

Children's Rights Alliance Response to the Department of Children and Youth Affairs' Consultation on the Reform of the Guardian *Ad Litem* Services

2016



The Children's Rights Alliance unites over 100 members working together to make Ireland one of the best places in the world to be a child. We change the lives of all children in Ireland by making sure that their rights are respected and protected in our laws, policies and services.

22q11
Ag Eisteacht
Alcohol Action Ireland
Alliance Against Cutbacks in Education
Amnesty International Ireland
ASH Ireland
Assoc. for Criminal Justice Research and Development (ACJRD)
Association of Secondary Teachers Ireland (ASTI)
ATD Fourth World – Ireland Ltd
Atheist Ireland
Autism Network Ireland
Barnardos
Barretstown Camp
BeLonG To Youth Services
Bessborough Centre
Catholic Guides of Ireland
Childhood Development Initiative
Children in Hospital Ireland
COPE Galway
Cork Life Centre
Crosscare
Dental Health Foundation of Ireland
Department of Occupational Science and Occupational Therapy, UCC
Disability Federation of Ireland
DIT – School of Social Sciences & Legal Studies
Down Syndrome Ireland
Dublin Rape Crisis Centre
Dun Laoghaire Refugee Project
Early Childhood Ireland
Educate Together
EPIC
EQUATE
Extern Ireland
Focus Ireland
Foróige
Gaelscoileanna Teo
GLEN - Gay and Lesbian Equality Network
Headstrong - The National Centre for Youth Mental Health
Healthy Food for All
Immigrant Council of Ireland
Inclusion Ireland
Independent Hospitals Association of Ireland
Inspire Ireland
Institute of Community Health Nursing
Institute of Guidance Counsellors
International Adoption Association
Irish Association for Infant Mental Health
Irish Association of Social Care Workers (IASCW)
Irish Association of Social Workers
Irish Association of Suicidology
Irish Autism Action
Irish Centre for Human Rights, NUI Galway
Irish Congress of Trade Unions (ICTU)
Irish Council for Civil Liberties (ICCL)
Irish Foster Care Association
Irish Girl Guides
Irish Heart Foundation
Irish National Teachers Organisation (INTO)
Irish Penal Reform Trust
Irish Premature Babies
Irish Primary Principals Network
Irish Refugee Council
Irish Second Level Students' Union (ISSU)
Irish Society for the Prevention of Cruelty to Children
Irish Traveller Movement
Irish Youth Foundation (IYF)
Jack & Jill Children's Foundation
Jesus Centre for Faith and Justice
Kids' Own Publishing Partnership
Law Centre for Children and Young People
Lifestart National Office
Mental Health Reform
Mounttown Neighbourhood Youth and Family Project
MyMind
National Childhood Network
National Organisation for the Treatment of Abusers (NOTA)
National Parents Council Post Primary
National Parents Council Primary
National Youth Council of Ireland
One Family
One in Four
Parentline
Parentstop
Pavee Point
Peter McVerry Trust
Rape Crisis Network Ireland (RCNI)
Realt Beag
SAFE Ireland
Saoirse Housing Association
SAOL Beag Children's Centre
School of Education UCD
Scouting Ireland
Simon Communities of Ireland
Society of St. Vincent de Paul
Sonas Housing Association
Special Needs Parents Association
SpunOut.ie
St. Nicholas Montessori College
St. Nicholas Montessori Teacher's Association
St. Patrick's Mental Health Services
Start Strong
Step by Step Child & Family Project
Suas Educational Development
Sugradh
Teachers' Union of Ireland
Terenure Rugby Football Club
The Ark, A Cultural Centre for Children
The Gaurdian Childrens Project
The Prevention and Early Intervention Network
The UNESCO Child and Family Research Centre, NUI Galway
Treoir
UNICEF Ireland
Unmarried and Separated Families of Ireland
youngballymun
Youth Advocate Programme Ireland (YAP)
Youth Work Ireland

Children's Rights Alliance

7 Red Cow Lane, Smithfield, Dublin 7, Ireland

Ph: +353 1 662 9400

Email: info@childrensrights.ie

www.childrensrights.ie

Introduction

The Children's Rights Alliance welcomes the opportunity to be consulted by the Department of Children and Youth Affairs on the reform of Guardian *Ad Litem* services under the Child Care Act 1991. The Children's Rights Alliance unites over 100 members working together to make Ireland one of the best places in the world to be a child. We change the lives of all children in Ireland by making sure that their rights are respected and protected in our laws, policies and services.

The Children's Rights Alliance welcomes the initiative by the Department of Children and Youth Affairs to establish a national Guardian *Ad Litem* (GAL) service. The Children's Rights Alliance has been calling for reform of the GAL service for over a decade.¹ We served as a member on the Children's Act Advisory Board Consultative Group which developed the 2009 guidance – *Giving a voice to children's wishes, feelings and interests*.²

This submission contains two parts. Section A documents constitutional and international human rights law of relevance to Guardian *Ad Litem*. Section B provides responses to the questions posed in the Department of Children and Youth Affairs' consultation paper – *Preparing a Policy Approach to the Reform of Guardian Ad Litem Arrangements in Proceedings under the Child Care Act 1991*. We would like to note that these are our initial thoughts on GAL reform. We look forward to continuing to engage with the Department as policy and legislative proposals for reform are developed.

Section A: Constitutional and International Human Rights Law of relevance to Guardian *Ad Litem*

UN Convention on the Rights of the Child

Under Article 12 of the UN Convention on the Rights of the Child, Ireland is obliged to assure to the child who is capable of forming his or her own views the right to be heard in any judicial proceedings affecting the child and for those views to be given due weight in accordance with the age and maturity of the child. The Articles make specific reference to the child being heard indirectly through a representative body, such as a GAL. Article 12 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 is also under an obligation to ensure decision-making is in the best interests of the child. Article 3 of the UN Convention provides that:

- 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*
- 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.*

1 See for example, Children's Rights Alliance (2006) *From Rhetoric to Rights: Second Shadow Report to the United Nations Committee on the Rights of the Child*, p. 22- 23.

2 Children's Act Advisory Board (2009) *Giving a voice to children's wishes, feelings and interests: Guidance on the Role, Criteria for Appointment, Qualifications and Training of Guardians ad Litem Appointed for Children in Proceedings under the Child Care Act, 1991*.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 9 of the Convention provides that all interested parties must be given an opportunity to participate in child care proceedings. It provides that:

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, **all interested parties shall be given an opportunity to participate in the proceedings and make their views known.** (emphasis added)

In line with Article 9, as proceedings under the Child Care Act 1991 may separate a child from his or her parents, children should be considered an 'interested party' and be afforded the opportunity to participate in the proceedings and give his or her views.³

Following an examination of Ireland in 2006, the UN Committee on the Rights of the Child called on Ireland to strengthen efforts, including through constitutional provisions, to ensure children have the right to express their views in all matters affecting them and to have those views given due weight, including through the use of a GAL, in particular in cases where children are separated from their parents.⁴ Following the latest examination in 2016, the UN Committee recognised progress made and called on Ireland to:

(a) Take measures to ensure the effective implementation of legislation recognizing the right of the child to be heard in relevant legal proceedings, particularly family law proceedings, including by establishing systems and/or procedures for social workers and courts to comply with the principle;

(b) Ensure that there are provisions under the Children and Family Relationships Act 2015 for covering the cost of an expert to hear the child's views in family law proceedings, **guarantee that the views of the child are taken into account in all child care proceedings;** (emphasis added)

To provide guidance on the implementation of the UN Convention, the UN Committee on the Rights of the Child develops General Comments, including *General Comment No. 12: The right of the child to be heard*,⁵ and *General Comment No. 14* on the best interest of the child principle.⁶

The Committee states that once a child has decided to be heard, he or she will have to decide how to be heard: "either directly, or through a representative or appropriate body."⁷ They recommend that, wherever possible, the child must be given the opportunity to be directly heard in any proceedings. The method chosen should be determined by the child (or by the appropriate authority as necessary) according to her or his particular situation.⁸

3 See B. Barrington (2015) 'Child Care Law' in *Making Rights Real for Children: A Children's Rights Audit of Irish Law*, Dublin, Children's Rights Alliance, p. 196.

4 UN Committee on the Rights of the Child (2006) *Concluding Observations: Ireland*, CRC/C/IRL/CO/2, para. 25.

5 UN Committee on the Rights of the Child (2009) *General Comment No. 12: The right of the child to be heard*, CRC/C/GC/12.

6 UN Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interest taken as a primary consideration, (art.3, para.1)*, CRC/C/GC/14, 29 May 2013.

7 UN Committee on the Rights of the Child (2009) *General Comment No. 12: The right of the child to be heard*, CRC/C/GC/12, para 35.

8 *Ibid.*, para 36.

The UN Committee notes that a child has the right not to exercise this right: expressing views is a choice, not an obligation.⁹ The right to be heard is a right of the child, not a duty on the child.¹⁰

Article 3 (best interests) and Article 12 (views of the child) are inextricably linked. The right of a child to be heard in child care proceedings is set out in General Comment No 12:

Whenever a decision is made to remove a child from her or his family because the child is a victim of abuse or neglect within his or her home, the view of the child must be taken into account in order to determine the best interests of the child. *The intervention may be initiated by a complaint from a child, another family member or a member of the community alleging abuse or neglect in the family. (emphasis added)*

The Committee's experience is that the child's right to be heard is not always taken into account by States parties. The Committee recommends that States parties ensure, through legislation, regulation and policy directives, that the child's views are solicited and considered, including decisions regarding placement in foster care or homes, development of care plans and their review, and visits with parents and family.¹¹

The UN Committee notes the importance of appointing an independent representative in cases of conflict. This may come into play for example where a social worker and the child have a different opinion. This sentiment is echoed in Article 3 of European Convention on the Exercise of Children's Rights (see below).

Where the child wishes to express his or her views and where this right is fulfilled through a representative, the latter's obligation is to communicate accurately the views of the child. In situations where the child's views are in conflict with those of his or her representative, a procedure should be established to allow the child to approach an authority to establish a separate representation for the child (e.g. a guardian ad litem), if necessary.¹²

EU Law

The Charter of Fundamental Rights of the European Union is legally binding on the EU. Article 24 of the Charter provides that:

- 1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.*
- 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.*
- 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.*

The Court of Justice of the European Union found that hearing a child is not an absolute right, but that if a court decides it is necessary, it must offer the child a genuine and effective opportunity to express his or her views.¹³ It also held that the right of the child to be heard, as provided in the Charter and the EU's Brussels II bis Regulation, requires legal procedures and conditions which enable children to express their views freely to be available to them, and the court to obtain those

9 *Ibid.*, para 16.

10 Committee of Ministers of the Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies)* http://www.coe.int/t/dghl/standardsetting/childjustice/default_en.asp, para.46.

11 UN Committee on the Rights of the Child (2009) *General Comment No. 12: The right of the child to be heard*, CRC/C/GC/12, para 53 & 54.

12 UN, Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interest taken as a primary consideration (art.3, para.1)*, CRC/C/GC/14, 29 May 2013, para 90.

13 CJEU, C-491/10 PPU, *Joseba Andoni Aguirre Zarraga v. Simone Pelz*, 22 December 2010; see also Section 5.4, which discusses further details of this ruling and the operation of the Brussels II bis regulation.

views.¹⁴ The court also needs to take all appropriate measures to arrange such hearings, with regard to the children's best interests and the circumstances of each individual case.

Council of Europe

A review of relevant case law suggests that child care proceedings are protected by Articles 6 and 8 of the European Convention on Human Rights (ECHR).¹⁵ Article 8 of the European Convention protects the right to respect for private and family life and Article 6(1) provides that:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Ireland signed the Council of Europe's European Convention on the Exercise of Children's Rights in 1996 but has yet to ratify this Convention. This Convention contains comprehensive guidance of relevance to GALs. Article 3 grants children the right to be informed and to express their views in proceedings as a procedural right.¹⁶ Article 4 provides the child with the right to apply for the appointment of a special representative in proceedings before a judicial authority affecting her or him. Article 5 provides that:

1 Subject to Article 9, the child shall have the right to apply, in person or through other persons or bodies, for a special representative in proceedings before a judicial authority affecting the child where internal law precludes the holders of parental responsibilities from representing the child as a result of a conflict of interest with the latter.

2 States are free to limit the right in paragraph 1 to children who are considered by internal law to have sufficient understanding.

Article 5 continues by providing other possible procedural rights, it states that:

Parties shall consider granting children additional procedural rights in relation to proceedings before a judicial authority affecting them, in particular:

- a) the right to apply to be assisted by an appropriate person of their choice in order to help them express their views;*
- b) the right to apply themselves, or through other persons or bodies, for the appointment of a separate representative, in appropriate cases a lawyer;*
- c) the right to appoint their own representative;*
- d) the right to exercise some or all of the rights of parties to such proceedings.*

Article 9 sets out more detail on the appointment of a representative, it provides that:

1 In proceedings affecting a child where, by internal law, the holders of parental responsibilities are precluded from representing the child as a result of a conflict of interest between them and the child, the judicial authority shall have the power to appoint a special representative for the child in those proceedings.

14 European Union Agency for Fundamental Rights, and the Council of Europe together with the Registry of the European Court of Human Rights (2015) Handbook on European law relating to the rights of the child, p. 42, <http://fra.europa.eu/en/publication/2015/handbook-european-law-child-rights>

15 R, E, J, K v Cafcass [2012] EWCA Civ 853 para 87 per McFarlane LJ. For a discussion on this point see B. Barrington (2015) 'Child Care Law' in *Making Rights Real for Children: A Children's Rights Audit of Irish Law*, Dublin, Children's Rights Alliance, p. 202-203.

16 Council of Europe, European Convention on the Exercise of Children's Rights, CETS No. 160, 1996.

2 Parties shall consider providing that, in proceedings affecting a child, the judicial authority shall have the power to appoint a separate representative, in appropriate cases a lawyer, to represent the child.

Article 10 set out the role of representatives. It states that:

1 In the case of proceedings before a judicial authority affecting a child the representative shall, unless this would be manifestly contrary to the best interests of the child:

a) provide all relevant information to the child, if the child is considered by internal law as having sufficient understanding;

b) provide explanations to the child if the child is considered by internal law as having sufficient understanding, concerning the possible consequences of compliance with his or her views and the possible consequences of any action by the representative;

c) determine the views of the child and present these views to the judicial authority.

2 Parties shall consider extending the provisions of paragraph 1 to the holders of parental responsibilities.

Constitutional Rights

Article 42A.4 provides that provision shall be made by law for the best interests of the child to be ‘the paramount consideration’ in child protection and care, adoption and family law proceedings and for the views of the child to be ‘ascertained and given due weight’.¹⁷ Article 42A.4 of the Constitution of Ireland provides that:

*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.

The constitutional right of a child under Article 42A.4 to is not adequately provided for in Irish law. A child has no automatic entitlement to have their voice heard in public or private family law proceedings affecting him or her.

Private Law: The Children and Family Relationships Act 2015 does not fully satisfy the constitutional provision. The Act provides, at the discretion of the Court, to procure from an expert a report in writing on any question affecting the welfare of the child or to appoint an expert to determine the views of the child and convey these to the Court.¹⁸ The cost of the expert must be borne by the parties to the cases, in effect the parent or guardian.¹⁹ This provision is likely to impact negatively on children in low income families who will face an additional barrier to having their voices heard.

Public Law: The right of a child to have his or her views heard in child care proceedings is not adequately provided for nor supported. In child care proceedings, the Child Care Act 1991 provides for the views of the child to be heard through a GAL. However, the appointment of the GAL is at the judge’s discretion if he or she is satisfied that it is necessary in the interests of the child and in the interests of justice to do so.²⁰ If a child is made a party to the proceedings the entitlement to a GAL ceases.²¹ GALs are unregulated, availability is patchy, and there is no statutory guidance on the eligibility criteria, role, functions or payment structures.²²

17 Constitution of Ireland - Bunreacht na hÉireann, Article 42A.4.

18 Children and Family Relationships Act 2015, s. 32. (1) (a) and (b).

19 *Ibid.*, s. 63.

20 Child Care Act 1991, s. 26(1).

21 *Ibid.*, s. 26(4).

22 See Department of Children and Youth Affairs (2014), *Seventh Report of the Special Rapporteur on Child Protection: A Report Submitted to the Oireachtas*, <http://www.dcy.gov.ie/documents/publications/SeventhSpecialRapReport2014.pdf> [accessed 12 May 2015]; and C. Coulter (2015) Final Report, Child Care Law Reporting Project, p. 80, and C. Corrigan (2015) *The Construction and Impact of Children’s Participation through the Guardian ad litem in Child Protection Cases: The Views of District Court Judges, Guardians ad litem and children*, unpublished Phd thesis, Trinity College Dublin.

B. Response to Consultation Questions

Principles & Policies – Response to Questions 1 & 2

The Children’s Rights Alliance believes the new GAL service must be compliant with children’s constitutional rights and with international human rights law.

Under the principles listed in the consultation document, it states that ‘the purpose of the service is to 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’. The next point acknowledges that children have rights including under the UN Convention on the Rights of the Child and the Constitution of Ireland.

While we agree with both of these sentiments we recommend that the purpose of the service be clarified. We believe the function of a GAL is to 1) vindicate a child’s right to be heard, 2) to represent the child or support him or her to be represented in the proceedings; and 3) to provide to the courts with an independent assessment of the child’s best interests.

We believe the purpose of the GAL should be to facilitate the child’s right under Article 42A.4.2° of the Constitution of Ireland to have his or her views heard to allow for them to be given due weight in proceedings having regard to the child’s age and maturity.²³ In addition, the GAL should provide his or her expert view as to what is in the best interests of the child during the proceedings, this will support the court to meet its duty to act with the best interests of the child as the paramount consideration, as required under Article 42A.4.1° of the Constitution of Ireland.²⁴

We note that the consultation paper is confined to the operation of the GAL service in proceedings under the Child Care Act 1991. We hope that the reforms made to the GAL service in this area can also be applied in the areas of adoption²⁵ and family law²⁶ to provide a standardised approach to meet the State’s obligations under Article 42A.4 of the Constitution of Ireland.

We recommend that the language of Article 42A.4 and Article 12 of the UN Convention on the Rights of the Child (views of the child) be reflected in the section on the function of a GAL.

The principles which will underpin the operation of a national GAL service should be in line with the principles set out in the Council of Europe Guidelines on Child-Friendly Justice, namely participation, best interests of the child, dignity, protection from discrimination, and rule of law;²⁷ and with principles set out in UN Committee on the Rights of the Child’s General Comment No. 12, including transparent and informative, voluntary, respectful, child-friendly, inclusive, supported by training, safe and sensitive to risk, and accountable.²⁸

Our view on the appointment of a GAL being at the discretion of the court is discussed further below.

Amendment of Existing Legislation – Response to Question 3

-
- 23 Article 42A.2° states that: 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.
- 24 Article 42A.1° states that: 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.
- 25 Under Section 24(2) of the Adoption Act 2010, the Adoption Authority shall give due consideration to the wishes of the child over the age of seven years, having regard to his or her age and understanding.
- 26 Section 11 of the Children Act 1997 amends the Guardianship of Infants Act 1964 by providing that the in family law proceedings the court may appoint a guardian *ad litem* for the child.
- 27 Committee of Ministers of the Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers’ Deputies)* http://www.coe.int/t/dghl/standardsetting/childjustice/default_en.asp
- 28 UN Committee on the Rights of the Child (2009) *General Comment No. 12: The right of the child to be heard*, CRC/C/GC/12, paras 132-134.

The Children’s Rights Alliance agrees with the proposal that Section 26 of the 1991 Act should be repealed and replaced by new provisions.

The new provisions must ensure children have access to a range of mechanisms to have their voice heard in judicial settings, including, but not limited to, a reformed *Guardian Ad Litem* service.

Establishing a Nationally Organised, Managed and Delivered Service – Response to Questions 4-6

Of the three options proposed in the consultation paper, the Children’s Rights Alliance favours the establishment of a new service under the auspices of an existing public body. The new service would be a national Court Welfare Service which would maintain a panel of GALs for appointment in public law (care proceedings and adoption) and private law (family law) proceedings. This is similar to the English body, CAFCASS, which represents children in both public and private law cases.

The State is obliged under Article 42A.4 of the Constitution of Ireland to hear the views of the child and uphold their best interest in certain public and private law proceedings. Such a court welfare service is urgently needed to support the implementation of the Children and Family Relationships Act 2015. The service would carry out assessments of the child’s welfare and best interests, ascertain his or her views, and carry out family and risk assessments, as required.

The new national Court Welfare Service service could be located under the aegis of the Courts Service with its budget line provided through the Courts Service. This structure would allow for independence from the Department of Children and Youth Affairs / Tusla, removing any real or perceived conflicts of interest.²⁹

The new service should maintain a panel of accredited GALs with detailed information on the individuals’ qualifications, special areas of expertise, geographical location and Garda vetting. This information should be available to a judge to allow him or her to select a GAL appropriate to the case under consideration.

All GALs should be required to engage in continuing professional development and to be compliant with a professional code of conduct and national standard. The new service should be empowered to consider and determine complaints against an individual GAL. The complaints and dispute resolution mechanism should include accessible and child-friendly material and procedures.

Critical success factors in the operation of a national GAL service should include that:

- It is a centrally managed national service which delivers a service governed by a set of national standards.
- The GALs are highly trained and experienced individuals whose expertise, independence, impartiality and rigour is valued and respected.
- The GAL service employs and manages individual GALs, provides them with supervision and training, and monitors and evaluates their work against professional standards/code of conduct.
- The management of the GAL service is independent in relation to budgetary and staffing decisions.
- A GAL is able to operate and provide his or her professional opinion even where it differs from other parties to the proceedings including Tusla.
- The service is provided by a public or non-profit entity: it is not a profit-making enterprise.
- A national policy is in place on how children will be heard in judicial proceedings, including children being heard directly by a judge; the appointing of a GAL (and legal advice/representation for the GAL); and the joining of a child or a GAL as a party to proceedings.

29 See Colm Roberts ‘Here Come the GALs’ in *Law Society Gazette*, Jan/Feb 2015, p. 18-19.
<http://www.lawsociety.ie/Documents/Gazette/Gazette%202015/jan-feb%20gazette%202015%20v3.pdf>

Children who are Made a Party to Proceedings – Response to Question 7

The Children’s Rights Alliance supports the retention of Section 25 of the 1991 Act which provides that in certain circumstances a child may be joined as a party to proceedings, in line with Articles 5(d) and 9(2) of the European Convention on the Exercise of Children’s Rights.

We believe that in complex and contentious cases legal representation may be required to guarantee the child’s right to a fair trial and fair procedures under Article 40.3 of the Constitution, as confirmed by Finlay Geoghegan J. in *FN and EB v. CO, HO and EK*,³⁰ and Article 6 of the European Convention on Human Rights. This is common practice under the UK model. We support the proposal that Section 26(4) be amended to allow for a child to have both his/her own legal representation and a GAL at the same time. This approach is in line with the UN Committee on the Rights of the Child General Comment No. 14 (see extract below).

We recommend that clarity is needed on the different roles that a child and his or her GAL may play within proceedings. It is our understanding that these may include:

- a child may be appointed a GAL
- a child may be appointed a GAL who accesses legal advice
- a child may be appointed a GAL who accesses legal advice and representation
- a child may be joined as a party to proceedings with their own legal representation and a GAL
- a GAL on behalf of a child may be joined as a party to proceedings with their own legal representation.

To foster a consistent national approach, we recommend that guidance be developed on the circumstances in which each of these scenarios may take place as justified by the circumstances of the case under consideration.

We also recommend that provision be made for a GAL who does not have legal representation to be permitted to ask the judge to put questions to witnesses on matters where they have concerns that they think are not being addressed.

McMenamin J. comments in the Supreme Court *OA* judgment delivered in June 2015 – after the passage into law of Article 42A of the Constitution – are important to note:

Prior to considering the legal question, it is necessary to emphasise that in child care cases a number of constitutional rights are at stake. Among these are, first, a child’s right to have decisions made with his or her welfare as a paramount consideration; second, the rights both of parents, (designated in the Constitution as the natural custodians of children), and of children themselves, to be properly represented in proceedings where the outcome can be truly life-changing for all involved. A further value, which forms an important part of the background, concerns the right of parents or guardians, in such proceedings, to choose their own lawyer, should they so wish. The practical protection of these rights necessitates access to an appropriate level of legal representation. But, as a corollary of these rights, there are constitutional and legal duties, including the State’s statutory duty to protect and vindicate the welfare of children where questions arise in relation to their welfare and care.³¹

30 [2004] 4 IR 311 [2004] IEHC 151At paras 28-29. The judge concluded that: *It is also well established that an individual in respect of whom a decision of importance is being taken, such as those taken by the courts to which s. 3 of the Act of 1964 applies, has a personal right within the meaning of Article 40.3 of the Constitution to have such decision taken in accordance with the principles of constitutional justice. Such principles of constitutional justice appear to me to include the right of a child, whose age and understanding is such that a court considers it appropriate to take into account his/her wishes, to have such wishes taken into account by a court in taking a decision to which s. 3 of the Act of 1964 applies. Hence s. 25 should be construed as enacted for the purpose of inter alia giving effect to the procedural right guaranteed by Article 40.3 to children of a certain age and understanding to have their wishes taken into account by a court in making a decision under the Act of 1964, relating to the guardianship, custody or upbringing of the child.*

31 [2015] IESC 52 - <http://www.courts.ie/Judgments.nsf/0/89A36CEB7B2B0A7680257E6D0055868B>

The UN Committee on the Rights of the Child has noted that:

*The child will need appropriate legal representation when his or her best interests are to be formally assessed and determined by courts and equivalent bodies. In particular, in cases where a child is referred to an administrative or judicial procedure involving the determination of his or her best interests, he or she should be provided with a legal representative, in addition to a guardian or representative of his or her views, when there is a potential conflict between the parties in the decision.*³²

Appointment of Guardian Ad Litem – Response to Question 8 and 9

The Child Care Law Reporting Project has found that the appointment of a GAL varies considerably across the country, ranging from a high of 79.8% children being appointed a GAL in Louth to a low of 13.3% of children in Galway.³³

The Children’s Rights Alliance does not support the proposal in the consultation paper that the appointment of a GAL remains at the discretion of the judge, even with the addition of proposed statutory guidance on the appointment of a GAL in specific circumstances. We believe the continuation of a discretionary approach is not sufficient to meet the child’s rights. It will not vindicate a child’s rights under Article 42A.4.2° of the Constitution; under Article 12 of the UN Convention on the Rights of the Child and General Comments No. 12 and No. 14.³⁴ It may also be a breach of Article 24(1) of the EU Charter of Fundamental Rights³⁵ and Articles 6 and 8 of the European Convention on Human Rights which guarantee a child the right to a fair trial and protects the right to respect for private and family life.³⁶

According to the Council of Europe guidelines on Child Friendly Justice, children should have the right to their own legal counsel and representation, in their own name, in proceedings where there is, or could be, a conflict of interest between the child and the parents or other involved parties.³⁷ In cases where there are conflicting interests between parents and children, the competent authority should appoint either a GAL or another independent representative to represent the views and interests of the child.³⁸ Adequate representation and the right to be represented independently from the parents should be guaranteed, especially in proceedings where the parents, members of the family or caregivers are the alleged offenders.³⁹

We recommend that the legislation be amended to provide for a presumption in favour of appointing a Guardian Ad Litem in all cases. The onus should be on the court to justify why such an appointment is not necessary given the circumstances of the case. This is in line with the position in England, Wales and Northern Ireland where a court is required to appoint a GAL unless it is satisfied that it is not in the child’s interest to do so.⁴⁰ The assumption is that a child has a right to have his or her views heard and to be represented by a GAL to promote and defend the child’s best interest.⁴¹

32 UN Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interest taken as a primary consideration, (art.3, para.1)*, CRC/C/GC/14, 29 May 2013, para 96.

33 C. Coulter (2015) Final Report, Child Care Law Reporting Project, p. 80.

34 UN Committee on the Rights of the Child (2006) Concluding Observations Ireland, CRC/C/IRL/CO/2, para 37(b).

35 Article 24(1) states that: Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

36 Article 6(1) states that: In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

37 Committee of Ministers of the Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers’ Deputies)* http://www.coe.int/t/dghl/standardsetting/childjustice/default_en.asp, para. 37.

38 *Ibid.*, para 42.

39 *Ibid.*, para 43.

40 Section 60(1) Children (NI) Order 1995 and Section 41(1) of Children Act 1989. See Cathy Donnelly ‘Reflections of a Guardian Ad Litem on the Participation of Looked-after Children in Public Law Proceedings’ in *Child Care in Practice*, Vol 16, No 2, April 2010 pp. 181-193.

41 B. Barrington (2015) ‘Child Care Law’ in *Making Rights Real for Children: A Children’s Rights Audit of Irish Law*, Dublin, Children’s Rights Alliance, p. 200.

We believe the proposals put forward on ceasing the appointment of a GAL need to be reconsidered. Certain cases may merit the retention or reappointment of the same GAL such as those involving Special Care, care placements outside the jurisdiction and where there are unresolved issues that are due back before the courts.

Role of Guardian Ad Litem – Response to Questions 10-12

Research by Carmel Corrigan found a wide interpretation of the GAL role by both GALs and judges interviewed. In addition to roles complying with the Children’s Act Advisory Board guidance, she found additional roles include those of negotiator of services for both children and parents, mediator between the HSE and parents, and as ‘compensating’ for poor social work practice in an over-burdened system.⁴²

The Children’s Rights Alliance believes that the description of the role of the GAL should clearly reflect the role of the GAL as a mechanism to facilitate the child’s right to have his or her views heard and their best interests met. In addition, legislation should direct the GAL to have the child’s best interests as the paramount consideration at all times.⁴³

We would support any measures that would promote a collaborative approach and thus enable child care proceedings to be less adversarial and more inquisitorial in nature. Alternatives to judicial proceedings such as mediation and alternative dispute resolution should be encouraged whenever these may best serve the child’s best interests.⁴⁴

Possible Provision of the Guardian Ad Litem Report to the Child – Response to Question 13

A child has a right to access information under the UN Convention on the Rights of the Child (Article 17),⁷⁵ and is a key component to ensure an individual has access to justice. The Council of Europe Guidelines on Child Friendly Justice note that a GAL or legal representative should communicate and explain the given decision or judgment to the child in a language adapted to the child’s level of understanding and should give the necessary information on possible measures that could be taken, such as appeal or independent complaint mechanisms.⁴⁵

Status of the Guardian Ad Litem – Response to Question 14

The UN Committee on the Rights of the Child states that the opportunity for representation must be “in a manner consistent with the procedural rules of national law”.⁴⁶ States parties are encouraged to comply with the basic rules of fair proceedings, such as the right to a defence and the right to access one’s own files.⁴⁷ The Committee notes that when the rules of procedure are not adhered to, the decision of the court or the administrative authority can be challenged and may be overturned, substituted, or referred back for further judicial consideration.⁴⁸

The Children’s Rights Alliance believes the proposal that the GAL is a court-appointed adviser needs further consideration and discussion. In some circumstances, the status of a court-appointed adviser may be too restrictive to allow the GAL to fulfil their duties depending on the function/role that they have within the proceedings, for example if they are made a party to proceedings.

42 C. Corrigan (2015) *The Construction and Impact of Children’s Participation through the Guardian ad litem in Child Protection Cases: The Views of District Court Judges, Guardians ad litem and children*, unpublished Phd thesis, Trinity College Dublin, pp. 260-261.

43 G. Shannon (2007) *Report of the Special Rapporteur on Child Protection A Report Submitted to the Oireachtas Geoffrey Shannon*, p. 66
http://www.dcy.gov.ie/documents/child_welfare_protection/Report_of_Special_Rapporteur_on_Child_Protection_Geoffrey_Shannon.PDF

44 Committee of Ministers of the Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers’ Deputies)* http://www.coe.int/t/dghl/standardsetting/childjustice/default_en.asp, para. 24.

45 Committee of Ministers of the Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers’ Deputies)* http://www.coe.int/t/dghl/standardsetting/childjustice/default_en.asp, para. 75.

46 Para 38.

47 *Ibid.*

48 Para 39.

Qualifications & Eligibility for Appointment – Response to Questions 15-17

In relation to the type of representative, the UN Committee on the Rights of the Child notes that he or she must have sufficient knowledge and understanding of the various aspects of the decision-making process and experience in working with children.⁴⁹ The representative must be aware that she or he represents exclusively the interests of the child and not the interests of other persons (parent(s)), institutions or bodies (e.g. residential home, administration or society).⁵⁰ Codes of conduct should be developed for representatives who are appointed to represent the child's views.⁵¹

In addition to the proposals put forward, the Children's Rights Alliance believes comprehensive recruitment procedures should be put in place to ensure that the individual meets not only the academic and professional qualifications criteria but that he or she can demonstrate their suitability and knowledge to carry out the role of a GAL. These should include interviews and reference checking. We believe the length of experience should be extended from three to five years: a period of five years was recommended in the Children's Act Advisory Board guidance, *Giving a voice to children's wishes, feelings and interests*.⁵² The national service should have a clear appraisal, evaluation and supervision process for all GALs.

The proposals for exceptional transitional measures must also include comprehensive recruitment procedures to assess the individual's suitability. We are aware of anecdotal concerns about poor practice among some current GALs. In the absence of any guidance or requirements to date, it is not sufficient to assume that past experience as a GAL means that you are suitable or qualified to be a GAL.

We believe that all GALs should have knowledge of child protection, child welfare and child development and the judicial system. We believe the GALs should be required to undergo standardised initial and ongoing professional development training. This training should include children's rights; child-centred methods of ascertaining the views of the child; the best interest of the child principle; working with children with disabilities, very young children and migrant and ethnic minority children; children's rights under the Constitution, the Child Care Act 1991 and other related statutes; and on the duty and roles of all parties and the judiciary in child care proceedings.

Access to Records, Record Management and Information Provision – Response to Questions 18-21

The Children's Rights Alliance supports the GAL have access to all relevant Tusla case records, which are not subject to legal privilege.

The national service should be obliged to provide an annual report to ensure accountability and transparency.

Role of the Child and Family Agency & Payment for Guardian Ad Litem Services – Response to Question 22

The Children's Rights Alliance recommends the budget for the national service should be allocated to a new dedicated public service under the auspices of the Court Service. The existing role of Tusla in relation to applying to the court for costs or having expenses measured or taxed should be transferred to the Court Service.

49 Para 36

50 Para 37

51 *Ibid.*

52 Children's Act Advisory Board (2009) *Giving a voice to children's wishes, feelings and interests: Guidance on the Role, Criteria for Appointment, Qualifications and Training of Guardians ad Litem Appointed for Children in Proceedings under the Child Care Act, 1991*, p. 10.

Engagement of Legal Representation – Response to Questions 23 & 24

The Children’s Rights Alliance believes further discussion is needed on the development of a framework that would allow a GAL, where he or she deems it to be necessary, to access independent legal advice/representation of his or her choosing to vindicate a child’s right to representation, in particular in complex and contentious cases.

Transitional Provision – Response to Question 25

We support the proposal in relation to transitional provision.

Regulations by the Minister– Response to Question 26

We support the proposal in relation to empowering the Minister to make regulations.

Conclusion – Response to Questions 27-29

We have no further comments.