

LAW SOCIETY SUBMISSION



**RESPONSE OF THE LAW SOCIETY OF IRELAND TO THE
CONSULTATION PAPER ON REFORM OF GUARDIAN *AD LITEM*
SERVICES UNDER THE CHILD CARE ACT, 1991**

DEPARTMENT OF CHILDREN AND YOUTH AFFAIRS

NOVEMBER 2015

ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

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1. Context/Introduction

- 1.1. The Society was invited, by the Department of Children and Youth Affairs, to comment on the consultation paper prepared by the Department on the reform of guardian *ad litem* services under the Child Care Act, 1991.
- 1.2. The Law Society of Ireland welcomes the opportunity to make these initial observations in relation to the proposed reforms. The potential for reform offers an opportunity to overhaul a system that is not working in the best interests of children and to put in place the infrastructure for a robust and effective system that vindicates the rights of children.
- 1.3. Article 42A.4.2° 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.’

The process of listening to and hearing the child has several advantages:

- i. It indicates to the child that his or her views and perspectives are respected and valued.
- ii. It offers the opportunity for building trust between the child and relevant officials.
- iii. Where the child believes he or she is being listened to, the child may be more willing to discuss other matters of concern with trusted adults.
- iv. It serves in part to ensure that the child feels that he or she has some agency in respect of his or her situation.
- v. It better ensures that the outcomes in litigation genuinely serve the best interests of the child.

This aspect of the amendment requires the Oireachtas to pass legislation to ensure that the views of the child who is capable of forming his or her own views are considered in child care and child protection proceedings and in cases involving adoption, guardianship, custody and access. It requires the court in such proceedings:

- i. First to ascertain the views of the child, and
- ii. Second to give due weight to those views.

- 1.4. The Family and Child Law Committee of the Law Society of Ireland, comprised of experienced family law practitioners working both in private practice and for other agencies, has considered the consultation questions and provides the responses set out in the following pages.
- 1.5. The Society welcomes a close and collaborative approach on this matter, and a meeting at the earliest opportunity is recommended.

2. Consultation Questions

Principles & policies

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

The principles and policies should:

1. identify the rights of the child in public law proceedings, and
2. construct a constitutionally conscious facility which will best maintain and protect those rights.

In their current form, they do not give adequate consideration to the changed constitutional context and updated recognition of the status of the child in proceedings. What does not appear to be reflected in the document is the rights of the child which include, but are not limited to, having his or her voice heard. Therefore, any consideration of the principles and policies must take into account the need to actively consider and vindicate a range of the constitutional rights of the child.

Of particular concern to the Society is the lack of consideration given to the rights to equal and effective participation under Article 42A(1)¹. The limiting of access to vindication, to be inferred from the non-presumption of the child's entitlement to a guardian *ad litem* and the granting to a court of local and limited jurisdiction the ability to limit rights of a child, when the courts are not granted similar powers to limit the rights of other parties, such as parents, is vulnerable to constitutional challenge.

In order for a child to enjoy at least parity, it is crucial that he/she has someone in court to advocate on his or her behalf. This advocacy should result in comprehensive representation for the child, which is best served by both a guardian *ad litem* and a lawyer – such as in the UK system. The current proposal that the guardian *ad litem* would simply act as an advisor to the court, which would retain discretion over appointment and give guidance to the guardian *ad litem* in the performance of their duties, is incompatible with what is required for the full range of the child's rights to be maintained and protected.

¹ 1 The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.

The outlined purpose of 'supporting the court' indicates that the guardian *ad litem* is intended to effectively be a creature of the court and not a representative for the child. It is foreseeable that, if the guardian *ad litem* is not the advocate, some other entity will have to be established – with the result that the role and usefulness of the guardian *ad litem* will be further diminished.

The Society suggests that if the document is re-worked with 'child' instead of 'guardian *ad litem*' it would be more constitutionally compliant. The Society therefore respectfully requests that the Department consider this as a different starting point.

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

The Society recommends that in order to protect the independence of the guardian *ad litem* any costs incurred by a guardian *ad litem* should be borne by an agency that is not a party to the proceedings.

Amendment of existing legislation

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

The Society supports the repeal of Section 26 of the 1991 Act in its entirety and its replacement by substantial provisions, primarily relating to the areas identified in the consultation paper.

Establishing a national organised, managed and delivered service

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

The Society is not in favour of the utilisation of existing or reformed structures in either the children or justice areas as it is of the opinion that the reforms would be subsumed into the existing culture and practices within such services.

The Society is not in favour of public procurement of services to be engaged under contract by the Minister of Children and Youth Affairs as it is of the opinion that this could result in a fragmented approach which prevents the establishment of the principles which underpin the service

such as consistency, transparency and cost effectiveness.

The approach preferred by the Society is that of a new dedicated public body that is conscious of and clear in its dedicated function, namely to protect and vindicate the rights of children. The highest standards should be expected in terms of excellence – with substantial requirements in terms of qualifications and experience and a key understanding of the obligations to the child. A new body would allow for consistency, transparency, efficiency and cost effectiveness. Importantly it would also allow for a fresh start. Current government policy on greater stream-lining of public bodies should not limit consideration of this option.

5. *Are there any other feasible, effective and sustainable approaches you would recommend? Please provide details and reasons.*

The Society has no alternative approaches to recommend but would welcome the opportunity to discuss its suggestion above further.

6. *What would you view as the critical elements for successful establishment and sustainable operation of a national service to be covered under each broad approach?*

The Society suggests the establishment of a new independent national service that has its own dedicated budget, is rights-based in its approach, is rigorously managed and is a regulated body with a proper complaints procedure.

Children who are made a party to proceedings

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

Although it may be regarded as empowering to the child to have him or her made party to proceedings, the Society is concerned that without a guardian *ad litem*, there will be a negative impact on children left in a situation where they are present in court together with their parent(s), where the issue to be determined is whether or not harm suffered by the child is sufficient to legally permit initial or ongoing removal from their parent(s) care, and when there is the ever present possibility that the child could be sent home with the parent(s).

It is accepted that many victims have great difficulty articulating their experience, and it must be acknowledged that articulating their experience presents a particular difficulty for a child victim where the

alleged perpetrator is present and the child may be in his or her care. In criminal proceedings cognisance is given to the need to protect child victims and it is equally necessary to consider the effect on a child in the above scenario.

Lawyers have expertise in the law and their function is to take instructions and advocate for those instructions within the law. They are not trained to assess what is in a child's best interests and are not qualified to attend child protection case conferences, professional meetings or child in care reviews.

There may be particular circumstances where the best approach for a particular child is to have legal representation and no guardian, but it is suggested these would be limited. Practical difficulties are likely to arise, for example a lawyer will inevitably need to take instructions, necessitating the child being in court or contactable throughout the proceedings no matter where they are or what activity they may be engaged in.

If the child is to be made a party in his or her own right, given that he or she is being deprived of an independent assessment of his or her best interests, it is suggested that a rigorous and accountable system is put in place regarding the procedure and reasons for limitation of the right.

Appointment of guardian ad litem

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

It is suggested that, consistent with Article 42A, a legislative presumption that a child is entitled to a guardian *ad litem* in every case, including for reviews, should be introduced.

It is further suggested that the envisaged guidance should relate to non-appointment in recognition of the fact that a crucial right of the child is not being maintained.

9. *Are there any additional matters you would recommend for inclusion as regards the basis, or envisaged guidance, for appointment of a guardian ad litem? Please give details and reasons.*

The Society has no further recommendations for inclusion but would welcome the opportunity to discuss this matter further.

Role of guardian ad litem

10. *What is your view of the description of role of a guardian ad litem? Please provide reasons for your response.*

The Society is of the opinion that no provision has been made for the role of the advocate, whereby the child's wishes and best interests are meaningfully represented in proceedings. The Society is concerned that, as stated above, the *guardian ad litem* as envisaged is a creature of the court and that courts are given unparalleled powers in respect of the child's representative that are not applicable to the other parties in the proceedings. It is not clear why this would be the case, unless it is envisaged that the child would be represented by an alternative professional. The Society has outlined its concerns about the qualifications of lawyers in this regard.

The first role of the guardian *ad litem* should be to ensure, to the best of his or her ability, that in court proceedings, the best interests of the child are properly weighted as the paramount consideration. In order to do this, he or she must seek to identify and promote those best interests. The latter requires an activity that is absent from the document.

11. *While a mediation role in any formal sense is not envisaged for the guardian ad litem, what opportunities, if any, would you consider exist for a guardian ad litem to contribute to increasing mutual understanding between the parties to the proceedings and between any of the parties and the child?*

The Society does not support the guardian *ad litem* having any role in contributing to mutual understanding between the parties to the proceedings and parties and the child as it is of the opinion that this would interfere with the integrity and independence of the role which is specifically to establish the wishes and best interests of the child and to represent them to the court.

12. *Are there other matters that you consider to be fundamental to the role of a guardian ad litem that you would recommend for inclusion? If so, please provide the necessary details and reasons.*

The Society recognises that promotion of the child's interests does not mean that the interests of others should be disregarded. The Society therefore suggests that there should be a facility to ensure, through qualification, experience and training, that the guardian *ad litem* while advocating for the child, does not of necessity have to engage in conflict

with the other parties

Possible provision of the guardian *ad litem* report to the child

13. *What is your view regarding possible provision being made for a copy of the guardian ad litem report to be made available to the child or have you any alternative arrangement to suggest? Please provide reasons for your response.*

While participation and consultation are necessary prerequisites to the process the Society is opposed to making available a report to a child in all circumstances. It is suggested that careful consideration is given to such factors as the child itself, his or her emotional stability and age, and that in certain circumstances a child over the age of 18 be allowed access to his or her report.

Status of the guardian *ad litem*

14. *What is your view on the status envisaged? Please give reasons for your response.*

It would appear that the envisaged status of the guardian *ad litem* would be similar to that of the Probation officer. The Society is of the opinion that this would disadvantage the child vis-à-vis other parties and, if the child is not provided with an alternative form of representation, would not be constitutionally compliant with both the child's rights and the State's obligations.

Qualifications & eligibility for appointment

15. *What are your views regarding appropriate qualifications and professional experience for appointment as a guardian ad litem? Please give reasons for your response.*

The Society is of the opinion that, in order to fully understand, evaluate and advocate for a child in proceedings, the guardian *ad litem* must have child protection qualifications as opposed to qualifications in child care.

It is recommended that the guardian *ad litem* should be required to have a minimum of seven years post-graduate experience, five of which are in the area of child protection and preferably (if the guardian *ad litem* is trained in social work) with management experience.

In respect of psychologists, similar qualifications are recommended with psychologists being required to have at least five years' experience

working in child protection.

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

As set out above it is recommended that guardians should have seven years post graduate experience five of which are directly in child protection.

17. *What are your views and/or recommendations regarding the transitional provisions envisaged for qualifying those who have recent experience of acting in the capacity of guardian ad litem but do not meet the envisaged qualification and professional experience criteria? Please give reasons for your response.*

The Society supports the proposed transitional provisions as they recognise relevant experience and Garda vetting. That said it is suggested that the new body should be empowered to interview and provide training to upskill and properly prepare any such professional.

Access to records, records management and information provision

18. *What are your views on the approach identified?*

The Society supports the proposed approach but suggests that “relevant” should be clearly defined.

19. *Are there additional matters you would recommend for inclusion? If so, please provide details and reasons.*

Disputes regularly occur over access to records and documents. In order to avoid such future disputes it is suggested that careful consideration should be given to the definitions as there should be a direct correlation between the welfare of the child and facility for the need to access the particular document/record.

20. *What type of information do you consider should be publicly available regarding the management and delivery of guardian ad litem services?*

The Society recommends that the selection process for guardians, the fees incurred, the number of cases handled per guardian *ad litem*, and the experience and qualifications of guardians should be publicly available.

21. *In your view and/or experience, what type of information should be available to the Minister to enable effective monitoring of the quality of guardian ad litem services?*

The Society recommends that the information referred to at Question 20 above should be made available to the Minister.

Role of the Child and Family Agency & payment of guardian *ad litem* services

22. *If involvement by the Child and Family Agency is to be retained strictly for the purposes of making payment in respect of guardian ad litem services, are there particular safeguards in addition to those indicated that you would wish to see implemented? Please give details and reasons.*

The Society is opposed to the Child and Family Agency continuing to fund this service as this has led to the perception that the guardian *ad litem* service has diminished service provision for vulnerable children. Recognition should be given to the right of the child to representation without creating competition between professionals on the one hand and children on the other.

It is suggested that, in order to recognise the child's right to effective participation and to promote the child's confidence in the independent assertion or vindication of that right, funding should be provided by a source other than the Child and Family Agency.

Engagement of legal representation

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

The Society has concerns that the proposed approach raises serious questions in relation to access to justice for the child.

The Supreme Court has recognised the right of parents' to be legally represented in child-welfare cases. It is clear that the child is entitled to representation on the same basis. Where a guardian *ad litem* is the advocate for the child, this necessarily entitles him or her to act on the child's behalf.

It is a fact that, in parts of the country, these proceedings have become exceptionally adversarial and not having legal representation could be a significant hindrance. The Society has concerns about the constitutionality of expecting an unqualified person to identify an 'issue of

uncommon legal complexity' or a child to argue for representation via an unqualified person.

The Society has concerns that granting to the court the power to give directions in the performance of the child's (through their guardian *ad litem*) lawyers, is arguably a fundamental interference with the principle of equality.

24. *Are there alternative or additional measure you would recommend to support sustainability, transparency, accountability and value in the expenditure of public funds in this area? Please give details and reasons.*

The Society recommends the introduction of a fee structure for both guardians *ad litem* and their legal representatives; regular audits of files and accounts; a complaints structure and a transparent system of appointment by the Court.

Transitional provision

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

The Society supports the envisaged transitional approach.

Regulations by the Minister

26. *Other than as indicated in this paper, are there other aspects of reformed arrangements you consider would necessitate the Minister making regulations and what do you consider to be the essential components of same? Please provide details and reasons.*

The Society has nothing further to add but would welcome the opportunity to discuss reform of the service.

Conclusion

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

The Society has nothing further to add but would welcome the opportunity to discuss reform of the service.

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

The Society is of the opinion that the role and organisation of the guardian *ad litem* service should reflect the new constitutional context of hearing the voice of the child.

29. *Have you any further information, views or recommendations to convey that would assist the Minister in devising policy proposals for an effective and sustainable national system to manage and deliver guardian ad litem services under the 1991 Act? If so, please provide details and reasons, as appropriate.*

The Society has nothing further to add but would welcome the opportunity to discuss reform of the service.

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