



**ombudsman
do leanaí
for children**

**Ombudsman for Children’s Office submission to the Joint Committee
on Children and Youth Affairs in relation to the General Scheme of the
Child Care (Amendment) Bill 2017**

29 March 2017

1. Introduction

The Government gave its approval for the publication of the General Scheme of the Child Care (Amendment) Bill 2017 on 17 January 2017. This submission has been prepared under Section 7(4) of the Ombudsman for Children Act 2002, which provides that the Ombudsman for Children may give advice to Ministers of Government on any matter relating to the rights and welfare of children, including the probable effect on children of the implementation of any proposals for legislation.

It has been of serious concern to the Ombudsman for Children’s Office (OCO) since its establishment that the failure to listen to children and young people has often resulted in a failure to protect them from abuse and neglect. The OCO welcomes this General Scheme and its stated objectives to ensure that the Guardian *ad litem* (GAL) service can be provided to benefit the greatest number of children and young people, so that their voices can be heard in child care proceedings and that this service will be of high quality and sustainable into the future.¹ The establishment of a nationally organised and managed Guardian *ad litem* service at a statutory level is a crucial step towards ensuring that children and their rights are placed at the centre of judicial proceedings affecting them.

¹ See <https://www.dcyd.gov.ie/documents/26092016ReformofGuardianAdlitemArrangements.htm>.

In November 2015, the OCO made observations to the Department of Children and Youth Affairs on preparing a 'Policy Approach to Reform of Guardian *ad litem* Arrangements in Proceedings under the Child Care Act 1991'.² In preparing both those observations and this submission, the Office has been mindful of the intensely serious and sensitive nature of child care proceedings. The children affected by such proceedings can be extremely vulnerable; the proceedings themselves can be long, complex and adversarial; and decisions arising from child care proceedings can have profound and lasting implications.

In 2015, the OCO highlighted that the Guardian *ad litem* service should be child-centred and child rights-based; independent; accessible in principle to any child affected by care proceedings under the 1991 Act; accountable; transparent; and sustainable.³ While there are many provisions in this General Scheme that are to be welcomed, the Office believes that a number of amendments are necessary to ensure that this legislative framework fully complies with these principles and protects the constitutional and international rights of children.

2. International children's rights standards

Following Ireland's ratification of the UN Convention on the Rights of the Child (CRC) in 1992, the state is required to undertake 'all appropriate legislative, administrative and other measures' for the implementation of children's rights,⁴ including:

- Children's right to have their best interests taken as a primary consideration in all activities undertaken by public and private institutions, including courts of law (Article 3); and
- Children's right to freely express their views in all matters involving or affecting them, and for these views to be given due weight in line with their age and maturity (Article 12).

Children's right to express views and be heard

² Ombudsman for Children's Office, *Observations on a Consultation Paper by the Department of Children and Youth Affairs on preparing a Policy Approach to Reform of Guardian ad Litem Arrangements in Proceedings under the Child Care Act 1991* (2015) at https://www.oco.ie/wp-content/uploads/2014/03/OCOResponse_DCYAConsultationPaper_GALS.pdf.

³ Ombudsman for Children's Office, *Observations on a Consultation Paper by the Department of Children and Youth Affairs on preparing a Policy Approach to Reform of Guardian ad Litem Arrangements in Proceedings under the Child Care Act 1991* (2015) at https://www.oco.ie/wp-content/uploads/2014/03/OCOResponse_DCYAConsultationPaper_GALS.pdf at p. 2.

⁴ See Article 4, CRC.

Although expressing views is a choice for each child and not an obligation, the rights afforded to children under Article 12 should not be subject to any age limits or other arbitrary restrictions, either in law or in practice.⁵ This is particularly important in the child care context as Article 9 of the CRC establishes that in proceedings that may involve the separation of a child from its parents, ‘all interested parties’ should have the opportunity to participate in proceedings and give their views. According to Barrington BL, ‘it is hard to see how a child could not in principle be an interested party’.⁶ Furthermore, the case-law of the European Court of Human Rights recognises the child’s right to participate in judicial proceedings ‘as stemming from the impact of the proceedings on the child and what is at stake for the child.’⁷

The CRC Committee is clear that the full implementation of children’s right to express views and be heard in judicial proceedings requires recognition of, and respect for, both verbal and non-verbal forms of communication, through which very young children can demonstrate understanding, choices and preferences.⁸ The assessment and determination of a child’s best interests must also include respect for the child’s right to express his/her views freely and have due weight given to these views.⁹ Furthermore, the child has a right to receive an explanation of how his/her views were considered and if they were disregarded or violated, the child should have access to an effective remedy.¹⁰

Children’s right to an independent representative

The Committee recommends that ‘wherever possible, the child must be given the opportunity to be directly heard in any proceedings’.¹¹ However, when hearing a child through a representative, such as a Guardian *ad litem*, the CRC Committee has noted the following:

⁵ CRC Committee, *General Comment No. 12: The Right of the Child to be Heard* (2009) UN Doc. CRC/C/GC/12 at pp. 8-9.

⁶ B. Barrington, “Child Care Law” in Children’s Rights Alliance and Law Centre for Children and Young People, *Making Rights Real for Children: A Children’s Rights Audit of Irish Law* (Dublin: 2015) at p. 196.

⁷ S. Phelan, “Access to justice and decision-making” in Children’s Rights Alliance and Law Centre for Children and Young People, *Making Rights Real for Children: A Children’s Rights Audit of Irish Law* (Dublin: 2015) at p. 26.

⁸ CRC Committee, *General Comment No. 12: The Right of the Child to be Heard* (2009) UN Doc. CRC/C/GC/2009/12 at pp. 8-9.

⁹ Committee on the Rights of the Child, *General Comment No 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013) UN Doc. CRC/C/GC/14 at pp. 11, 13.

¹⁰ Committee on the Rights of the Child, *General Comment No 12: The Child’s Right to be Heard* (2009) UN Doc. CRC/C/GC/12 at p. 11.

¹¹ Committee on the Rights of the Child, *General Comment No 12: The Child’s Right to be Heard* (2009) UN Doc. CRC/C/GC/12 at pp. 9-10.

- It is of utmost importance that the child's views are transmitted correctly to the decision-maker by the representative;
- Representatives must have sufficient knowledge and understanding of the various aspects of the decision-making process and experience in working with children. They should also receive ongoing and systematic training, including training on children's rights and skills-based training on communicating with children at their level of understanding.
- The representative must be aware that she or he exclusively represents the interests of the child and not the interests of other parties (including the parents, institutions, bodies or society).¹²

Notably, the Committee has stated that the child will need appropriate legal representation when his or her best interests are to be formally assessed and determined by the 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'*.¹³

In its Concluding Observations on Ireland's children's rights record in 2016, the CRC Committee recommended that the State party should take measures to ensure the effective implementation of legislation recognising the right of the child to be heard in relevant legal proceedings, in particular family law proceedings, including by establishing systems and/or procedures for social workers and courts to comply with the principle.¹⁴

3. Children's rights in the Constitution

Following the Children's Referendum, the Thirty-First Amendment of the Constitution (Children) Act 2012 inserted section 42A into the Constitution of Ireland in 2015. Article

¹² 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) at p. 27 and Committee on the Rights of the Child, *General Comment No 12: The Child's Right to be Heard* (2009) UN Doc. CRC/C/GC/12 at pp. 9-10.

¹³ Committee on the Rights of the Child, *General Comment No 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013) UN Doc. CRC/C/GC/14 at p. 19. See also, 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) at pp. 17, 28.

¹⁴ Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic reports of Ireland* (2016) UN Doc. CRC/C/IRL/CO/3-4 at p. 7.

42A(1) provides express recognition of children’s rights at a constitutional level, and clearly establishes the duty of the State to protect and vindicate those rights through its laws.

Of particular relevance in this context are Articles 42A.4.1^o and 42A.4.2^o which provide that, in the resolution of child care proceedings brought by the State and proceedings concerning adoption, guardianship, custody and access, the best interests of the child must be the paramount consideration, and the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child. In line with Article 12 of the CRC, the amendment does not limit the right of children to be heard on the grounds of age but places a constitutional imperative on the courts to ascertain and consider the views of all children, having regard to the principle that expressing views is a choice for each child and not an obligation.

This amendment has been described as ‘*a game-changer for children’s rights in Ireland*’ but it is recognised that immediate and specific rights-based measures, including at a legislative level, are key to ensuring that it can make a real and tangible difference to children’s lives.¹⁵

Although the express rights afforded to children under Article 42A.4.2^o are limited to specific judicial settings, it is reasonable to more broadly interpret this provision in light of Articles 3 and 12 of the CRC, which provide children with the right to have their best interests taken as a primary consideration, and to express views and be heard, in all judicial and administrative decisions affecting them.¹⁶

The OCO considers it essential for the Oireachtas to reflect this broader position and establish at a legislative level that in the resolution of *all* judicial proceedings affecting children, the best interests of the child must be the paramount consideration, and the views of the child shall be ascertained and given due weight having regard to their age and maturity.

4. The General Scheme of the Child Care (Amendment) Bill 2017

¹⁵ M. Corbett, “The Children’s Referendum is a Game-Changer for Children’s Rights in Ireland” (2012) 5(4) *Irish Journal of Family Law* 95 at p. 95.

¹⁶ The Irish courts have held that laws passed after the ratification of Ireland’s international law commitments fall to be interpreted in light of those commitments. See *Dos Santos v. Minister for Justice* [2013] IEHC 237 and B. Barrington, “Child Care Law” in Children’s Rights Alliance and Law Centre for Children and Young People, *Making Rights Real for Children: A Children’s Rights Audit of Irish Law* (Dublin: 2015) at p. 189.

As stated above, many of the provisions in this General Scheme are to be welcomed and the OCO would like to commend the work of the Department of Children and Youth Affairs in seeking to address the identified issues with the current Guardian *ad litem* system, in consultation with other stakeholders in the children's sector. It is very clear that statutory regulation of the Guardian *ad litem* system is needed to ensure that an effective, credible and standardised mechanism is available to promote the rights of children affected by judicial proceedings. However, in light of the State's obligations to implement the constitutional and international rights of children as set out above, the OCO would like to take this opportunity to make a number of suggested amendments.

The Principles & Policies Underpinning the General Scheme

Before addressing the different provisions in detail, the first and most important point to highlight is that, in the view of the OCO the General Scheme is not underpinned by a fully child-centred and child rights-based position.

Head 3 of the General Scheme sets out that the Minister will establish a national Guardian *ad litem* service to enhance the decision-making capacity of the courts regarding the child's views and best interests in proceedings under the Child Care Act 1991. The explanatory note for Head 4 further explains that the Minister will establish this service to support the courts in child care proceedings. The explanatory note for Head 6 also states that the proposed role of the GAL is that he or she works for the court to enhance its decision-making capacity.

As stated previously, the OCO is of the view that legislative reform in this area needs to be underpinned by recognition of Guardians *ad litem* as being first and foremost a service for children to give effect to their constitutional and international rights.¹⁷ However, in light of the provisions set out above, it appears that the General Scheme is based on an understanding of Guardians *ad litem* as being primarily a service to the courts, with the function of providing support to the courts when they deem it necessary to inform their decision-making. This is of real disappointment to this OCO in that it can be described as a

¹⁷ Ombudsman for Children's Office, *Observations on a Consultation Paper by the Department of Children and Youth Affairs on preparing a Policy Approach to Reform of Guardian ad Litem Arrangements in Proceedings under the Child Care Act 1991* (2015) at https://www.oco.ie/wp-content/uploads/2014/03/OCOResponse_DCYAConsultationPaper_GALS.pdf at p. 1.

utilitarian as opposed to a rights-based approach to participation: participation is being undertaken to improve the effectiveness of an intervention and is seen as relevant only when it is useful to those initiating it.¹⁸ While acknowledging that the child's views and the professional opinion of the GAL on best interests may indeed serve judicial decision-making well, this should not be the first and primary function of the service. Such an approach fails to reflect the reality that implementing the rights of children to have their views heard and best interests promoted in judicial proceedings is not a gift to be bestowed by adults on some children, but an important constitutional obligation that must be fulfilled.

OCO Recommendation: The provisions in the General Scheme should be recalibrated to ensure that access to an independent representative such as a Guardian *ad litem* is expressly framed as the right of the child affected by judicial proceedings as well as a service for the courts.

Heads 3 & 4 – The Establishment of a National Guardian ad litem Service

Provision is made under Head 4 to enable the Minister to establish a national Guardian *ad litem* service by way of public procurement. Subsection 7 clarifies that an arrangement under this Head will not give rise to an employment relationship between a service provider and its employees or agents on the one hand and the Minister on the other.

The explanatory note for Head 3 sets out the intention that the Minister will procure a national service in the short term but that other options, such as the location of the service in a new or existing/reformed public body, will be explored in the medium to longer term. However, the explanatory note for Head 4 states that the implementation of these proposals will entail the procurement of a national service *on one, or more than one occasion (at intervals of some years)* until such time as other arrangements are made (emphasis added).

The OCO is concerned that the implementation of the above provisions in practice will largely result in the maintenance of the status quo for a long period of time, with all rather

¹⁸ M. Liebel and I. Saadi, "Cultural variations in constructions of children's participation" in M. Liebel, K. Hanon, I. Saadi and W. Vandenhole, *Children's Rights from Below: Cross-Cultural Perspectives* (Basingstoke and New York: Palgrave MacMillian, 2012) at pp. 162-182.

than the majority of GALs operating under the auspices of one contracted service provider. As highlighted in 2015, the Office considers that an optimal approach to putting in place a national Guardian *ad litem* service that is child-centred and rights-based; independent; accessible; accountable; transparent; and sustainable is to establish and properly resource an independent statutory body.¹⁹ Such a body would be given powers to employ or establish a panel of Guardians *ad litem* who can be appointed by a court in proceedings covered by the legislation.²⁰ The OCO believes that it is essential to remove the tendering process for the Guardian *ad litem* service and immediately establish a statutory body that is completely independent from any Government Department or agency, capable of providing sustainability and long term consistency, and in line with international best practice.

A 2004 report commissioned by the National Children's Office examined the operation of Guardian *ad litem* services in other jurisdictions, including England and Wales, where the children's guardian service is managed by a non-departmental public body, accountable to the Secretary of State in the Ministry of Justice, known as the Children and Family Court Advisory and Support Services, (CAFCASS).²¹ According to this report, the main advantages of having a single, state funded agency are that it would ensure greater consistency across Ireland; it would be independent; it would provide a means to recruit, train and select GALs; it could employ GALs on a salary and would allow for more effective controls over the legal costs of solicitors representing GALs; and it would provide a means for quality control and oversight of the service. The Office acknowledges that there are difficulties with this approach as the report noted that an independent national agency would be expensive to establish and run and would take time to develop. Furthermore, the authors were of the view that it is quite likely that many existing GALs would not transfer to a new State-run GAL agency, where they would probably be less well-remunerated than in private practice.²²

¹⁹ Ombudsman for Children's Office, *Observations on a Consultation Paper by the Department of Children and Youth Affairs on preparing a Policy Approach to Reform of Guardian ad Litem Arrangements in Proceedings under the Child Care Act 1991* (2015) at https://www.oco.ie/wp-content/uploads/2014/03/OCOResponse_DCYAConsultationPaper_GALS.pdf at p. 2.

²⁰ For further details about how such a body might work in practice, see National Children's Office, *Final report from Capita Consulting Ireland, in association with the Nuffield Institute for Health* (2004) at https://www.dcy.gov.ie/documents/publications/GAL_Review_Final_Report_040302.pdf at pp. 87-89.

²¹ National Children's Office, *Final report from Capita Consulting Ireland, in association with the Nuffield Institute for Health* (2004) at https://www.dcy.gov.ie/documents/publications/GAL_Review_Final_Report_040302.pdf.

²² National Children's Office, *Final report from Capita Consulting Ireland, in association with the Nuffield Institute for Health* (2004) at https://www.dcy.gov.ie/documents/publications/GAL_Review_Final_Report_040302.pdf at pp. 87-89.

However, these challenges have to be considered in light of the State's obligations under both domestic and international law to meet the rights of children affected by judicial proceedings that fall outside of the Child Care Act 1991, including but not limited to the following:

- The Government has committed in Goal 3 of *Better Outcomes, Brighter Futures* to ensure that all children have a voice in the court process - and the legal system more broadly - when decisions are being made that affect their lives.²³
- As set out above, Article 42A.4 expressly provides that in the resolution of proceedings concerning adoption, guardianship, custody and access, the best interests of the child must be the paramount consideration, and the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.
- The Children and Family Relationships Act 2015 has given further effect to this provision in private family law proceedings by providing that the court may procure a report from an expert on any question affecting the welfare of the child or appoint an expert to determine and convey the child's views.²⁴
- Article 11(2) of the Brussels II Regulation has also been interpreted as imposing a mandatory positive obligation on Irish courts to provide a child with the opportunity to be heard in proceedings relating to jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility.²⁵
- Article 10 of the EU Victims' Directive (2012) recognises the right of child victims to be heard during criminal proceedings affecting them, with due account given to their age and maturity. The Criminal Justice (Victims of Crime) Bill 2016 was published on 29 December 2016 in order to transpose this Directive into Irish law. Section 14(7) states that any views or concerns raised by the child, taking into account his or her

²³ Department of Children and Youth Affairs, *Better Outcomes, Brighter Futures: The national policy framework for children & young people 2014 - 2020* at http://dcya.gov.ie/documents/cypp_framework/BetterOutcomesBetterFutureReport.pdf at p. 32.

²⁴ See Section 32(1). The Children Act 1997, through its amendment of the Guardianship of Infants Act 1964, allows for the appointment of Guardians *ad litem* in private family law proceedings but these provisions have never been enacted. However, in practice GALs have been acting for children in private law proceedings under provisions set out in Section 47 of the Family Law Act 1995 by producing social reports. See N Carr, "Guiding the GALs: A Case of Hesitant Policy-making in the Republic of Ireland" (2009) 3 *Irish Journal of Family Law* 60 at p. 61.

²⁵ *N. V. N. (hearing a child)* [2008] IEHC 382.

age and level of maturity, shall be taken into account when determining whether and to what extent the child might benefit from protection measures or special measures. This Bill also provides victims with the right to receive ongoing information in simple and accessible language, to enable them to understand and participate in the criminal justice process.

- The Supreme Court in Ireland has clarified that the Hague Convention provides children involved in abduction cases, who have attained a sufficient age and degree of maturity, with the right to have their views taken into account as part of the decision-making process.²⁶
- The appointment of a Guardian *ad litem* and the communication of a child's views to the court in proceedings under the Mental Health Act 2001 have been considered by the High Court to be necessary procedural safeguards in compliance with the European Convention on Human Rights.²⁷

In light of these commitments and the need to ensure the efficient use of resources, the OCO is concerned about the creation of a contracted service at significant cost to the state²⁸ that is only available to children in proceedings under the Child Care Act 1991. While child care proceedings are an important starting point, it is essential to future proof the legislation by establishing an independent statutory body with a mandate that can be extended to provide children with access to independent representatives in all of the areas set out above. As stated by the Special Rapporteur on Child Protection: *'The legislation to be enacted by the Oireachtas should not confine itself to the limitations of the constitutional amendment and should provide for the views of the child to be ascertained in any proceedings regarding the interests of the child.'*²⁹

Although the process of setting up an independent statutory body will clearly involve its challenges, the OCO is of the view that this is the best approach to take. We are also

²⁶ *RMM v. MD* [1999] No. 162/99M S.C.

²⁷ *X.Y., A Minor Suing by her Guardian Ad Litem, Raymond McEvoy v. The Health Service Executive* [2013] IEHC 490.

²⁸ Guardian *ad litem* professional fees amounted to €9.1 million in 2014 and €8.2 million in 2015. Note, with effect from 1 January 2015, Tusla fixed the professional fee rate at €125 per hour and ceased payment for time spent travelling. See Comptroller and Auditor General, *Report on the Accounts of the Public Services 2015* (2016) at http://www.audgen.gov.ie/documents/annualreports/2015/report/en/Report_Accounts_Public_Services_2015.PDF at pp. 133-134.

²⁹ Dr. Geoffrey Shannon, *Sixth Report of the Special Rapporteur on Child Protection: A Report Submitted to the Oireachtas* (2013) at <https://www.dcy.gov.ie/documents/Publications/SixthRapporteurReport.pdf> at pp. 22-23.

confident that these challenges can be overcome through the cooperation of all the necessary stakeholders and forward-planning, as well as by making maximum use of the learning available from Northern Ireland, England and Wales around the establishment and operation of such a model in practice.

This is a pivotal opportunity for the Government to clearly demonstrate that it is committed to proactively working towards the full implementation of the rights of children affected by all judicial proceedings.

OCO Recommendation: An independent statutory body should be established and properly resourced, with a clear remit to manage and deliver a Guardian *ad litem* or similar independent representative service in all judicial proceedings affecting children. This body should independently oversee the training, performance and appointment of Guardians *ad litem*. Although this body should be based on the CAFCASS model, it should be positioned within the area of ‘children’ rather than ‘justice’ to support the development of a child-centred and child rights-based service.

Head 5 – The Function of a Guardian *ad litem*

Head 5 sets out that the function of a Guardian *ad litem* will be to enhance the decision-making capacity of the court by informing the court of the child’s views and advising the court on what is in the child’s best interests in the proceedings before the court having considered the views of the child. Subsection 2 sets out the role of the Guardian in more detail. The OCO has previously expressed its view that the role and duties of the Guardian *ad litem* need to be clearly defined in law to provide for consistency of practice and decision-making.³⁰

OCO Recommendation: Although the broad aims of Head 5 are a very welcome development, the Office believes that it can be strengthened to more fully protect the rights of children. As recommended above, the provision should be recalibrated to ensure

³⁰ According to the 2004 report commissioned by the National Children’s Office, ‘the central problem with the GAL service at present is derived from the absence of a tight legal framework which defines clearly and unambiguously the role and duties of the GAL’. See National Children’s Office, *Final report from Capita Consulting Ireland, in association with the Nuffield Institute for Health (2004)* at https://www.dcyv.gov.ie/documents/publications/GAL_Review_Final_Report_040302.pdf at p. 62.

that access to an independent representative such as a Guardian *ad litem* is framed as the right of the child affected by judicial proceedings as well as a service for the courts.

Other suggested amendments are as follows:

- Subhead (2) should expressly provide that a Guardian *ad litem* will meet and interview the child in the most favourable settings and under the most suitable conditions, having regard to the individual circumstances of the child.
- Subhead 2(a) should more clearly reflect the language of the international children's rights framework which promotes '*the right of 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, and for due weight to be given to the child's views in accordance with his or her age and maturity*' (Article 12, CRC).
- Subhead (3)(c) states that in exercising his or her function, a Guardian *ad litem* may seek a direction from a court in relation to procuring a report from a person where such a report does not currently exist and where consultation in relation to procuring such a report has taken place with the Child and Family Agency. Although the promotion of a multi-disciplinary approach is to be welcomed, further clarity is needed about how this provision will be implemented in practice, having regard to the need for timely and child-centred decision-making.
- Subhead (4) should include the following principles: (a) the principle that all children capable of forming their own views shall be provided the opportunity to have their views heard in any judicial proceedings affecting them, either directly or through a representative or an appropriate body; and (b) the child's right not to express his or her views.

Recent research has highlighted that deciding on when a child is old enough or sufficiently mature to have their views upheld and in what particular circumstances is a challenge faced by Guardians *ad litem* and judges. This research, which involved the analysis of GAL's reports, also demonstrated that the method by which they present the views of the child varies considerably in practice. Verbatim quotes from children were rare, while in a number of instances the child's views were relatively minor components of the reports and lacked depth, detail or context. The practice of Guardians *ad litem* selecting how much of what

the child said was included in the report, predominantly from a welfare or protectionist perspective, was also identified.³¹ The Child Care Law Reporting Project has noted that the ‘voice of the child’ can be invoked by Tusla in proceedings without a clear evaluation by the court of the weight to be given to it in light of the child’s age and maturity: ‘*We have seen the views of teenagers dismissed as not being in their best interests, while the reactions of toddlers are held to demonstrate the “voice of the child” when that accords with the position of the social worker in question*’.³²

OCO Recommendation: Head 5 should expressly recognise that the function of the Guardian *ad litem* is to ascertain the views of the child and to present them accurately to the court. It should also be clarified that the child has a right to receive an explanation of how his/her views were considered by both the GAL and the court.

Heads 6 & 8 – The Status of a Guardian ad litem & Dual Representation

Head 6 provides that a Guardian *ad litem* will be independent in the exercise of his or her function and will not be a party to the proceedings, meaning that he or she may not cross-examine parties or witnesses. The explanatory note for this Head states that the proposed role of the GAL is that he or she works for the court to enhance its decision-making capacity as a special type of expert witness. It clarifies that the role differs from that of an expert witness in that the Guardian *ad litem* has a duty not just to the court to enhance its decision-making capacity but also to the child to give him/her a voice in proceedings.

Firstly, the term ‘special type of expert witness’ is a vague and ambiguous description of how the status of the Guardian *ad litem* will operate in practice. Further legal clarity and certainty is required in this regard.

Secondly, the most important matter that needs to be addressed here is the issue of party status for the child involved in child care proceedings. The OCO would like to repeat its recommendation in 2015 that particular consideration should be given to the question of the child becoming a party to child care proceedings affecting him/her through the

³¹ C. Corrigan, 2015, *Children’s voices, adult’s choices: The voice of the child through the guardian ad litem in child care proceedings in the Irish District Courts*, Ph D Thesis for School of Social Work and Social Policy, TCD, unpublished at pp. 259-269, 272.

³² C. Coulter et al, *Final Report: Child Care Law Reporting Project* (Dublin: Child Care Law Reporting Project, 2015) at p. 47.

appointment of a Guardian *ad litem*. As highlighted by this Office, the issue of party status is of very considerable significance in light of the procedural rights that having such status entails, including the right to address the court, the right to cross-examine, the right to seek discovery and the right to appeal.³³ Children’s right to fair procedures and representation have also been confirmed by both domestic courts and the European Convention on Human Rights.³⁴

In practice, Guardians *ad litem* have sometimes fulfilled the function of defending the rights of the child as his or her representative in proceedings by testing evidence, making applications in relation to the welfare of the child and making submissions to the court for example.³⁵ Justice O’Hanlon has also raised her concerns that if the Guardian *ad litem* is not a party to the proceedings, they will not have the standing in court to take the full range of applications in the welfare of the child as it may be appropriate to take or to appeal any decisions of the court. In her view, this would significantly weaken the participation and representation of the child in proceedings that centrally affect them.³⁶

It is important to note at this point that Head 8(12) provides that where a child becomes a party to the proceedings, the court may determine that the appointment of the Guardian *ad litem* may continue or cease, as it may consider appropriate. The OCO welcomes that the General Scheme dispenses with the current automatic prohibition on dual representation. Although it is generally acknowledged that there are cost implications to this model of dual representation, it is presented as an ideal in cases where life-changing decisions are being made.³⁷

This approach is also in line with the CRC Committee’s recommendation that a child will need both appropriate legal representation, in addition to a Guardian *ad litem*, in any

³³ Ombudsman for Children’s Office, *Observations on a Consultation Paper by the Department of Children and Youth Affairs on preparing a Policy Approach to Reform of Guardian ad Litem Arrangements in Proceedings under the Child Care Act 1991* (2015) at https://www.oco.ie/wp-content/uploads/2014/03/OCOResponse_DCYAConsultationPaper_GALS.pdf at pp. 4-5. See also, B. Barrington, “Child Care Law” in Children’s Rights Alliance and Law Centre for Children and Young People, *Making Rights Real for Children: A Children’s Rights Audit of Irish Law* (Dublin: 2015) at p. 196.

³⁴ For example, see High Court [2004] IEHC 151 and Supreme Court [2015] IESC 64. See also, C. Dignam, D. Duggan and N. McDonnell, “Cherishing the Children?” (2016) 21(1) *The Bar Review* 21 at p. 23.

³⁵ Children’s Rights Alliance, *Report Card 2017* (Dublin: Children’s Rights Alliance, 2017) at p. 91.

³⁶ Justice Bronagh O’Hanlon, *Submission from Ms Justice Bronagh O’Hanlon in relation to the survey concerning a policy approach to the reform of the guardian ad litem arrangements in proceedings under the Child Care Act 1991* (2015) at <https://www.dcy.gov.ie/documents/legislation/20160926JusticeBronaghOHanlonandJusticeHenryAbbott.pdf> at p. 6.

³⁷ S. Phelan, “Access to justice and decision-making” in Children’s Rights Alliance and Law Centre for Children and Young People, *Making Rights Real for Children: A Children’s Rights Audit of Irish Law* (Dublin: 2015) at p. 31.

judicial procedure involving the determination of his/her best interests.³⁸ However, concerns have been raised that, in practice, the General Scheme could deprive younger children of procedural rights when they are appointed a Guardian *ad litem* as a ‘special type of expert witness’, in circumstances where older children are not deprived of such rights when they are appointed as a party to the proceedings and provided with dual representation.³⁹

OCO Recommendation: It is essential that further consideration is given to the impact of these proposals in practice, having regard to children’s rights to fair procedures and representation. The prohibition in the General Scheme on Guardians *ad litem* becoming a party to the proceedings should be removed. Furthermore, it should be expressly recognised that Guardians *ad litem* do not need to apply to the court for permission to appoint legal representation.

Head 7 – Qualifications and Eligibility for the Appointment of a Guardian ad litem

Under Head 7 of the General Scheme, all professionals appointed to the position of Guardian *ad litem* under the new national service must have a social work or psychology qualification and a minimum of 5 years experience in child welfare and protection. Subheads (2) and (3) provide for transitional arrangements for existing Guardians *ad litem*, highlighting that they may be required to undergo further training deemed necessary by the service provider.

It is noted that the General Scheme is silent on the training requirements for GALs with a social work or psychology background. While acknowledging the training and study required to obtain a qualification in these areas, it is clear that any profession should have the benefit of dedicated initial and continued professional development training in order to act effectively as a Guardian *ad litem*. As previously stated in our submission on the consultation paper, the OCO is also of the view that the parameters in respect of the professional disciplines which are eligible for appointment should not be unduly narrow or limited, so as to automatically exclude other professionals who may have the necessary

³⁸ National Children’s Office, *Final report from Capita Consulting Ireland, in association with the Nuffield Institute for Health* (2004) at https://www.dcy.gov.ie/documents/publications/GAL_Review_Final_Report_040302.pdf at p. 26.

³⁹ B. Barrington, “Child Care Law” Children’s Rights Alliance and Law Centre for Children and Young People, *Making Rights Real for Children: A Children’s Rights Audit of Irish Law* (Dublin: 2015) at p. 202.

experience, knowledge and skills to fulfil this role (for example, legal professionals and medical professionals).

A more inter-disciplinary approach would mitigate against the risk of the new national service and Guardian *ad litem* practice being fashioned by the ethos and practices of two professions and anticipate any potential over reliance on predominantly former social workers and psychologists from within Tusla and the HSE moving to work as GALs. The OCO is also of the view that an inter-disciplinary approach would be necessary if an independent statutory body, with responsibility for providing independent representatives in all proceedings involving children as outlined above, is established.

OCO Recommendation: Provision should be made to require all Guardians *ad litem* to undergo initial and ongoing professional training specific to the role. Further consideration should be given to the merits of providing for the development of a more holistic, inter-disciplinary Guardian *ad litem* service, through the appointment and training of professionals with a wide range of backgrounds, knowledge and skills by the independent statutory body.

Under Head 7, Guardians *ad litem* must also be registered with the Health and Social Care Professionals Council (CORU). The role of CORU is “to protect the public by promoting high standards of professional conduct, education, training and competence through statutory registration of health and social care professionals”.⁴⁰ Notably, since 2011 registration with CORU is mandatory for all practicing social workers in Ireland.⁴¹ The Minister for Health will also shortly be establishing the Psychologists Registration Board under the Health and Social Care Professionals Act 2005 to regulate psychologists working in Ireland.⁴²

Recommendation: This Office is of the view that in order to ensure consistency in the level of service provided across the state, and to promote clarity about the specific role of Guardians *ad litem* as distinct to other professional groups, consideration should be given to working towards a separate regulated profession for Guardians *ad litem* under the Health and Social Care Professionals Council.

⁴⁰ See http://www.coru.ie/en/about_us/what_is_coru.

⁴¹ See http://www.coru.ie/en/about_us/social_workers_registration_board.

⁴² See http://www.coru.ie/en/news/details/state_boards_campaign_to_appoint_members_to_the_psychologists_registration.

Head 8 – The Appointment of a Guardian ad litem

Head 8(1) provides that the High Court will as a matter of course order the appointment of a Guardian *ad litem* in special care proceedings (subject to subhead 7), while Head 8(2) provides that the District Court or Circuit Court may on its own motion or on the application of any party order the appointment of a Guardian *ad litem* (subject to subhead 8).

The Scheme sets out that the District Court or Circuit Court will have regard to certain matters in determining whether to make an order to appoint a Guardian *ad litem* and the intention is that such an appointment will be the norm. It also provides that where the court declines to make an order for the appointment of a Guardian *ad litem* in District or Circuit Court proceedings, it must state its reasons for doing so in open court.

With regard to the operation of the current Guardian *ad litem* system, it is well documented that there is no consistency in the appointment of GALs or in the extent to which courts hear the voice of the child in child care cases. Out of the 1,194 District Court cases it reviewed over the period December 2012 – June 2015, the Child Care Law Reporting Project found that, on average, a Guardian *ad litem* was appointed in 53% of cases. Considerable variations in the appointment of GALs across the country was noted, with such professionals being appointed to children in 79% of cases in Louth but only 13% of cases in Galway.⁴³ Of the 636 cases where the child/children involved were appointed a GAL, almost 82% of these Guardians were represented by a private solicitor, with less than 7% represented by a barrister. Notably, children were provided with direct legal representation in only 16 of the 1,194 cases reviewed.⁴⁴

Recent research also shows that under the current system, children are being afforded their right to be heard on the basis of a seemingly arbitrary set of criteria. In particular, a number of judges who took part in the research commented that they would limit the appointment of Guardians *ad litem* to complex cases, suggesting that the service provided by the Guardians to the court ranks above consideration of the implementation of the right of the child.

⁴³ C. Coulter et al, *Final Report: Child Care Law Reporting Project* (Dublin: Child Care Law Reporting Project, 2015) at p. 80.

⁴⁴ C. Coulter et al, *Final Report: Child Care Law Reporting Project* (Dublin: Child Care Law Reporting Project, 2015) at pp. 69-70.

The OCO welcomes the introduction of a presumption in favour of the appointment of a Guardian *ad litem* in all child care proceedings but is concerned that the current inconsistency in practice may continue, particularly in ‘less complex’ cases. It clearly cannot be the case that children’s constitutional rights enshrined in Article 42A are protected in some proceedings and not in others. Notably, Justice Gibbons has recommended the appointment of a GAL in all child care proceedings to ensure compliance with the CRC and domestic legal principles and has argued as follows:

*‘Many would disagree with this proposition on the basis that it is not necessary in every case, that it would not be a good use of resources and that it might delay proceedings unnecessarily. I do not see these arguments having any real validity. In many cases, the GAL would not have much input, the issues would be clear thus the GAL’s role would simply be to ensure that not only is justice done in this context but being seen to be done and more importantly, the child, the subject matter of the process would have a voice’.*⁴⁵ (Gibbons, 2007: 187)

OCO Recommendation: In light of Article 42A of the Constitution and Articles 3 and 12 of the CRC, a universal Guardian *ad litem* service should be established that is accessible as a matter of right to any child affected by care proceedings under the 1991 Act. With regard to the ability of a child to ‘form’ views, the legislation should operate on a presumption of capacity, requiring the court to prove otherwise.

Other suggested amendments are as follows:

- Head 8(3)(f) states that the court, in determining whether to make an order to appoint a Guardian *ad litem*, will have regard to the views expressed by the parties to the proceedings and the child. It is unclear how the views of the child will be heard at this stage and further clarity is needed as to how this provision will operate in practice.
- Head 8(11) clarifies that where a court orders the appointment of a GAL in different proceedings in respect of the same child, the service provider will seek, in as far as is practicable, to assign the same Guardian *ad litem* to the child. This proposal should

⁴⁵ C.M. Gibbons, “Aspects of child care in the District Courts” (2007) 2 *Judicial Studies Institute Journal* 169 at p. 187.

be amended to include a requirement to seek and listen to the views of the child as to whether he/she supports the appointment of the same Guardian *ad litem*.

Head 9 – The Payment of Fees

Head 9 establishes that the Child and Family Agency will pay the fees due to the national service provider contracted to provide the Guardian *ad litem* service by the Minister.

Subhead 3 clarifies that the Child and Family Agency will not exercise any oversight or governance role in respect of the (i) service provided by the national service provider, (ii) individual Guardians *ad litem* in respect of the exercise of their specific function under Head 5 or (iii) solicitors or barristers on the relevant panels.

While appreciating that the current proposals attempt to mitigate against the risk of a real or perceived conflict of interest in this regard, the OCO would like to repeat its concerns expressed in 2015 about the Child and Family Agency having any role in the funding of the national Guardian *ad litem* service.⁴⁶ Such concerns have also been raised by the Comptroller and Auditor General, who stated in 2015 that the position of Tusla as the party initiating the proceedings, and as paymaster of the Guardian *ad litem* costs, may lead to a perceived conflict of interest.⁴⁷ Similarly, Ms Justice O’Hanlon has stated as follows: “*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*’.⁴⁸

OCO Recommendation: First and foremost, the OCO recommends the establishment of a statutory body that has complete independence to operate and manage the Guardian *ad litem* service. However, irrespective of the approach adopted by the Department to the establishment of a national Guardian *ad litem* service, funding should be provided through an independent Government source.

⁴⁶ Ombudsman for Children’s Office, *Observations on a Consultation Paper by the Department of Children and Youth Affairs on preparing a Policy Approach to Reform of Guardian ad Litem Arrangements in Proceedings under the Child Care Act 1991* (2015) at https://www.oco.ie/wp-content/uploads/2014/03/OCOResponse_DCYAConsultationPaper_GALS.pdf at p. 2.

⁴⁷ Comptroller and Auditor General, *Report on the Accounts of the Public Services 2015* (2016) at http://www.audgen.gov.ie/documents/annualreports/2015/report/en/Report_Accounts_Public_Services_2015.PDF at pp. 131-132.

⁴⁸ Justice Bronagh O’Hanlon, *Submission from Ms Justice Bronagh O’Hanlon in relation to the survey concerning a policy approach to the reform of the guardian ad litem arrangements in proceedings under the Child Care Act 1991* (2015) at <https://www.dcy.gov.ie/documents/legislation/20160926JusticeBronaghOHanlonandJusticeHenryAbbott.pdf> at p. 7.

Head 14 - Regulations

Head 14 provides that the Minister may make such regulations as are necessary including on such matters relating to best practice in the exercise of the function of a Guardian *ad litem* which has the best interests of the child as the paramount consideration.

OCO Recommendation: The Minister for Children and Youth Affairs should prepare draft regulations during the course of this Bill's passage through the Houses of the Oireachtas to inform the debate on the legislation and allow greater precision in the analysis of its impact.

The OCO is also of the view that the establishment of an independent statutory body is the best means by which the new national Guardian *ad litem* service can be monitored and evaluated to ensure accountability and transparency. However, irrespective of the approach adopted by the Department, the regulations by the Minister should include the matter of monitoring and evaluating the management and operation of the new service.