Submission From Ms. Justice Bronagh O'Hanlon in relation to the survey concerning a policy approach to the reform of *guardian ad litem* arrangements in proceedings under the Child Care Act 1991 to the Department of Children and Youth Affairs

I have read the following and concur with same, having discussed the matter with Ms Justice O'Hanlon.

– Judge Henry Abbott, Family Law List Judge, High Court

1. Introduction: I welcome the opportunity to make submissions to the Department of Children and Youth Affairs regarding the guardian *ad litem* system in Ireland. I have taken the Child Care List for the last year and a half and this list deals with children in secure care, both minors and adults, who are placed in a variety of institutions both in England, Scotland and Ireland. I also take the Hague Convention List dealing with inter-country abductions concerning children and I sit in the Family Law Courts as a High Court Judge hearing private family law cases. While I am in a very good position to see the workings of the current guardian ad litem, I will not comment on all the issues of policy proposed in the consultation paper.

2. The Irish guardian *ad litem* system must be regarded in the light of Article 42A for which 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 an 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 to 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 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, where 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.

3. In addition 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.*

Ireland must comply and must be seen to comply in terms of the proper administration of justice, with the Constitutional, European Convention and international human rights of the child in developing a guardian *ad litem* system. Since the insertion of Article 42A into the Constitution the rights of children are strengthened in that there is now a constitutional imperative that the best interest of the child shall be the paramount consideration. Where a child is capable of forming his or her own views, these views shall be ascertained and given due weight having regard to the age and maturity of the child.

4. EU regulation 2201/2003 of the 27th November, 2003 Concerning Jurisdiction, Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility (known as Brussels II Revised) applies to public law proceedings. It requires the Court to hear the voice of the child when making orders pertaining to the child's welfare and custody.

5. With regard to the above outlined Constitutional and international provisions for the rights of children and in response to **consultation questions 1 and 2**, I would

state that the best interests of the child must be paramount. The other principles and policies outlined in the consultation paper are also appropriate as guidelines.

6. With regard to the establishment of a nationally organised managed and delivered service as referred to in **consultation questions 4, 5 and 6**, I would respectfully submit that this is not necessarily an area on which I should or will make comment. However, there is clearly a requirement for some oversight to ensure that the guardians *ad litem* are working in the best interests of the children they represent so it would be a positive that only guardians working as part of the national service would be eligible.

7. **Consultation question 7** enquires as to whether the existing arrangement under the 1991 Act that does not allow a child to have the benefit of their own legal representation as well as a guardian *ad litem* should continue. From my experience as a High Court Judge hearing the special care list I understand that many complex issues may arise especially in the transition towards becoming eighteen years old. There has to be an assessment around capacity in order to determine whether the child may instruct their own legal team and while that process is happening it may be necessary to retain the services of the guardian *ad litem.*

8. It is envisaged that appointments of a GAL would remain at the discretion of the court while legislation would merely offer guidance as referred to in **consultation questions 8 and 9**. It is submitted that 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. The proposal that appointments would remain at the discretion of the court is at odds with the legislation in the UK, for example, 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"[1]. It is also submitted that the automatic discharge of the guardian *ad litem* upon the judge granting or refusing the relevant application may not be appropriate in all cases. There are many cases where the child may have ongoing issues whether in care or in their family home and the guardian *ad litem* who has knowledge of them already is best suited to uphold their views and interests. I believe that the Court should have liberty to retain the services of the guardian *ad litem* if the circumstances require.

9. The role of the guardian *ad litem*, as referred to in **consultation questions 10 to 13**, appears to contain the broad strokes of what would be required of a guardian *ad litem*. The central role of the guardian *ad litem* in ensuring that the voice of the child is heard effectively. The focus should be on representing the child's views and not merely reporting them to the Court. All that is currently said about the guardian ad litem in legislation is in Section 26 of the Child Care Act 1991 as follows:

1) *If any proceedings under Part IV or VI the child to whom the proceedings relate is not a party, the court may, if it is satisfied that it is necessary in the interests of the child and in the interests of justice to do so, appoint a guardian ad litem for the child.*
2) *Any costs incurred by a person acting as a guardian ad litem under this section shall be paid by the health board concerned. The health board may apply to the court to have the amount of any such costs or expenses measured or taxed.*
3) *The court which has made an order under subsection (1) may, on the application to it of a health board, order any other party to the*

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

proceedings in question to pay to the board any costs or expenses payable by that board under subsection (2).

4) *Where a child in respect of whom an order has been made under subsection (1) becomes a party to the proceedings in question (whether by virtue of an order under section 25 (1) or otherwise) then that order shall cease to have effect.*

10. This section at least alludes to the fact that the guardian *ad litem* is appointed when it is necessary in the interests of the child. It should be emphasised and more clearly articulated in any future legislation that the role of the guardian ad litem is to ascertain the views of the child, represent them in court and also to advise what they view as being in the best interests of the child so as to assist the Court in making its decision.

11. **Consultation question 14** asks about the status of the guardian *ad litem.* 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. The proposal envisages the guardian *ad litem* having a status of court appointed advisor 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. It would therefore significantly weaken the participation and representation of the child in proceedings that centrally affect them. 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

may engage the Article 6 right to a fair trial under the European Convention on Human Rights. The rights of parties to be heard and to be represented are undoubtedly established. Even if the guardian *ad litem* is not to be seen as a party to the proceedings there is still a requirement that they be legally represented if they so wish. This flows from the requirement that the child's best interests and voice be fully and effectively heard by the courts.

12. A concern that I have in relation to the section on the qualifications and eligibility for appointment of the guardians *ad litem* referred to in **consultation questions 15, 16 and 17** is that the qualifications may be quite restrictive. It is important to state that there should be a high standard sought in the delivery of any service to children and especially in these sensitive cases. However, the requirement to have acted as a guardian *ad litem* on not less than 20 occasions over the preceding 24 months may prevent new people from becoming guardians *ad litem*.

13. It is submitted that the current role of the Child and Family Agency in relation to payment for guardian *ad litem* services as referred to in **consultation questions 21 and 22** is unhelpful. Clear and transparent independence is one of the fundamental principles proposed to underpin the reformed service and if the payment for the service comes from one of the other parties to the proceedings that independence is undermined. Payment through a national service provider would remedy this issue.

14. Engagement of legal representation as referred to in **consultation questions 23 and 24** is the issue that I can most clearly comment on. Firstly, I think the idea of a guardian having access to legal advice or representation as an exceptional matter where the need is expressly established and required in order for the effective discharge of the roll is extremely short sighted. In the list which I undertake each Thursday there can be up to 35 cases for intensive welfare review. It is my respectful

submission that doing the business of that list properly would not be possible without the engagement of a legally represented *guardian ad litem* who is in a position to be represented by a solicitor and counsel. To remove said representation would seem to me to be the reversal of the present constitutional position in terms of the rights of the children. From an administration of justice point of view, the list itself could take several days if the present procedure is not followed. In any one day the multiplicity and variation of legal issues which arises is quite enormous. Not only that, but in any one case the child concerned can suffer from a wide range of disparate medical, physical and or psychological complaints. This is often coupled with a complex history in terms of neglect, emotional, psychological, physical and sexual trauma augmenting their difficulties. It is accepted that where you have more than three parties in an action it does render proceedings somewhat unyielding however, the representative for the guardian is an essential component in assisting the Court.

15. In my opinion matters could be structured differently, much differently in fact, which would require considerable thought. It seems to me, for example, that it is not necessary for all parties to appear in court on every occasion (i.e. at every monthly intensive welfare review) if there is no particular issue in the case at that time. The guardian's involvement becomes crucial where there is an issue either in terms of interventions which ought to have been available to the child in terms of therapies, assessments, educational matters and such like. The guardian *ad litem* is then invaluable required to attend and present the views of the child to the Court.

16. **Conclusion:** The proposals for an independent, efficient and transparent system for guardians ad litem who represent the best interests of the child are to be welcomed. It is essential that guardians are assisted in continuing their essential role.

Further Conclusions in relation to the reform of the guardian ad litem arrangements from Ms Justice Bronagh O'Hanlon

1. I have been sitting as a High Court Judge taking the minor's list every Thursday for a considerable period of time now. This involves dealing with children in secure care in Ireland, the whole issue of placing children in secure care in England where necessary. This list also deals with vulnerable adults. Preparation for the hearings on Thursday involves reading a minimum of three reports per case prior to hearing the list. These reports come from the social worker and from the guardian ad litem and reports from various medical personnel can also be involved. This list involves intensive welfare review on a monthly basis of each child in care and covers children who are in step down placements where an order may have been discharged but where nonetheless the matter is kept before the High Court until the child has successfully stepped down. It is a specialised area of work. The guardian's view is absolutely essential to the smooth running of the Court. Issues to be decided upon can include resolving disputes as to the most appropriate way forward and ensuring that the proper planning occurs to give the appropriate care and treatment to the persons concerned.

2. Because of a lack of suitable secure care facilities in Ireland to suit people, in particular people who are psychiatrically unwell or people who have exceptionally complex conditions, some of these children have to be placed abroad. The real and extreme difficulty this list faces is when the child or vulnerable adult is ready to step down and come back to this jurisdiction there is a constant problem of a lack of suitable places available for that child so the problem is twofold. The lack of secure psychiatric facilities in Ireland for the treatment of secure care clients and a complete lack of appropriate step down facilities impairs the possibility of maintaining the

health and wellbeing of that child on return is proving to be a real problem. It seems to me that there is an acute necessity for the building of an appropriate facility in Ireland in which to treat children who are psychiatrically unwell and/or who have extreme conduct and other disorders.

3. The list also deals with the capacity issues which have to be decided on a case by case basis in certain circumstances where the need arises. The complexities and range difficulties encountered by these minors and vulnerable people are quite extraordinary.

4. It seems to me that where there are inadequate or no facilities available into which a person can return a person from England, that person can then begin to regress or be at risk of regression and it seems a futile waste of the Irish tax payers money if we are not to provide as a matter of extreme urgency, the appropriate step down and/continuing recovery facilities for young people/vulnerable adults. I would view this situation as gravely urgent. It has been the practice for the person taking the minors list; I have visited recently all facilities in England and Ireland where we have children in secure care. At the moment a number of these are ready to return to Ireland and they await the provision of appropriate facilities to ensure their smooth return and integration. There is a huge cultural issue for these children where there are many months and sometimes up to a number of years abroad in a different cultural environment to their own, far away from their family and friends and that creates its own sense of loss for them and extra pressure not only on the patient themselves but on their families. Immediate intervention is therefore required in my view to alleviate the suffering for these people. It is also highly expensive for our country to pay for these facilities abroad and to pay for the cost in many instances of the access visits abroad.

5. It seems to me that unless the High Court had the assistance very regularly of the *guardian ad litem* and the expert team of trained lawyers in each case as it at present, this particular body of work i.e. intensive welfare review and case hearings, could take an entire week every week. We are facing a more complex legal framework in the capacity legislation at present before the Dáil. This is very much an expanding body of work being undertaken in the High Court. The inter jurisdictional aspects are quite complicated and have to be dealt with very carefully as is at present with reciprocal orders being necessary as is at present when children are sent abroad to be detained in English hospitals.

6. The huge focus at the moment in this list is on ensuring that the average three and a half months time spent in secure care by any child is used to quickly and efficiently assess all needs including educational, psychological, medical and psychiatric in order to protect the constitutional rights of these children. I noted that the Department of Education are refusing to ensure a ratio better than special needs schooling of 6:1 in Ballydowd, for example. This places the school which produced the first ever Leaving Certificate graduate last summer from a child in special care there in an impossible situation looking at the age mix and security level risk. This whole area needs urgent attention. Through cooperative endeavour we now see the beginning of a resolution of issues concerning psychiatric and psychological screening in a timely fashion where children enter this system.