



# Bill Digest

## Child Care (Amendment) Bill 2019

No. 66 of 2019

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### Abstract

The *Child Care (Amendment) Bill 2019* deals with the appointment of guardians ad litem (GAL) to children in court proceedings dealing with their welfare and protection. It puts the functions and powers of a GAL on a statutory footing. The Bill allows the Minister for Children and Youth Affairs to make regulations setting out the qualifications and experience necessary to be authorised as a GAL.

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## Summary

The [Child Care \(Amendment\) Bill 2019](#) will put the appointment of guardians ad litem (GALs) on a statutory footing. It sets out how and when GALs will be appointed by a court. It provides for the functions and powers of GALs, and how GALs will be authorised by the Minister for Family and Youth Affairs.

A Bill Briefing page on the Bill can be found [here](#).

### Guardian ad litem

The Joint Committee on Children and Youth Affairs noted that:

‘A Guardian *ad Litem* (GAL) represents the best interests of the child in court proceedings which enables the judge to make an informed decision based on a professional assessment as to what the needs of the child are. A GAL gives the child a voice in public court proceedings where they may otherwise have gone unheard.’

The Bill defines a guardian ad litem as ‘a person in respect of whom an authorisation is issued.’

## Summary of the Bill’s provisions

Table 1 below summarises the provisions of the *Child Care (Amendment) Bill 2019*. Further discussion of key provisions of the Bill can be found in the Principal Provisions section of this Bill Digest.

**Table 1: Provisions of the Child Care (Amendment) Bill 2019**

Section	Title	Effect
<b>Part 1 Preliminary and General</b>		
1.	Short title, collective citation and commencement	This is a standard provision
2.	Definition	This defines the <i>Child Care Act 1991</i> as the Principal Act
3.	Repeals	This repeals section 26 of the <i>Child Care Act 1991</i> which deals with the appointment of Guardians ad litem as the Bill makes provision for this. It also repeals parts of the <i>Child Care (Amendment) Bill 2011</i> which have not been commenced to date
<b>Part 2 Guardian ad litem</b>		
4.	Amendment of section 24 of Principal Act	This now provides that best interests of the child are paramount in proceedings about their care and protection
5.	Views of child	This provides that, where a child is capable of forming his or her own views in any proceedings before a court under the Principal Act, the court must determine how to facilitate the child in expressing his or her views and give any views that the child wishes to express due weight, having regard to the child’s age and maturity

6.	Guardians ad litem - insertion of Part VA in Principal Act	<p>Section 6 of the Bill inserts a new Part VA in the <i>Child Care Act 1991</i> and it sets out the following:</p> <p>Section 35A: Interpretation for Part VA of the Principal Act</p> <p>Section 35B: Order directing appointment of guardian ad litem (s.35B(2) High Court order directing appointing GAL, s35B(3) District Court order directing appointing GAL</p> <p>Section 35C: Appointment of guardian ad litem for child</p> <p>Section 35D: Legal advice and representation</p> <p>Section 35E: Functions of guardians ad litem appointed for children</p> <p>Section 35F: Powers of guardians ad litem appointed for children</p> <p>Section 35G: Provision of information by Child and Family Agency (Tusla)</p> <p>Section 35H: Cessation of effect of order under Section 35B(2) or (3)</p> <p>Section 35I: Costs</p> <p>Section 35J: Regulations (Part VA)</p> <p>Section 35K: Provision of information by guardians ad litem to Minister</p> <p>Section 35L: Authorisation to perform GAL functions</p> <p>Section 35M: Notification of relevant matters to Minister re. performance</p> <p>Section 35N: Revocation of authorisation</p> <p>Section 35O: Cessation of authorisation</p> <p>Section 35P: Contracts for services</p> <p>Section 35Q: Transitional and saving provisions (Part VA)</p> <p>This deals with the appointment of GALs and their functions and powers.</p>
7.	Miscellaneous amendments to Principal Act	These are technical amendments
8.	Amendments to other Acts	These amendments will be to make reference to this Bill in other Acts
<b>Part 3 Increase in Membership of Board Of Child And Family Agency</b>		
9.	Amendment of <i>Child and Family Agency Act 2013</i>	This increases the number of ordinary members of the Board from 7 to 9 and makes consequential amendments.
<b>Schedule</b>		
Part 1	Miscellaneous amendments to the <i>Child Care Act 1991</i>	These amendments reflect the changes made by the Bill
Part 2	Amendments to other Acts	These amendments reflect the changes made by the Bill

## Background

This Bill Digest provides general background information in relation to the progress of the Bill and the role guardians ad litem in Irish courts.

## Progress of the Bill

The Bill follows on from a [General Scheme of the Child Care \(Amendment\) Bill 2017](#) and a [Revised General Scheme of Child Care Amendment Bill 2018](#). The Joint Committee on Children and Youth Affairs carried out pre-legislative scrutiny on the 2017 General Scheme but not the revised General Scheme. The Digest does not compare the Schemes with the Bill in detail.<sup>1</sup>

**Table 2: Comparison of several provisions between the General Scheme, Revised General Scheme and the Bill**

	<b>General Scheme (2017)</b>	<b>Revised General Scheme (2018)</b>	<b>Bill (2019)</b>
<b>Qualifications and eligibility of GALs</b>	Set out in Head 7	Set out in Head 6	Not in the Bill. The Minister may set them out in regulations
<b>Powers of the GAL</b>	Not able to cross examine	Included the power to cross examine in certain circumstances	Cross examination not included in powers of GAL
<b>Establishment of a national GAL service</b>	Set out in Head 3	Set out in Head 3	Not provided for in the Bill

<sup>1</sup> The Digest does not include a pre-legislative scrutiny traffic light to show how the Department of Children and Youth Affairs (DCYA) complied with the recommendations of Joint Committee on Youth and Children on the General Scheme of the Bill. This is because DCYA published a revised General Scheme.

The Department of Children and Youth Affairs<sup>2</sup> (DCYA) noted that:

‘The revised General Scheme reflects Government’s decision in December 2017 for a new Guardian ad litem service to be established within an executive office of the Department of Children and Youth Affairs. It also addresses further recommendations of the Joint Oireachtas Committee for Children and Youth Affairs on the General Scheme as published in January 2017.

The revised Scheme strengthens the powers of Guardians ad litem in a number of important areas. In the interests of procedural fairness, the Guardian ad litem will be permitted to cross-examine parties and witnesses in certain circumstances. S/he will also have the power to make applications to the court on issues concerning the welfare of the child where the child is in care.

The professional qualifications to act as a Guardian ad litem have been broadened to include social care and psychiatry. This addition will help ensure that the new service is diverse and responsive to the different needs of children involved in child care proceedings.

In addition to providing for a presumption in favour of appointment of a Guardian ad litem in all child care proceedings, a new provision is included in the revised General Scheme requiring the court to say how it intends to hear the views of the child, if it declines to appoint a Guardian ad litem.’

DCYA also proposed to establish an Expert Reference Panel:

‘to provide additional specialised advice and opinion to the Department on a number of key operational aspects of the new Guardian ad litem service. These expert inputs will be used to inform an operational framework to assist the service in meeting its responsibilities as a service to children, young people, their families and to the courts as required by legislation.’

This has not been established to date.

While there have been several consultations and detailed reports about the GAL structure in Ireland and on the General Scheme of the Bill, there has not been much specific commentary directly related to the provisions of the *Child Care (Amendment) Bill 2019* as published. A child law solicitor has criticised the Bill and stated that it ‘has had no input or consultation from lawyers acting on behalf of the interests of children on the front line, or guardians themselves.’<sup>3</sup>

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<sup>2</sup>[https://www.dcy.gov.ie/docs/Reform\\_of\\_Guardian\\_ad\\_litem\\_arrangements\\_in\\_child\\_care\\_proce/3969.htm](https://www.dcy.gov.ie/docs/Reform_of_Guardian_ad_litem_arrangements_in_child_care_proce/3969.htm)

<sup>3</sup> <https://www.lawsociety.ie/gazette/top-stories/guardian-ad-litem-bill-is-diluting-childrens-rights-solicitor2/>

Table 3 below sets out a timeline of changes and proposed changes to the GAL system.

**Table 3: Timeline of changes and proposed changes to the GAL system**

Date	Event
1991	<a href="#">Child Care Act 1991</a>
2012	<a href="#">Referendum</a> on the rights of the child
2014	Tusla is established as an independent legal entity on 1 January 2014, comprising the HSE Children and Family Services, the Family Support Agency and the National Welfare Board.
2015	Public consultation on guardian ad litem held by the Department. See <a href="#">responses</a>
2015	The <a href="#">Thirty-First Amendment of the Constitution (Children) Act 2012</a> comes into force following legal challenges
2015	<a href="#">Comptroller and Auditor General report on the Guardian ad Litem Service</a>
2017	<a href="#">General Scheme of the Child Care (Amendment) Bill 2017</a>
2017	Joint Committee on Children and Youth Affairs: <a href="#">Report on the Heads of Bill of the General Scheme of the Child Care (Amendment) Bill, May 2017</a>
2018	<a href="#">Revised General Scheme of Child Care Amendment Bill 2018</a>
2019	<a href="#">Child Care (Amendment) Bill 2019</a> published

Source: L&RS.

## The role of the guardian ad litem in Ireland

The Auditor and Comptroller General carried out a review<sup>4</sup> of GAL provision in Ireland in 2015. The report has useful background information in relation to the evolution of the role of GALs in Ireland. It noted that while the *Child Care Act 1991*:

‘provides for the appointment of guardians ad litem, it is silent on the role. Furthermore, the legislation does not contain any guidelines on the eligibility criteria and qualifications of a person to be appointed as guardian ad litem, or their duties to the Court.

The role of the guardian ad litem was considered in the context of a special care case in 2007.<sup>5</sup> The judgment describes the function of the guardian ad litem as being twofold; firstly to place the views of the child before the court and secondly, to give the guardian’s view as to what is in the best interests of the child.

The Children Acts Advisory Board (CAAB) was established under Section 20 of the *Child Care (Amendment) Act 2007*<sup>6</sup> to provide advice on policy issues relating to the co-ordinated delivery of services to children and young people at risk. One of the statutory functions of

<sup>4</sup> <https://www.audit.gov.ie/en/Find-Report/Publications/2016/Guardian-Ad-Litem-Service.pdf>

<sup>5</sup> The judgment was delivered by Mr Justice MacMenamin in the case of HSE v K (a minor) 2007.

<sup>6</sup> <http://revisedacts.lawreform.ie/eli/2007/act/26/front/revised/en/html>

CAAB was to publish guidance on the qualifications, criteria for appointment, training and role of any guardian ad litem appointed for children in proceedings under the Child Care Act 1991.

In May 2009, CAAB published guidelines under the title ‘Giving a voice to children’s wishes, feelings and interests.’<sup>7</sup> The guidelines define the role of the guardian ad litem as to “independently establish the wishes, feelings, and interests of the child and present them to the court with recommendations”. However, CAAB was dissolved with effect from 8 September 2011, and notwithstanding that they are widely accepted as best practice, the guidelines were never given a statutory footing.’

The Comptroller and Auditor General notes that:

‘The term ‘guardian *ad litem*’ literally translates as ‘guardian for the suit’. It refers to the court appointed guardian in place for the duration of the court case.’

According to the Joint Committee on Children and Youth Affairs in their [Report on the Heads of Bill of the General Scheme of the Child Care \(Amendment\) Bill, May 2017](#):

“The GAL [system] as it currently operates is not fit for purpose; it is completely unregulated; there is no oversight or accountability; and the role of the GAL is not defined in legislation. The appointment of GALs in court proceedings is at the discretion of the judge, meaning that access to a GAL is inconsistent across the country.

Over the past three years (2014-2016) the provision of the GAL service has cost the state approximately €46.1 million, money which cannot be quantified in terms of value for money as there is no clear payment structure in place.

A regulated system can operate on a much more cost effective basis as evidenced by similar services in other jurisdictions. The Children’s Hearings Scotland (CHS) provided the GAL service on a budget of £3.7 million (€4.32m) in 2015 whereas the provision of the GAL service cost the Irish state €14.8 million in the same year. It is our opinion that the legislation will bring down the exorbitant costs and in turn provide a service that will better serve the most vulnerable children in our society.”

The [explanatory memo](#) to the Bill states that:

‘The national guardian *ad litem* service will be provided from an Executive Office within the Department of Children and Youth Affairs. The Executive Office will be responsible for: providing the guardian *ad litem* service to the courts; monitoring the performance of guardians *ad litem*, and providing legal advice and arranging legal representation for a guardian *ad litem* where required.’

Following pre-legislative scrutiny of the General Scheme of the Bill, the Joint Committee on Youth and Family Affairs stated that:

‘The Committee strongly recommends that there should be no involvement of Tusla in relation to the provision of the GAL service.’

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<sup>7</sup> <http://www.caab.ie/getdoc/40509107-c5a7-40ab-bcea-20e8ef8095fc/Giving-a-voice-to-children-s.aspx>



## Principal Provisions of the Bill

The Digest does not deal with every provision in the Bill.

### Preliminary and general

Section 1 of the Bill deals with commencement and the short title and citation of the Bill. The Minister for Children and Youth Affairs can commence the Bill by orders and different parts of the Bill can be commenced at different times. The Bill (other than Section 8 and Part 3 which do not deal with children in care) and the *Child Care Acts 1991 to 2015* can be cited as the *Child Care Acts 1991 to 2019*. References to the Principal Act in the Bill are references to the *Child Care Act 1991*.

### Repeals

Section 3 repeals section 26 of the Principal Act which deals with the appointment of a GAL in child care proceedings. Section 6 of the Bill will now deal with the appointment of GALs. Parts of the *Child Care (Amendment) Act 2011* which have not been commenced to date<sup>8</sup> are also repealed by Section 3. These provisions will be covered by provisions in the Bill.

### Best interests of the child and the views of the child

A new Article 42A was inserted into the Constitution<sup>9</sup> following a referendum on the rights of the child in 2012. This Article significantly strengthened the rights of children in care proceedings and are reflected in the Bill in section 4 which deal with the best interests of a child, and the view of a child.

#### Article 42A of the Constitution

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.

4 1° Provision shall be made by law that in the resolution of all proceedings—

- (i) brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or
- (ii) concerning the adoption, guardianship or custody of, or access to, any child,

the best interests of the child shall be the paramount consideration.

4 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.

<sup>8</sup> Subsections 13(b), (c), (d) and 14(b) of the *Child Care (Amendment) Act 2011*. These dealt with service of documents, promotion of best interests, procurement of documents and appointing a solicitor and payment of expenses.

<sup>9</sup> The [Thirty-First Amendment of the Constitution \(Children\) Act 2012](#) came into force in 2015

### Best interests of the child

Section 4 amends the Principal Act by substituting a new section for the existing section 24 which provides that the welfare of the child is to be paramount in proceedings in a court under this Act in relation to the care and protection of a child. Currently section 24 states that the court, having regard to the rights and duties of parents, whether under the Constitution or otherwise, must (a) regard the welfare of the child as the first and paramount consideration, and (b) in so far as is practicable, give due consideration, having regard to his age and understanding, to the wishes of the child.

The new section 24 expands on this approach and sets out detailed considerations that the court is to consider in deciding what is in the best interests of a child. Section 24 provides that the court will now regard the **best interests** of the child as the paramount consideration in all proceedings relating to the care and protection of a child, including special care. The court must now have regard to all circumstances which are relevant to the child including:

- (a) the child's age, maturity and any special characteristics of the child,
- (b) the benefit to the child of having a meaningful relationship with each of his or her parents and with the other relatives and persons who are involved in the child's upbringing,
- (c) the views of the child where he or she has chosen to express such views,
- (d) the physical, psychological and emotional needs of the child,
- (e) the social, intellectual and educational upbringing and needs of the child,
- (f) the religious, spiritual, cultural and linguistic upbringing and needs of the child, and
- (g) any harm which the child has suffered or is at risk of suffering, including harm because of household violence, and the protection of the child's safety and psychological well-being.

### Views of the child

Section 5 of the Bill inserts a new section 24A into the Principal Act. It provides that, where a child can form his or her own views in any proceedings in relation to the care and protection of children then the court must determine how to facilitate the child in expressing his or her views and give any views that the child wishes to express due weight, having regard to the child's age and maturity.

### Guardian ad litem provisions

Section 6 of the Bill is a lengthy provision which inserts a new Part VA in the *Child Care Act 1991*. It sets out the following:

Section 35A:	Interpretation for Part VA of the Principal Act
Section 35B:	Order directing appointment of guardian ad litem
Section 35C:	Appointment of guardian ad litem for child
Section 35D:	Legal advice and representation
Section 35E:	Functions of guardians ad litem appointed for children

Section 35F:	Powers of guardians ad litem appointed for children
Section 35G:	Provision of information by Child and Family Agency (Tusla)
Section 35H:	Cessation of effect of order under Section 35B(2) or (3)
Section 35I:	Costs
Section 35J:	Regulations (Part VA)
Section 35K:	Provision of information by guardians ad litem to Minister
Section 35L:	Authorisation
Section 35M:	Notification of relevant matters
Section 35N:	Revocation of authorisation
Section 35O:	Cessation of authorisation
Section 35P:	Contracts for services
Section 35Q:	Transitional and saving provisions (Part VA)

## Interpretation (Part VA)

Section 35A sets out the definitions to be used in Part VA. These include that a reference to the District Court can be construed as a reference to the Circuit Court on appeal from the District Court and that where proceedings are under Part IVA of the Principal Act, court means High Court.

## Mandatory appointment of guardian ad litem in certain cases

Section 6 of the Bill inserts a new section 35B into the Principal Act which provides that a GAL will only be appointed if the District or High Court makes an order directing the appointment. A GAL must be appointed to a child who is the subject of special care proceedings in the High Court. Special care orders are made by the High Court and result in a child being detained in a special care unit for their own safety and welfare.<sup>10</sup>

Section 8 of Part 2 of the Schedule makes provision for the mandatory appointment of a GAL in all proceedings regarding the involuntary admission of a child who has a mental disorder to an approved centre (under Section 25<sup>11</sup> of the *Mental Health Act 2001*). Both special care and involuntary admission to an approved centre involve the deprivation of liberty of a child.

## Discretion of District Court to appoint a GAL

A GAL will not automatically be appointed by order of the District Court under Part IV,<sup>12</sup> IVB or VI<sup>13</sup> of the *Child Care Act 1991*. The Court can consider whether to appoint a GAL on foot of its own motion or on the application of any party to the proceedings. In considering whether to make an appointment, the District Court must have regard to the following:

- (a) the best interests of the child;
- (b) the age and maturity of the child;

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<sup>10</sup> <https://www.dcy.gov.ie/docs/EN/Special-Care/1914.htm>

<sup>11</sup> <http://www.irishstatutebook.ie/eli/2001/act/25/section/25/enacted/en/html>

<sup>12</sup> These refer to interim care orders, care orders, supervision orders and delivery and return of children

<sup>13</sup> This refers to accommodation and maintenance of children in care

- (c) the nature of the issues in dispute in the proceedings;
- (d) any report on any question affecting the welfare of the child;
- (e) where the child wishes to express his or her views, whether an order under that subsection will assist the expression by the child of his or her views in the proceedings; and
- (f) any views regarding such an order expressed by the child and the parties to the proceedings or any other person to whom the proceedings relate.

In cases where the District Court decides not to order the appointment of a GAL then it will need to give reasons for this decision, and it is required to outline how a child wishing to express his or her views will be facilitated to do so.

## Legal advice and legal representation

The Comptroller and Auditor General's report on GAL provision<sup>14</sup> in Ireland found that GAL legal representation costs in 2015 amounted to €5.9 million (2014: €7.4 million), comprising solicitors' fees of €5 million and counsel fees of €0.9 million. In answer to a recent PQ<sup>15</sup> on GALs, the Minister for Children and Youth Affairs stated that: 'the costs associated with the provision of GAL services amounted to €14.65m in 2018 and €14m in 2017.'

The legal representation of GALs has divided stakeholders, as seen in the submissions on the 2015 Department of Children and Youth Affairs consultation on reform of the GAL system and other reports. Some have argued that the huge expense associated with legal representation has in part contributed to the service falling into disrepute, and that GALs should only have access to legal representation in exceptional cases.<sup>16</sup>

Others, including Barnardos, argue that the way to control costs is not by restricting access to essential legal advice and representation. The Council of the Bar of Ireland, while acknowledging the issue of resources and public expenditure, suggest that

"it is utterly wrong to select a child's fundamental right to a Guardian *ad litem* and legal representation as an issue that can be reduced to its monetary value or cost."

Stakeholders, including the Council of the Bar of Ireland and the ISPCC have suggested that Ireland should follow the dual representation model used in the UK. This allows a child to be appointed both a Guardian *ad litem* and legal representation. According to the ISPCC:

"The U.K. experience tells us that if a child's wishes and needs are to be effectively represented to the court, both a Guardian *ad Litem* and solicitor are necessary. To have a Guardian *ad Litem* but no solicitor disadvantages both the child and the Guardian *ad Litem* from the outset, as neither are legal experts."

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<sup>14</sup> <https://www.audit.gov.ie/en/Find-Report/Publications/2016/Guardian-Ad-Litem-Service.pdf>

<sup>15</sup> <https://www.kildarestreet.com/wrans/?id=2019-07-11a.2381&s=ad+litem>

<sup>16</sup> See submission of the Child and Family Agency at <https://www.dcy.gov.ie/viewdoc.asp?fn=%2Fdocuments%2F26092016ReformofGuardianAdlitemArrangements.htm>

Where legal representation is appointed, stakeholders, including Carol Coulter<sup>17</sup>, have suggested that a GAL should have choice in respect of who their representative is.

Section 35D provides that where an order is made appointing a GAL in special care proceedings then the Minister will organise the provision of legal advice and legal representation for the GAL. In other cases relating to the care and protection of children then the Minister may arrange for the provision of legal advice or legal representation to a GAL but it is not automatic. The Minister must have regard to the following in deciding whether to arrange legal advice, legal representation or both:

- whether it is in the best interests of the child that legal representation be provided;
- any views in relation to legal representation for the guardian *ad litem* expressed by the court that made the order;
- whether the guardian *ad litem* intends to make an application under this Act in relation to the child;
- the opinion of the guardian *ad litem* in relation to any application in the proceedings by the Child and Family Agency;
- whether it would be unreasonable to expect the guardian *ad litem* to deal with the matter to which the proceedings concerned relate without legal advice or legal representation, or both, because of its complexity or for any other reason;
- whether there are special circumstances that make it appropriate for legal representation to be provided;
- such other matters as the Minister considers appropriate.

### Functions of GALs appointed for children

Section 35E sets out the functions of a GAL. These have not been set out in legislation to date. The functions of a GAL are:

- (a) to learn any views expressed by the child in relation to the matters to which the proceedings relate (in so far as practicable and where the child can form his or her own views), and
- (b) to make recommendations to the court regarding what is in the best interests of the child, having considered these views, if any.

A GAL appointed for a child must give the court a report that tells the court of any views expressed by the child in relation to the matters to which the proceedings relate, and includes the GAL's recommendation regarding what is the best interest of the child (reasons for the recommendation must be given in the report). The GAL should also inform the child, having regard to his or her age and maturity of the recommendations to the Court by the GAL re. the best interests of the child, and the outcome of the proceedings, and any other matter relevant to the proceedings as the guardian *ad litem* considers appropriate.

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<sup>17</sup> Director, Child Care Law Reporting Project. See submission at <https://www.dcy.gov.ie/viewdoc.asp?fn=%2Fdocuments%2F26092016ReformofGuardianAdlitemArrangements.htm>

The GAL should also inform the court of any other relevant issues relating to the best interests of the child, coming to his or her knowledge because of the performance by the guardian ad litem of his or her functions.

Section 35E also sets out that the GAL will is not a party to the proceedings, is independent in the performance of their functions and can be called as a witness by the court or any party to the proceedings. It also provides that the GAL must have regard to the best interests of the child as the paramount consideration when performing his or her duties. This includes having regard to

- (a) the child's age, maturity and any special characteristics of the child,
- (h) the benefit to the child of having a meaningful relationship with each of his or her parents and with the other relatives and persons who are involved in the child's upbringing,
- (i) the views of the child where he or she has chosen to express such views,
- (j) the physical, psychological and emotional needs of the child,
- (k) the social, intellectual and educational upbringing and needs of the child,
- (l) the religious, spiritual, cultural and linguistic upbringing and needs of the child, and
- (m) any harm which the child has suffered or is at risk of suffering, including harm because of household violence, and the protection of the child's safety and psychological well-being.

The section also provides that the Section 35E provides that a copy of the report prepared by a GAL will be made available to each party to the proceedings, or their counsel or solicitor, if applicable. However, the court may order that parts of the report be redacted where it is considered appropriate. The functions in Section 35E are largely like those set out in the Revised General Scheme 2018 but the functions in the Scheme also included an obligation on the GAL to 'promote and facilitate the child's right to a voice and to have any views expressed by him/her considered in the proceedings.'

## Powers of GALs appointed for children

Section 35F sets out the powers of GALs appointed under the Bill. It provides that a GAL can apply to the court to:

- obtain a report on any question affecting the welfare of the child in cases where there is no report on the question or where the information is out of date;<sup>18</sup>
- for the provision of information to the GAL from any person; or
- in relation to any other matter relating to his or her functions.

The court can direct the Child and Family Agency (Tusla) to obtain a report from a person nominated by the court on any question affecting the welfare of the child. A copy of a report prepared under section 35F(2)(a) will be made available to the guardian ad litem, any party to the

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<sup>18</sup> The GAL must consult with the parties to the proceedings or the counsel or solicitor before making this request



proceedings or, if appropriate, their counsel or solicitor, and this report may be received in evidence in the proceedings. The court may decide that the report should be partly redacted if it is appropriate. The court can also direct that a person gives specified information to the GAL, or give other directions as it thinks appropriate. However, the person is not required to give the GAL information which is subject to legal professional privilege<sup>19</sup>.

The author of a report which was prepared under this section can be called as a witness by the court, the GAL or any party to the proceedings.

The Revised General Scheme 2018 provided that the GAL could cross examine in certain limited circumstances<sup>20</sup> but this is not included in the Bill.

### Provision of information by Child and Family Agency

Section 35G allows the guardian ad litem to make a request to the Child and Family Agency (Tusla) for information about the welfare of the child which is necessary for the performance of his or her functions. The Child and Family Agency must comply with such a request unless it would be a breach of the Data Protection Regulation<sup>21</sup> and the *Data Protection Act 2018*.<sup>22</sup> If the Child and Family Agency refuses to comply with a GAL's request for information then it must give the GAL reasons for the refusal. It does not have to give the GAL information which would be exempt from court proceedings on the grounds of legal professional privilege.

### Provision of information by GALs to the Minister

Under Section 35K of the Principal Act (as inserted by Section 6 of the Bill) the Minister may request a GAL to provide the Minister with information<sup>23</sup> in relation to the guardian's functions, including information relating to the proceedings in which the GAL has been appointed for the child. A GAL is required to comply with such a request.

### Qualifications

The Bill does not include specific provisions in relation to the qualifications needed for a GAL or the number of years of experience he or she needs. These provisions are likely to be set out under regulations under Section 35L (authorisation) and/or by way of regulations which the Minister can make under Section 35J of Part VA.

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<sup>19</sup> Legal professional privilege is a right conferred by law to protect communications containing legal advice between a solicitor/barrister and their client from being disclosed to any other parties.

<sup>20</sup> Where the GAL intends to give evidence on a particular matter which may conflict or contradict the evidence being given by a party or witness, in accordance with the rule in *Browne v Dunn*, the GAL will be permitted to put such evidence to that witness by way of cross-examination in order to afford that person an opportunity of commenting on same; and (ii) where a party or a witness to the proceedings gives evidence that impugns the conduct, reputation or good name of the GAL.

<sup>21</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02016R0679-20160504>

<sup>22</sup> <https://www.oireachtas.ie/en/bills/bill/2018/10/>

<sup>23</sup> This is subject to the Data Protection Regulation and the *Data Protection Act 2018*

The General Scheme of the Bill (2017) provided that a person would not be eligible for inclusion on a Guardian *ad litem* panel unless: he/she had a qualification<sup>24</sup> in social work or psychology; was registered with the Health and Social Care Professionals Council; had a minimum of 5 years postgraduate experience in child welfare and protection; and was Garda vetted. Similarly, the Revised General Scheme (2018) provided that a person would not be eligible for inclusion on a Guardian *ad litem* panel unless he/she had a relevant qualification in social work; social care; psychology, or psychiatry, had a minimum 5 years of post-graduate experience and was Garda vetted.

## Authorisation

Section 35L of the *Child Care Act 1991* as inserted by Section 6 of the Bill deals with the authorisation of GALs. The Minister will only authorise a person to perform the functions of a GAL when the Minister thinks that person is appropriate to carry out the function of a GAL. The section provides that the Minister can set out a class or classes of person who are suitable to be a GAL.

In setting out this class or classes the Minister must have regard to ‘the qualifications, minimum level of professional experience, training and expertise of such class or classes of person’. When setting out the requirements that a specified class or classes must meet, the Minister must have regard to the functions the GAL will perform and the promotion of high professional standards and good practice. Section 35M provides that a GAL must notify the Minister if a relevant matter which relates to him or her comes to his or her attention. This includes a criminal record under Section 2 of the [National Vetting Bureau \(Children and Vulnerable Persons\) Act 2012](#).<sup>25</sup> Failure to notify the Minister about a relevant matter can lead to the revocation of authorisation for the GAL under Section 35N. The Minister can also revoke authorisation where a requirement for granting authorisation is no longer satisfied; the person has committed a serious breach of regulations made under Part VA; if the person cannot perform the functions of a GAL because of ill-health; or there are other good and sufficient reasons (not specified further) to do so. Authorisation can also cease in a number of situations outlined by Section 35O including the revocation of authorisation or at the request of the GAL.

## Regulations (Part VA)

Section 35J enables the Minister to make regulations relating to the performance by guardians *ad litem* of their functions under this Act in order to promote high professional standards and good practice. The regulations can:

- specify the standards to be applied by guardians *ad litem* to the performance by them of their functions under this Act;
- make provision for the training of guardians *ad litem*;

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<sup>24</sup> It also set out circumstances where a person without one of these qualifications could be included in a panel of GALs.

<sup>25</sup> “Criminal record”, in relation to a person, means—(a) a record of the person’s convictions, whether within or outside the State, for any criminal offences, together with any ancillary or consequential orders made pursuant to the convictions concerned, or (b) a record of any prosecutions pending against the person, whether within or outside the State, for any criminal offence, or both;



- make provision for codes of conduct for guardians *ad litem*;
- make provision for the procedures that are to apply to monitor, measure and evaluate the performance by guardians *ad litem* of their functions under this Act;
- make provision for the establishment and administration of a system of investigation and adjudication of complaints against guardians *ad litem*;
- make provision for the procedures that are to apply in respect of the keeping of records by guardians *ad litem*;
- specify such fees and expenses as the Minister, with the consent of the Minister for Public Expenditure and Reform, may from time to time determine shall be paid to guardians *ad litem*;
- make provision for such matters of procedure and administration as appear to the Minister to be necessary or expedient in respect of the provision, or arrangement for the provision of, legal advice to, and legal representation for, guardians *ad litem*;
- make provision for such other matters as the Minister considers necessary to ensure that guardians *ad litem* are capable of performing their functions under this Act.

### Financial implications/costs

In 2015, the Office of the Comptroller and Auditor General reviewed the operation of the GAL system at the time in Ireland. The [Report of the Comptroller and Auditor General](#) calculated that the annual cost for providing the Guardian *ad litem* service for 2014 was €9.1m, and €8.2m for 2015. The legal costs for the same period were €7.4m and €5.9m. The Public Accounts Committee undertook a detailed examination of Chapter 11 of the 2015 Report on 19<sup>th</sup> of January 2017.<sup>26</sup>

According to the Comptroller and Auditor General:

“The absence of key data means that demand for the service cannot be reliably estimated. It also makes it difficult to reliably forecast and budget for expected costs and to assess the overall cost-effectiveness of the service.”<sup>27</sup>

The Report contained a number of recommendations and conclusions, including:

- that regulation of the guardian *ad litem* service could help to ensure that a quality standardised service is available;
- responsibility for the management and supervision of the service should be assigned to a single entity, preferably a body that is independent of the legal proceedings.

It found that fees for GALs per case ranged from a low of €4,800 to a high of €28,700.<sup>28</sup> It also highlighted the difference between the Irish fee structure and other common law jurisdictions, as set out in the table overleaf.

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<sup>26</sup> Chapter 11 Guardian *ad litem*, Committee Debates at <http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/DebatesWebPack.nsf/committeetakes/ACC2017011900002?opendocument#K00075>

<sup>27</sup> *Ibid*

**Figure 11.4 Irish fee structure compared with other common law jurisdictions**

Fee structure <sup>a</sup>	Ireland	Northern Ireland	England and Wales	Scotland
Fee base	Per hour	Per hour	Per hour	Piecework
Fee rates for professional time – preparatory work, liaising with child and family and report writing	€125 p/h	€40 p/h	€42 p/h	€333 flat fee
Fee rates for professional time – attendance at court	€125 p/h	€40 p/h	€42 p/h	€167 flat fee
Fee rates - travel and waiting time	€0 p/h	€24 p/h	€42 p/h	Exceptional basis only <sup>b</sup>

Source: Analysis by the Office of the Comptroller and Auditor General

Notes: a Sterling rates have been converted to € equivalent using the Central Bank exchange rate as at 8 June 2016.

b Under the Scottish fee structure, travel time is built into the flat fee payments for appointment and attendance at court. Return trips over 4 hours are classed as exceptional travel and attract an additional fixed fee of €83 for 4-6 hrs and €167 for round trips in excess of 6 hrs.

The explanatory memo<sup>29</sup> to the Bill states that:

‘Costing projections indicate that the proposed guardian *ad litem* service can be provided within existing resources and the restructuring of the service will provide scope to extend the service to all children who are the subject of child care proceedings within the current expenditure envelope.’

Section 35L of the Principal Act (which is inserted by Section 6 of the Bill) deals with costs. It provides that any costs or expenses reasonably incurred by the guardian ad litem in the exercise of his or her functions under this Act will be paid by the Minister and the Minister may apply to the court to have the amount of any such costs or expenses measured or taxed.

Section 35J of the Principal Act (as inserted by Section 6 of the Bill) allows the Minister to make regulations to promote good practice and high professional standards. Section 35J(1)(g) states that the Minister can specify such fees and expenses as the Minister, with the consent of the Minister for Public Expenditure and Reform, may from time to time determine shall be paid to guardians ad litem.

<sup>28</sup> The report acknowledged that ‘This does not present a full picture of the average cost per case, since an individual case may span a number of years and this data is limited to costs incurred in 2015’. Notwithstanding these limitations, it shows a high level of variation in the average cost — from a low of €4,800 to a high of €28,700’.

<sup>29</sup> <https://data.oireachtas.ie/ie/oireachtas/bill/2019/66/eng/memo/b6619dmemo.pdf>

## Other provisions in the Bill

Section 9 of the Bill amends section 19(1) of the *Child and Family Agency Act 2013*<sup>30</sup> and aims to add two ordinary members to the membership of the Board of the Child and Family Agency (Tusla). The Board is currently made up of a chairperson, a deputy chairperson and 7 ordinary members. Section 9 also makes consequential amendments to section 22 of the *Child and Family Agency Act 2013* to reflect the change in the number of ordinary board members: the number of members needed to call a meeting of the Board; the number of ordinary members required to achieve a quorum, and, the number of ordinary members required to achieve a quorum where there is a vacancy on the Board.

## Schedule - Miscellaneous amendments

Part 2 of the Schedule lists several technical amendments to the *Children Act 2001*, the *Mental Health Act 2001*, the *National Vetting Bureau (Children and Vulnerable Persons) Act 2012* and the *Children First Act 2015*.<sup>31</sup> These amendments will update references to the *Child Care Acts* to include this Act.

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<sup>30</sup> <http://www.irishstatutebook.ie/eli/2013/act/40/section/19/enacted/en/html#sec19>

<sup>31</sup> <http://www.irishstatutebook.ie/eli/2015/act/36/enacted/en/pdf>



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