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**An Bille um Chúram Leanaí (Leasú), 2019**  
**Child Care (Amendment) Bill 2019**

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*Meabhrán Míitheach agus Airgeadais*  
*Explanatory and Financial Memorandum*

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**EXPLANATORY AND FINANCIAL MEMORANDUM**

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**Purpose of the Bill**

Guardian *ad litem* arrangements for children who are the subject of public law child care proceedings are currently provided for under section 26 of the Child Care Act 1991. The Bill proposes to replace the limited provision in section 26 and insert a new Part into the 1991 Act for the purpose of regulating the existing *ad hoc* system of guardian *ad litem* appointments. The principal objective of the Bill is to extend the guardian *ad litem* system so that it benefits the greatest number of children and young people, and to ensure that a high quality and sustainable service is provided into the future.

It is intended that the guardian *ad litem* will enhance the decision-making capacity of the court in child care proceedings. The core functions of the guardian *ad litem* will be to inform the court of any views which the child wishes to express and to advise the court on what, in his or her professional opinion, is in the child's best interests.

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.

**Financial Implications**

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.

**Provisions of the Bill**

**PART 1**

**Preliminary and General**

**Section 1 - Short title, collective citation and commencement**

*Section 1* is a standard provision that provides for the short title, collective citation and commencement of the Bill.

**Section 2 - Definition**

*Section 2* sets out the definition of key terms used in the Bill.

### **Section 3 - Repeals**

*Section 3* repeals section 26 of the Principal Act. Section 26 provides for the appointment of a guardian *ad litem* in childcare proceedings. It is necessary to repeal this section as it will be replaced by the provisions in this Bill. Subsections 13(b), (c), (d) and 14(b) of the Child Care (Amendment) Act 2011 are also repealed. These subsections have not been commenced and are being replaced by the provisions of this Bill.

## **PART 2**

### **Guardian *Ad Litem***

### **Section 4 - Amendment of section 24 of Principal Act**

*Section 4* amends the Principal Act by substituting a new section for the existing section 24.

The purpose of this amendment is to reflect the intent of Article 42A of the Constitution, which was inserted into the Constitution by the Thirty-First Amendment of the Constitution (Children) Act 2012 (the “Children’s Referendum”).

The new section 24 specifies that in any child care proceedings before a court under the Principal Act, including proceedings before the High Court in relation to special care, the court shall regard the best interests of the child as the paramount consideration. The court will also be required, when determining what is in the best interests of the child, to have regard to all the circumstances that it considers relevant. A non-exhaustive list of such circumstances is described in paragraphs (a) to (g) of the new section 24.

### **Section 5 - Views of child**

*Section 5* inserts a new section 24A into the Principal Act. This new section provides that, where a child is capable of forming his or her own views in any proceedings before a court under the Principal Act, including proceedings before the High Court in relation to special care, 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.

### **Section 6 - Guardians *ad litem* – insertion of Part VA in Principal Act**

This section inserts a new Part VA “Guardian *ad litem*” into the Principal Act.

#### ***Chapter 1 — Interpretation (Part VA)***

### **35A - Interpretation (Part VA)**

*Section 35A* sets out the definitions used in this Part and clarifies that in this Part, 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.

#### ***Chapter 2 — Appointment, functions and powers***

### **35B - Order directing appointment of guardian *ad litem***

*Section 35B* specifies that a person cannot be appointed as a guardian *ad litem* for a child unless an order directing such appointment has been made under this section. It provides that the High Court will appoint a guardian *ad litem* for all children in all special care proceedings and creates a presumption in favour of appointment in proceedings before the District Court.

This section sets out a list of the matters that the District Court is required to have regard to when deciding whether or not to appoint a guardian *ad*

*litem*. Where the District Court decides not to make an order appointing a guardian *ad litem*, the court is required to give the reasons supporting its decision and to outline how a child wishing to express his or her views will be facilitated to do so.

*Section 35B* provides that the High Court and the District Court as appropriate, will, when appointing a guardian *ad litem*, give directions in relation to the service of documents relating to the proceedings on the Minister and the guardian *ad litem*, as appropriate.

### **35C - Appointment of guardian *ad litem* for child**

*Section 35C* requires the Minister to appoint a person to act as a guardian *ad litem* when an order in relation to such an appointment is made by the High Court or the District Court and to notify the court of this appointment. The Minister's powers of appointment include the power to appoint a different individual to act as guardian *ad litem* for the child in place of a previously appointed guardian.

### **35D - Legal advice and legal representation**

*Section 35D* provides that where an order is made appointing a guardian *ad litem* in special care proceedings, the Minister will arrange for the provision of legal advice and legal representation for the guardian *ad litem*. Furthermore, the Minister may arrange for the provision of legal advice or legal representation (or both) to a guardian *ad litem* appointed in proceedings under Part IV, Part IVB or VI of the Principal Act. A list of factors for the Minister to consider when deciding whether or not to provide legal advice, legal representation (or both) to a guardian *ad litem* appointed under *section 35B(3)* is set out in paragraphs (a) to (g) of *section 35D(3)*.

### **35E - Functions of guardians *ad litem* appointed for children**

*Section 35E* sets out the core functions of a guardian *ad litem* which are to ascertain the views of the child, where the child is capable of forming his or her own views, and, having considered these views, to make recommendations to the court on what is in the best interests of the child. The guardian *ad litem* is required to prepare a report for the court which conveys the views of the child on the matters to which the proceedings relate, and which makes recommendations on what is in the best interests of the child. The guardian *ad litem* is required to state the reasons for his or her recommendations.

Having regard to the child's age and maturity, the guardian *ad litem* is also required to inform the child of the recommendations contained in his or her report, the outcome of the proceedings and any other matters relevant to the proceedings which the guardian *ad litem* considers appropriate. The guardian *ad litem* must also inform the court of any additional matters which are relevant to the best interests of the child, which come to his or her attention during the course of the performance of his or her duties as a guardian *ad litem*.

*Section 35E* provides that, in performing his or her functions, the guardian *ad litem* will regard the best interests of the child as the paramount consideration. In determining what is in the best interests of the child, a guardian *ad litem* must have regard to all the factors he or she considers relevant to the child including those listed in paragraphs (a) to (g) of the new *section 24(2)* of the Principal Act.

*Section 35E* provides that a copy of the report prepared by a guardian *ad litem* will be made available to each party to the proceedings, or their counsel or solicitor, if applicable. The report may be received in evidence

in the proceedings. *Section 35E* also provides that the court may order, where it considers appropriate, that the report will be redacted in part.

*Section 35E* provides that a guardian *ad litem* can be called as a witness by the court or by any party to the proceedings. It further provides that a guardian *ad litem* is independent in the performance of his or her functions and that he or she is not a party to the proceedings.

### **35F - Powers of guardians *ad litem* appointed for children**

*Section 35F* provides that a guardian *ad litem* may apply to the court to request that a report be obtained from a person, nominated by the court, on any question affecting the welfare of the child. A guardian *ad litem* may make such an application where there is no existing report, or where there is a report, but the information contained within that report is out of date. Before making an application to the court for such a report, the guardian *ad litem* is required to consult with the parties to the proceedings, or the counsel or solicitor (if any) representing the parties.

Following an application from the guardian *ad litem*, the court may direct the Child and Family Agency to procure 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 proceedings or, if appropriate, their counsel or solicitor, and this report may be received in evidence in the proceedings. The court may, where it considers appropriate, order that such a report will be redacted in part. The court will determine which party or parties to the proceedings will pay the fees and expenses of the person who prepared the report. In addition, the author of a report which was prepared pursuant to this section may be called as a witness by the court, the guardian *ad litem* or any party to the proceedings.

The guardian *ad litem* may also make an application to the court in relation to the provision of information from any person or on any matter which relates to the guardian *ad litem's* functions. The court may, by order, direct a person to provide specified information to the guardian *ad litem* or make other directions as the court considers appropriate. Where the court has made an order directing the provision of information to the guardian *ad litem* under this section, the person to whom the direction applies is obliged to comply with the direction. *Section 35F* clarifies that a person is not required to provide the guardian *ad litem* with any information which is subject to legal professional privilege.

### **35G - 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 for information in relation to the welfare of the child which is necessary for the performance of his or her functions. Subject to the Data Protection Regulation and the Data Protection Act 2018, the Child and Family Agency is obliged to comply with such a request. In the event that the Child and Family Agency refuses to comply with a request from a guardian *ad litem* for information, the Agency is obliged to provide the guardian *ad litem* with the reasons for its refusal. The Child and Family Agency is not required to furnish information which would be exempt from court proceedings on the grounds of legal professional privilege.

### **35H - Cessation of effect of order under section 35B (2) or (3)**

*Section 35H* specifies the circumstances in which an order appointing a guardian *ad litem* to special care proceedings in the High Court, or proceedings in the District Court, ceases to have effect. It provides that, in circumstances where a court has ordered that proceedings will be kept under review, the court can direct that the guardian *ad litem* will remain

appointed until the conclusion of such a review. In circumstances where a child for whom a guardian *ad litem* has been appointed becomes a party to the proceedings, *section 35H* provides that the court which made the order to appoint the guardian *ad litem* will decide when this order ceases to have effect.

### **35I - Costs**

*Section 35I* provides that the Minister will pay any reasonable costs or expenses incurred by a guardian *ad litem* while exercising their functions under this Bill on or after the relevant date. The Minister may apply to the court to have the amount of these costs or expenses measured or taxed. Following an application from the Minister, the court may order a party to the proceedings to pay any costs or expenses payable by the Minister under this section.

### **35J - Regulations (Part VA)**

The purpose of *section 35J* is to allow the Minister to develop and maintain a regulatory framework for the purpose of ensuring that guardians *ad litem* are held to high professional standards when performing their functions under this Bill. A list of the matters which the regulations may provide for is set out in paragraphs (a) to (i) of *section 35J(1)*.

### **35K - Provision of information by guardians *ad litem* to Minister**

*Section 35K* provides that, subject to the Data Protection Regulation and the Data Protection Act 2018, the Minister may request a guardian *ad litem* to provide the Minister with information in relation to the guardian's functions, including information relating to the proceedings in which the guardian *ad litem* has been appointed for the child. A guardian *ad litem* is required to comply with such a request.

## **Chapter 3 — Authorisation**

### **35L - Authorisation**

*Section 35L* provides that the Minister may issue an authorisation to those persons that he or she considers appropriate to perform the functions of a guardian *ad litem*. A person will not be considered as an appropriate person to perform the functions of a guardian *ad litem* unless they fulfil the requirements of the regulations to be made under this section. *Section 35L* provides that in the interests of promoting high professional standards and good practice, the regulations may prescribe matters such as the particular professions from which guardians *ad litem* may be authorised and the qualifications and minimum levels of professional experience required.

When considering whether to issue an authorisation to a person, the Minister may request information from that person for the purpose of informing the Minister's decision on whether or not to issue such an authorisation. A person who wishes to be authorised as a guardian *ad litem* is obliged to comply with such a request.

### **35M - Notification of relevant matters**

*Section 35M* provides that a person who has been authorised to act as a guardian *ad litem* is required to notify the Minister in writing of any relevant matter which would affect their authorisation. 'Relevant matter' is defined as a criminal record within the meaning of section 2 of the National Vetting Bureau (Children and Vulnerable Persons) Act 2012 other than a conviction to which section 14A of that Act applies.

### **35N - Revocation of authorisation**

*Section 35N* sets out the circumstances in which the Minister may revoke the authorisation of a guardian *ad litem*.

### **35O - Cessation of authorisation**

*Section 35O* sets out the circumstances in which a guardian *ad litem*'s authorisation will cease. It provides that where an authorisation which has been granted for a fixed period is due to expire before the conclusion of proceedings in which the guardian *ad litem* has been appointed for a child, the Minister may extend the authorisation until the conclusion of those proceedings.

## **Chapter 4 — Miscellaneous**

### **35P - Contracts for services**

*Section 35P* provides that the Minister may enter into contracts for service with persons in the context of the Minister's functions under sections 35C(1) or 35L(1). The Minister may issue an authorisation to perform the functions of a guardian *ad litem* to those persons with whom the Minister has entered into a contract for services. A contract for service will contain terms and conditions determined by the Minister with the consent of the Minister for Public Expenditure and Reform.

### **35Q - Transitional and saving provisions (Part VA)**

*Section 35Q* sets out the transitional arrangements to be put in place to ensure that there is minimal disruption to existing guardian *ad litem* appointments in those proceedings which are ongoing. It further sets out the transitional provisions which will apply in situations where a guardian *ad litem* is deemed to have been appointed and where they have engaged legal representation for an ongoing case.

### **Section 7 - Miscellaneous amendments to Principal Act**

*Section 7* makes provision for certain technical amendments to the Principal Act which are required in order to make reference to sections inserted by this Bill. These are set out in *Part 1* of the *Schedule*.

### **Section 8 - Amendments to other Acts**

*Section 8* provides for the amendment of those Acts specified in *Part 2* of the *Schedule*.

## **PART 3**

### **Increase in Membership of Board of Child and Family Agency**

#### **Section 9 – Amendment of Child and Family Agency Act 2013**

*Section 9* amends section 19(1) of the Child and Family Agency Act 2013 for the purpose of increasing the membership of the Board of the Agency by two ordinary members. A number of consequential amendments to section 22 of the 2013 Act are required as a result of this increase in membership and these relate to: the number of Board members required 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 1* of the *Schedule* sets out a number of miscellaneous and technical amendments to section 23G, section 23M, section 28 and section 33 of the Principal Act. These are required in order to insert cross references to the new provisions proposed to be inserted by this Bill.

An amendment to section 23NK of the Principal Act is proposed in order to clarify that, where a child is subject to a special care order or interim special care order, a guardian *ad litem* can apply to the High Court for directions, or for an order, on any question affecting the welfare of the child.

An amendment to section 27 of the Principal Act for the purpose of inserting two new subsections is also proposed. The two new subsections will clarify that, for the purposes of section 27, a reference to the party or parties includes a reference to a guardian *ad litem*, if any, appointed under Part VA (Guardian *ad litem*). The purpose of this amendment is to ensure that a copy of any report on any question affecting the welfare of the child prepared under section 27 of the Principal Act is to be made available to a guardian *ad litem*.

*Part 2* of the *Schedule* sets out a series of 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 for the purpose of inserting references to this Bill.

*An Roinn Leanaí agus Gnóthaí Óige,*  
*Lúnasa, 2019.*