of whom proceedings have been instituted, must have a guardian *ad Litem* appointed to them in order to give effect to their right to participate in proceedings affecting them. A possible exception to this might be where a child is approaching his or her majority and is particularly mature and able to effectively speak for him or herself. The proposals are at odds with the legislation in the UK which provides for the mandatory appointment of a Guardian *ad Litem* for a child in equivalent proceedings in that jurisdiction in all cases except 'unless satisfied that it is not necessary in order to safeguard his interests'. [9]

3.2 Although the Capita/Nuffield[10] report noted a deficit in research in Ireland in the area of the contribution of Guardians *ad Litem* to proceedings relating to

---

[8] Committee on the Rights of the Child, General Comment Number 12 (2009) *'The Right of the Child to Be Heard'* CRC/C/GC12 at para. 65.

[9] Section 41(1) of the Children's Act 1989

[10] The Capita/Nuffield Review of the Guardian *ad Litem* Service (2004) commissioned by the National Children's Office.

children, McWilliams and Hamilton[11] note the following in respect of the position in the UK:

> *"However, some relevant literature is available. A study undertaken by the Children's Society (2000 in NCO, 2004, p. 10) in the UK suggested that 'substantial contributions are made by a GAL to the court process, based on the views of children, families and other professionals' through their role as facilitators. The study also found that guardians ad litem were important in relation to decisions reached when children were received into care. There was a suggestion that they added weight to the recommendations of social workers when they reached similar conclusions about the action required. The National Children's Office report (2004) refers to research conducted by Ruegger (2001) in the UK who found that in a study of 136 children, the majority expressed positive views about the guardian ad litem. On the other hand, a significant number of children seemed confused about the guardian's role, which they believed was to represent their wishes rather than their best interests. There was also some lack of understanding around confidentiality. However, the NCO goes on to note that there is agreement in the literature that 'children need a voice, particularly in public law proceedings affecting their care, welfare or liberty' (NCO, 2004, p. 25)".*

3.3 McWilliams and Hamilton[12] also foreground the importance of childrens' ECHR Article 6 rights:

> *"Article 6 of the ECHR guarantees children as legal rights holders under the Convention the legal right to be heard in all proceedings affecting their civil rights and obligations as well as in criminal law matters. Under Article 6(3) a child has the right to represent him/herself in person or through a representative of his/her own choice."*

3.4 In respect of the ban under the Child Care Act on the appointment of both a Guardian *ad Litem* ***and*** a solicitor for the child, the authors state as follows[13]:

> *"In this regard, the statutory recognition afforded the dual role of the guardian in the Child Care (Amendment) Bill is greatly to be welcomed. The current ban on the appointment of both a guardian and a solicitor for the child under the Child Care Act would seem to*

---

11 McWilliams, Ann and Hamilton, Claire (2010) "'There isn't Anything like a GAL: The Guardian ad litem Service in Ireland" Irish Journal of Applied Social Studies: Vol. 10: Iss. 1, Article 5.Available at: http://arrow.dit.ie/ijass/vol10/iss1/5

12 *ibid* at pages 33-34

13 *ibid* at page 35

stem from a misunderstanding of the guardian's role in child care proceedings as solely an 'advocate' for the child's wishes. The system also compares unfavourably to the British system in which a 'tandem model' evolved where the guardian ad litem must appoint a legal representative for the child (NCO, 2004). Since the introduction of the Children Act (1989) in the UK all children in public law proceedings must be appointed a guardian ad litem who is an experienced and qualified social worker in the absence of good reasons why this should not be done (Department of Health, 1995; Timms, 1995; Monro and Forrester, 1995; Head, 1995; Fortin, 1998). The guardian ad litem role in the UK was also extended to assisting the court in the management of a case".

3.5 The central and essential role of the guardian *ad litem* in ensuring that the voice of the child is heard effectively in secure care cases in the High Court is manifest from the judgment of MacMenamin J in Health Service Executive v DK (a minor), unreported, July 18, 2007 which is referred to in greater detail below.

3.6 The State is under an obligation to ensure that the best interests of the child shall be the paramount consideration and that the voice of the child involved in proceedings must be fully and effectively heard. The only way that can be achieved save in rare and exceptional cases is through the direct involvement of a suitably qualified and equipped guardian *ad litem*.

3.7 That is the case whether a guardian *ad litem* is considered to be a party to the proceedings or not but certain consequences flow from a definition of the guardian *ad litem's* status in the proceedings.

4. THE PARTY STATUS OF A GUARDIAN *AD LITEM* AND LEGAL REPRESENTATION

4.1 There is no superior court case-law on the status of the Guardian *ad Litem* in child care proceedings before the District Court. It is by no means clear that they do not currently enjoy party status. There is some authority in the District Court for suggesting that the Guardian *ad litem* is not a party to proceedings, however the extent to which this is binding or has created a precedent of any sort is questionable.

4.2 The proposal envisages the Guardian *ad Litem* having a status of a court-appointed adviser to the Court in relation to certain matters and provides that the Guardian *ad Litem* will be able to access legal representation in exceptional circumstances. This effectively will mean that the Guardian *ad Litem* is not a party to the proceedings and would not have *locus standi* to take the full range of applications in the welfare of the child as it may be appropriate to take nor to appeal any decisions of the Court, for example. It would also deprive the

Guardian *ad Litem* of the *locus standi* to take certain other applications under the Child Care Act 1991, as amended, including those under Section 27 which provides for applications for the procurement of reports on children. It would therefore significantly weaken the participation and representation of the child in proceedings that centrally affect them.

4.3 There is a specific reference, on page 10 of the consultation paper, to figures relating to public expenditure on guardians *ad Litem* and it is noted that "currently no statutory or generally applicable criteria exist to underpin the necessity, value for money or accountability in regard to the engagement of legal services by individual Guardians *ad Litem.*

4.4 As noted above, the consultation paper envisages that a Guardian *ad Litem* would have to make an application to the Court in order to obtain legal advice/representation and, having considered any such application, the Court may, if it thinks fit, appoint a solicitor to advise and/or represent the Guardian *ad Litem* in relation to some or all of the issues identified. In addition, the document provides that the Court may give directions as to the performance of the solicitor's duties and, if necessary in the view of the Court, directions in relation to the instruction of Counsel. This proposal fetters the Guardian's role in respect of whether to obtain legal advice/representation and their choice of representation. It is also highly unusual and arguably, an interference with the relationship between solicitor and Counsel in that the solicitor is directed by the Court as to which applications/submissions may be made, and as to the briefing of Counsel. This proposal risks turning the Court into the client as well as the arbiter of the case.

5. GUARDIAN *AD LITEM* SYSTEM IN IRELAND

5.1 Nicola Carr [14]notes, in her 2009 article on the role of the Guardian *ad Litem* in Ireland that:

> *"The role of the Guardian ad litem was first introduced in Irish legislation in provisions set out in the Child Care Act 1991 . The United Nations Convention on the Rights of the Child ("UNCRC"), which Ireland ratified in 1992, sets out a framework for the recognition and achievement of children's rights. Article 3 of the UNCRC articulates that the best interests of the child should be a primary consideration in all activities undertaken by public and private institutions, including courts of law and administrative and legislative bodies. Article 12 of the UNCRC deals with the right of the child to have their views heard and again judicial and administrative proceedings affecting the child*

[14] Nicola Carr 'Guiding the GALs: A Case of Hesitant Policy-making in the Republic of Ireland' in Irish Journal of Family Law (2009) 12 (3) 60.

are specifically referenced.[2] *It has been identified that the ratification of the UNCRC led to the establishment of mechanisms in individual states to allow for children's best interests to be represented and their views to be heard in juridical contexts".*

5.2 Carr notes that the publication of the Kilkenny Incest report in 1993 was also an impetus for the development of an independent system for representing the views and best interests of the child. In relation to the development of the role in other jurisdictions she notes that:

> *"In England and Wales, Guardians ad litem have been tasked with representing children's interests in certain care and related proceedings since 1984. The relevant legislation providing for the Guardian ad litem was in fact introduced in statute in the Children Act 1975; however, this was not brought into force until 1984.*[10] *Overviews of this area outline that the main impetus for the introduction of the role in these jurisdictions during this period was a result of the fall-out from inquiries into child deaths from abuse and neglect. Further legislative reforms in England and Wales, most notably the Children Act 1989 and the Children Act Advisory Committee 1997, have strengthened the role of the Guardian ad litem in law; for example under the terms of the Children Act 1989 an appointment of a Guardian ad litem is mandatory unless the court is satisfied it is not necessary; and by introducing a policy and practice framework to govern service delivery".*

5.3 Currently, a Guardian *ad litem* can be appointed by the Court in public law proceedings pursuant to Section 26 of the Child Care Acts 1991 – 2011, where the Court is of the view that it is in the interests of the child and in the interests of justice to so do. A Guardian *ad litem* can only be appointed where the child is not a party to the proceedings pursuant to Section 24 of the Act. The section allows for a guardian *ad litem* to be appointed in relation to proceedings pursuant to Parts IV and VI of the Act. Part IV includes interim and full care orders as well as supervision orders and Part VI includes access, aftercare and applications pursuant to section 47 of the Act. The Bar of Ireland has a concern that the current system itself in simply conferring a discretion on the District Court as to whether or not to appoint a guardian *ad litem* rather than imposing a requirement to appoint a guardian in all but exceptional cases may itself be in breach of the domestic and international legal standards referred to above. However, it is acknowledged that this is probably met by the long-established principle that the District Court must exercise its functions and powers in a constitutional manner. The Bar of Ireland has a grave concern that an express provision that a guardian *ad litem* should ***not*** be appointed save in exceptional circumstances would be in breach of constitutional and international law rights.

5.4 It is important to note that the focus, as a result of international human rights standards, has been on *representing* the child's interests as opposed to merely reporting them to the Court. This clearly implies a full and unfettered ability to act on those interests, where appropriate by way of legal submission and advocacy and the taking of certain application. It also implies party status in the context of proceedings in the same way as the representation of the interests of the Child and Family Agency or the parents/legal guardians in the proceedings. To adopt any other approach is to immediately create an inequality of arms and to fetter the role of the guardian *ad litem* to represent the interests of the child.

5.5 Some guidance on the role of the Guardian *ad Litem* was given in the context of the Judgment of MacMenamin J., in the case of *Health Service Executive v D.K. (a minor)*, unreported, July 18, 2007, a case involving a young person for whom an application for special care had been made but who died before the order could be implemented. In giving this guidance MacMenamin J also implicitly emphasised the central and necessary role played by guardians *ad litem*. MacMenamin J. addressed the role of the Guardian *ad Litem* in such cases and stated that the *"only suitably qualified Guardians ad Litem should be used in High Court proceedings on the minor list"* (unless in exceptional circumstances) and sets out that the qualifications of the Guardian should be laid before the court and details on Garda vetting should also be supplied.

5.6 MacMenamin J. further noted that:

> *"The function of the guardian should be twofold; firstly to place the views of the child before the court, and secondly to give the guardian's views as to what is in the best interests of the child."*

5.7 Additionally, the judgment addressed the issue of information exchange between the Guardian *ad Litem* and the Health Service Executive, particularly in relation to circumstances where the child is considered to be at risk. Attention is given specifically to the issue of the Guardian communicating any such information to *"other care professionals engaged with the minor"*, but as Carr notes *"however, the judgment does not specifically address the issue of reciprocity in this regard, i.e. information on "adverse risk" which should be communicated to the Guardian"*. Specifically the Judge noted, at para. 59 of the Judgment:

> *"It has been pointed out:-*
>
> *(a) Unless there are exceptional circumstances only suitably qualified guardians ad litem will be used in High Court proceedings in the Minors List.*
>
> *(b) The function of the guardian should be twofold; firstly to place the*

views of the child before the court, and secondly to give the guardian's views as to what is in the best interests of the child.

(c) A guardian ad litem should bring to the attention of the Health Service Executive any risks which he or she believes may adversely affect the best interests of the child, and if not satisfied with the response may bring the matter to the attention of the court. The guardian ad litem should take steps where necessary to co-operate with, and where possible share relevant information with, other care professionals engaged with the minor.

(d) A duty of a guardian ad litem is to ensure compliance with the constitutional rights of a minor. For this purpose, the guardian should ensure that there is provided to the minor a means of making his or her views known.

(e) A guardian ad litem may fulfil the dual function of reporting to the court regarding the child's care and also by acting as the child's representative in any court proceedings and thereby communicating to the court the child's views.

(f) On an application for detention, and for the appointment of a guardian ad litem the court should be afforded such basic information as would suffice to satisfy it that the said person was an appropriate candidate to act as a guardian ad litem. In particular, the court should be furnished with the qualifications of the guardian ad litem and also details of any vetting of such person by An Garda Siochana.

(g) The guardian ad litem should meet the minor as often as necessary in order to be satisfied that the minor's wishes and views are adequately represented regarding his or her detention and care.

(h) The guardian ad litem should meet with the minor's family or carers in the community and be familiar with their views and desires regarding the minor's detention and care.

(i) The guardian ad litem should make himself/herself aware of the minor's history and the minor's interaction with the various social service agencies.

(j) The guardian ad litem should seek to interact in a positive way with the staff of the Health Service Executive charged with the minor's care while in detention. The guardian should ensure that their views concerning the minor's welfare are expressed at each case conference meeting held by the H.S.E. to discuss the minor's care, and should be familiar with the outcome of decisions reached at such meeting.

(k) When proceedings are listed before the court, the guardian ad litem should, where necessary, prepare a report specifically addressing the issues set out above. Additionally, where an issue arises from the contents of any other reports are prepared for the court by other

parties to the proceedings, the guardian ad litem should, where necessary, address those issues in the report. This can only be done where such reports are available to the guardian ad litem in sufficient time.

(l) When the Health Service Executive moves to have a minor discharged from secure care, the guardian ad litem should apprise the court of the child's view regarding his onward placement. In addition, the guardian ad litem should inform the court of his or her professional opinion regarding such a move and the proposed onward placement.

(m) Where a divergence of opinion as to the care of the minor exists between the Health Service Executive and the guardian ad litem, the guardian should first attempt to resolve this issue with the H.S.E. However, where this is not possible, the guardian ad litem should inform the court as soon as practicable of their concerns.

(n) Where a minor has absconded from secure care and the guardian ad litem is aware of this, the guardian ad litem should be satisfied that steps are being taken to address the problem. If the issue persists, then the guardian ad litem should take steps to inform the court of the minor's absence having first informed the H.S.E. that they are about to do so.

(o) The guardian ad litem should express a view to the court as to how a case is best kept under review after a minor is discharged from secure care. When a minor is discharged from such care the guardian ad litem should confirm with the court whether they are to continue to remain involved in the proceedings".

5.8 There is nothing in the *DK* Judgment to support the weakening of the role or status of the Guardian *ad Litem* or to suggest that the Guardian *ad Litem* has not or should not have party status. Indeed, the Judgment points to the opposite, especially in terms of the role of the Guardian *ad Litem* in ensuring compliance with the constitutional rights of the minor.

5.9 The introduction of Article 42A has focused minds on the concept of the voice of the child in child and family law proceedings and has resulted in commentary on the mechanisms by which this concept can be realised. As stated above, the amendment requires that laws be enacted for securing, in the case of a child who is capable of forming his or her own views, the views of the child and putting them before the Court. Due weight is to be afforded those views, having regard to the age and maturity of the child. There is a constitutional obligation on the legislature to introduce legislation to give effect to this provision and to provide for participation and representation in line with international human rights

standards[15]. The right to fair procedures and the right to natural and constitutional justice apply equally to children as to adults. This was clear prior to the coming into effect of Article 42A of the Constitution and can only have been strengthened as a result of that Article taking effect. [16] Children enjoy the same personal rights as adults and their procedural rights should be promoted and protected. These rights clearly include the right to participate in proceedings affecting their welfare so fundamentally and to have representation, including legal representation, so that they can have access to documents, the right to cross examine witnesses, and to take applications as appropriate.

6. LEGAL REPRESENTATION AND PARTY STATUS: ENGAGING ARTICLE 6 AND EQUALITY OF ARMS

6.1 Does the guardian *ad litem* have an entitlement to legal representation by reason of their role in vindicating the rights of the child?

6.2 If a child is the subject of proceedings concerning his or her welfare, it is established that they enjoy a right to participate, a right to be heard and that their best interests shall be the paramount consideration. There is not doubt whatsoever that if a guardian *ad litem* is party to the proceedings he or she is entitled to legal representation of his or her choosing.

6.3 If a child, via their Guardian *ad litem* does not have equal standing in the case to other parties, it is difficult to envisage how their rights can be protected. This engages the principle of Article 6 rights to a fair hearing and equality of arms.

6.4 In *R, E, J, K* v Cafcass [2012] EWCA Civ 853, Mc Farlane J at Para. 87 of that notes the following in relation to Article 6 of the European Convention on Human Rights:

> *"ECHR, Art 6(1) confers a right to a fair hearing within a reasonable time by an independent and impartial tribunal. The right includes a right to participate effectively in the proceedings and to have fair and effective access to the court. It was conceded on behalf of the appellants, and is well established by the case law (see e.g. Edwards v United Kingdom (1992) 15 EHRR 417 paras 31–39), that the evaluation of fairness involves looking at the proceedings as a whole, rather than piecemeal".*

---

[15] See, in particular General Comment No. 12 of the UNCRC (cited elsewhere) in which the Committee states that "All States should develop administrative procedures in legislation which reflect the requirements of article 12 and ensure the right to be heard along with other procedural rights, including the rights to disclosure of pertinent records, notice of hearing and respresentation by parents or others.

[16] See, *FN and EB v CO, HO and EK* [2004] 4 IR 311

6.5 In *Steel and Morris v. United Kingdom*, Judgment of February 15, 2005, the Court found a violation of Article 6 (1) in a case in which the applicants were defendants in a defamation suit brought by McDonald's concerning leaflets they had distributed. The Court reiterated that it is central to the concept of a fair trial, in civil as well as in criminal proceedings, that a litigant should be afforded the opportunity to present his or her case effectively, and that he or she should enjoy equality of arms with the opposing side. The Court distinguished the earlier case of *McVicar* and pointed to the complexity of the legal issues, the large quantities of interlocutory actions, court hearings, documentary evidence, written judgments, and witnesses, including scientific experts.

6.6 In *Cruz de Carvalho v. Portugal*, Application Number 18223/04, Judgment 10 July 2007 the Court found a violation of Article 6(1), in circumstances where the applicant was prevented by the judge from interrogating witnesses and participating actively in the oral proceedings of his case due to his not being represented by a lawyer. The Court pointed out that this disadvantaged the applicant as the notion of a fair trial, incorporates the principle of equality of arms.

6.7 In *Winterwerp v. the Netherlands*, Judgment of October 24, 1979, the Court found a violation of Article 5(4) on the grounds that the applicant, was confined in a psychiatric hospital on mental health grounds, was not afforded an opportunity to participate in proceedings for a review of his confinement, and was not represented by a lawyer. The Court was clear that even though the judicial proceedings referred to in Article 5(4) did not always need to be attended by the same guarantees as those required under Article 6(1), it was imperative that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation. The Court further found that in cases of detention on mental health grounds, special procedural safeguards may be required to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves.

6.8 In *Bouamar v. Belgium*, Judgment of February 29, 1988, the Court held that it was essential not only that the applicant should have had the opportunity to be heard in person, but also that he should also have had the assistance of a lawyer. Here, the applicant, who was a minor, was provisionally placed in a remand prison due to his behaviour. He had no legal counsel in any of the hearings for judicial review of his detention. The Court found that the fact that the applicant appeared in person before the court was not sufficient to provide him with the necessary safeguards entailed in Article 5(4).

6.9 The rights of parties to be heard and to be represented are undoubtedly established. These rights cannot be abrogated for the sole aim of reducing costs.

6.10 It is the view of the Bar of Ireland that the rights of the child mean that even if a guardian *ad litem* is not to be seen as a party to the proceedings there is still a requirement that the guardian *ad litem* be legally represented if he or she wishes. This must flow from the requirement that the child's best interests and voice be fully and effectively heard by the courts.

7. Entitlement to a Guardian *ad Litem* and Legal Representation: the Tandem Model

7.1 In the UK, all public law cases involving children must appoint a Guardian *ad litem* and the Guardian *ad litem* must appoint a solicitor in what is known as the tandem model. It is clear that the tandem model presents a framework for the protection of the rights of the child. Thus, in *R, E, J, K* v Cafcass [2012] EWCA Civ 853, Mc Farlane J. noted the importance of the tandem model in that jurisdiction. At Paras. 7 - 9. He stated as follows:

> *"The availability of the tandem model in child care proceedings has been under focus in the recent review of the Family Justice System carried out for the government by a panel chaired by Mr David Norgrove. In its interim report (March 2011) at paragraph 4.243 onward the Norgrove panel reported as follows:*
>
> > *"The tandem model is fundamental to our system and receives strong support....the court needs an impartial social work opinion even though this results in a degree of duplication with the role of the Local Authority social worker."*
>
> *In its final report (November 2011) the panel reported respondents expressing "strong support for the tandem model". The panel recommended to the government that the tandem model should be retained, but that the pressure of high caseloads and limited resources should be reflected in a proportionate deployment of the solicitor and children's guardian either working together or individually as the needs of a particular case require.*
>
> *In its formal response to the Norgrove Review (February 2012) the government accepted the recommendation that the tandem model should be retained with resources carefully prioritised and allocated. The response states (page 63):*
>
> > *"the government agrees that the tandem model remains an important vehicle for ensuring that children's wishes, needs and feelings can be understood and independently represented within the court."*

8. CONCLUSION

8.1 Serious caution is urged against depriving Guardians *ad litem* of party status or legal representation. This will offend the fundamental principles of a child's right to participate in proceedings, to be heard, and to have their best interests considered as the paramount consideration. It cannot be the case that a child would in theory be forced to choose between having access to a Guardian *ad Litem* and potentially be deprived of legal representation and access to the full gamut of legislative provisions that parties avail of, or if they seek to be a party to a case with the rights that accrue, they must do so without a Guardian *ad Litem* and risk breach of their protections under Article 42A. It would be absurd if the very function that Guardians *ad litem* are appointed to perform and rights that they are entrusted with protecting will be negated and breached by their very presence in a case.

8.2 Furthermore, the contention that Guardians *ad litem* will continue to be appointed and avail of legal representation in secure care cases creates an unnecessary discrimination between types of cases and the children involved. It cannot be the case that children's constitutional rights enshrined in Article 42A are protected only in the High Court and not in the District Court. Only a profound misunderstanding of the potential for complexities that can arise in cases involving children could give rise to such a distinction. There can be a very fine line between a case involving secure care and a child not in secure care.

8.3 The Consultation Paper states that *"no statutory or generally applicable criteria exist to underpin necessity, value for money or accountability in regard to the engagement of legal services by individual guardians ad litem".* It is submitted, on the contrary, that there is ample applicable international and constitutional legal principles which underpin the necessity for legal services by Guardians *ad litem.*

8.4 The Council of The Bar of Ireland recognises that issues of resources and public expenditure arise and will engage further with the Department of Children and Youth Affairs on this matter, if required. However, it is utterly wrong to select a child's fundamental right to a Guardian *ad Litem* and legal representation as an issue that can be reduced to its monetary value or cost.

8.5 On the 10th November 2012, the Irish people voted to enshrine children's rights in the constitution, in order to strengthen the role of children in law and enhance their protections in line with international provisions. It was a strong statement and endorsement of an Irish vision for how children should be treated and safeguarded. The proposals contained in the Consultation Paper regarding the status of a Guardian *ad Litem* and their entitlement to legal representation essentially constitutes a step backwards from the progress made in 2012, to the

point where there must be serious concerns as to the proposals' compliance with constitutional and international standards.

8.6 The Council of The Bar of Ireland recognises that for any legal system to operate at its optimum level, access must be enjoyed by all stakeholders at all levels of society. Children are among the most vulnerable of those stakeholders; their access to the legal system must be supported and protected in the highest possible way.