

LAW SOCIETY SUBMISSION



GENERAL SCHEME OF THE CHILD CARE (AMENDMENT) BILL 2017

JOINT OIREACTHAS COMMITTEE ON CHILDREN & YOUTH AFFAIRS

MARCH 2017

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. Introduction

- 1.1. The Law Society (the “Society”) made a Submission to the Department of Children and Youth Affairs In November 2015 in response to the Consultation Paper on Reform of the Guardian ad Litem System Services under the Child Care Act, 1991. The Society is firmly of the opinion that the role and organisation of the guardian ad litem (“GAL”) service should reflect the new Constitutional context of hearing the voice of the child.
- 1.2. The explicit Constitutional context is provided for in Article 42A.4.2

Provision shall be made by law for securing, as far as practicable, that in all proceedings [referred to in subsection 1] 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.
- 1.3. The views of the Society suggested that, consistent with Article 42A, a legislative presumption that a child is entitled to a GAL in every case, including for reviews, should be introduced. The Society welcomes the publication of the General Scheme of the Child Care (Amendment) Bill 2017 and looks forward to having an input into this much needed legislation.
- 1.4. 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 is essential to ensure compliance with the constitutional imperative that the voice of the child be heard.
- 1.5. This is 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 their rights. In addition, 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.
- 1.6. 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 ensures that the outcomes in litigation genuinely serve the best interests of the child.
- 1.7. The amendment to the Constitution 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 first, to ascertain the views of the child and second, to give due weight to those views.

- 1.8. The remainder of this submission includes the views, insights and recommendations of the Society in relation to certain Heads of the General Scheme.

2. Observations on heads of the General Scheme

2.1. **Head 3 – Establishment of a national Guardian ad litem service**

- 2.1.1. The Society has some reservations that the establishment of a national service “in the short term” could result in this interim service evolving into a more permanent solution and the “other options” will not be fully explored and implemented in a timely fashion.
- 2.1.2. There are also concerns that the service would be envisaged within an “existing/reformed public body”. In Northern Ireland the GAL service is run by an independent state agency funded by the Department of Health, Social Services and Public Safety. In England and Wales there is also an independent non-departmental public body – the Children and Family Court Advisory Support Services (CAFCASS). In Scotland the GAL service is outsourced to a national children’s charity – Children 1st.
- 2.1.3. The Society is not in favour of public procurement of services to be engaged under contract by the Minister for 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.
- 2.1.4. In addition the Society believes 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.

2.2. **Head 4 – Arrangements with service providers**

- 2.2.1. The management and operation of the service must clearly state the purpose and remit of the service. It is suggested that in sub paragraph (3) the word “may” should read “shall” and the list should be non-conclusive.

2.2.2. The intent, purpose and role of in-house legal advice need further exploration. There should be clarity as to the role of such personnel viz-a-viz the panels of solicitors and barristers.

2.3. **Head 5 – Function of a Guardian ad litem**

2.3.1. The GAL's role is to review the information and reports from the social workers and to establish from all relevant sources (family, social workers, schools and other professionals) what is in the best interest of the child. This assessment also has to clearly establish the views of the child. Only then can the GAL provide a written report to the court outlining the views and best interests of the child.

2.3.2. 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. Children have Constitutional rights which need to be identified and protected and this is best provided, in a comprehensive way by, the child being represented by a GAL and a lawyer, as in the U.K. The role of a GAL is to identify and promote the child's best interests and to convey them to the court.

2.3.3. The Society suggests that the best interests of children in public law cases should be no more and no less than the best interests of children in private law cases. In this regard it is suggested that the comprehensive criteria in establishing the best interests of children in private law cases, as set out in section 31 of the Guardianship of Infants Act, 1964, should be incorporated in any consideration of the best interests of children in this legislation.

2.3.4. Sub-paragraph (3)(c) refers to "procuring a report" whereas the Explanatory Note refers to a "professional assessment". Clarity is required regarding the intent of this section.

2.4. **Head 6 – Status of a Guardian ad litem**

2.4.1. The Society welcomes the statement that the GAL will not be a party to the proceedings.

2.5. **Head 7 – Qualifications and eligibility for appointment of a Guardian ad litem**

2.5.1. 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. The GAL must promote the child's best interests. The new body must operate with 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.

- 2.5.2. We propose that a GAL would have qualifications in child protection rather than child care – preferably 7 years post graduate, including 5 in child protection, and preferably with management experience.

2.6. **Head 8 – Appointment and cessation of appointment**

- 2.6.1. It is a misnomer to describe the current appointment of GALs as a system or a service. The appointments are made ad hoc and vary from judge to judge and case to case. There is no nationwide panel of GALs and no agreed criteria for appointment, qualifications, experience, training, supervision, support or management of the GALs.
- 2.6.2. There is no transparency regarding the appointment of legal representation for a GAL, whether by solicitor or solicitor and counsel. At present it is a matter for the individual GAL to appoint the legal representative. There is no structure to the “system” of appointment.
- 2.6.3. The Society recommends the introduction of a fee structure for both GALs and their legal representatives; regular audits of files and accounts; a complaints structure and a transparent system of appointment by the Court. The selection process for guardians, the fees incurred, the number of cases handled per GAL, and the experience and qualifications of guardians should be publicly available. At present there is no monitoring or management of the service.
- 2.6.4. The Society has serious misgivings that for one jurisdiction, the High Court, it “will” appoint GALs (in special care proceedings) but the Scheme provides that for another jurisdiction, the Circuit and District Courts, they “may” appoint GALs. The vast majority of cases involving children under the Child Care legislation take place in the District Court. The Constitutional imperative to hear the voice of the child cannot leave any discretion to any court to appoint a GAL or not. The Explanatory Note to the General Scheme states that the intention is that an appointment is the norm. The legislation must clearly state this.
- 2.6.5. We welcome the provision whereby the court may determine whether the GAL should continue or cease to act, when a child is joined as a party to the proceedings

2.7. **Head 9 – Fees of a Guardian ad litem and legal fees**

- 2.7.1. The Society recommends that, in order to protect the independence of the GAL, any costs incurred by a GAL should be borne by an agency that is not a party to the proceedings. This would address any concern that reforms would be subsumed into the existing culture and practices within such services. It is submitted that it is not appropriate to have one of the parties to the proceedings being the funder of a GAL as there is, at least, a perception of a conflict of interest.

2.7.2. It must be said that there is no “system” for the appointment of legal representation for the GALS, whether by solicitor or solicitor and counsel. This again is completely on an ad hoc basis and usually a matter for the individual GAL.

2.7.3. Sub-paragraph (2)(c) omits reference to those providing in-house legal advice.

2.7.4. In addition it is suggested that it is inadvisable to oblige the Agency to discharge fees and to specifically rule out oversight and governance.

2.8. Head 10 – Provision of information to a guardian ad litem

2.8.1. It is suggested that, if a GAL is seeking personal data in relation to the family, it may be appropriate that the application to court in relation to this should be on notice to the family (sub-paragraph (4)).

2.8.2. The reference to “family” in sub-paragraph (7) may need to include the following – those who may be in loco parentis to a child, cohabittees of a parent of a child and any guardian who may have been appointed.

2.9. Head 12 – Provision of information relating to the report of a Guardian ad litem to a child

2.9.1. 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. There should be a direct correlation between the welfare of the child and facility for the need to access the particular document/record.

2.9.2. In the context of providing reports under this Head, it is recommended that “relevant” records be defined.

2.10. Head 15 – Amendment to section 24 of the Principal Act

2.10.1. See reference above to the specific inclusion of the “best interests” of the child criteria in the Guardianship of Infants Act legislation – which should be replicated here.

2.11. Head 16 – Amendment to section 27 of the Principal Act

2.11.1. This is welcomed by the Society

2.12. **Head 17 – Repeals**

2.12.1. This is welcomed by the Society

3. **Conclusion**

3.1.1. The Society welcomes this opportunity to come before the Oireachtas Committee on Children and Youth Affairs and is very happy to engage further with Committee members and officials in relation to this legislation, which is critical to ensure that the voice of children in these life-altering cases are heard.

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