

Opening Statement on the General Scheme of the Child Care (Amendment) Bill 2017 to the Joint Oireachtas Committee on Children and Youth Affairs

March 2017



The Children's Rights Alliance unites over 100 members working together to make Ireland one of the best places in the world to be a child. We change the lives of all children in Ireland by making sure that their rights are respected and protected in our laws, policies and services.

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Ag Eisteacht
Alcohol Action Ireland
Alliance Against Cutbacks in Education
Amnesty International Ireland
ASH Ireland
Assoc. for Criminal Justice Research and Development (ACJRD)
Association of Secondary Teachers Ireland (ASTI)
ATD Fourth World – Ireland Ltd
Atheist Ireland
Autism Network Ireland
Barnardos
Barretstown Camp
Bedford Row Family Project
BeLonG To Youth Services
Care Leavers' Network
Catholic Guides of Ireland
Child Care Law Reporting Project
Childhood Development Initiative
Children in Hospital Ireland
COPE Galway
Cork Life Centre
Crosscare
Cybersafe
Dental Health Foundation of Ireland
Department of Occupational Science and Occupational Therapy, UCC
Disability Federation of Ireland
Down Syndrome Ireland
Dublin Rape Crisis Centre
Dun Laoghaire Refugee Project
Early Childhood Ireland
Educate Together
EPIC
EQUATE
Extern Ireland
Focus Ireland
Foróige
Future Voices Ireland
Gaelscoileanna Teo
GLEN- the LGBTI equality network
Immigrant Council of Ireland
Inclusion Ireland
Independent Hospitals Association of Ireland
Institute of Community Health Nursing
Institute of Guidance Counsellors
Irish Association for Infant Mental Health
Irish Association of Social Workers
Irish Centre for Human Rights, NUI Galway
Irish Congress of Trade Unions (ICTU)
Irish Council for Civil Liberties (ICCL)
Irish Foster Care Association
Irish Girl Guides
Irish Heart Foundation
Irish National Teachers Organisation (INTO)
Irish Penal Reform Trust
Irish Primary Principals Network

Irish Refugee Council
Irish Second Level Students' Union (ISSU)
Irish Society for the Prevention of Cruelty to Children
Irish Traveller Movement
Irish Youth Foundation (IYF)
Jack & Jill Children's Foundation
Jesuit Centre for Faith and Justice
Jigsaw
Kids' Own Publishing Partnership
Law Centre for Children and Young People
Lifestart National Office
Mental Health Reform
Migrant Rights Centre Ireland
Mounttown Neighbourhood Youth and Family Project
MyMind
National Childhood Network
National Organisation for the Treatment of Abusers (NOTA)
National Parents Council Post Primary
National Parents Council Primary
National Youth Council of Ireland
One Family
One in Four
Parentstop
Pavee Point
Peter McVerry Trust
Rape Crisis Network Ireland (RCNI)
Realt Beag
SAFE Ireland
Saoirse Housing Association
SAOL Beag Children's Centre
Scouting Ireland
School of Education UCD
Sexual Violence Centre Cork
Simon Communities of Ireland
Social Care Ireland
Society of St. Vincent de Paul
Sonas Domestic Violence Charity
Special Needs Parents Association
SpunOut.ie
St. Nicholas Montessori College
St. Nicholas Montessori Teachers' Association
St. Patrick's Mental Health Services
Step by Step Child & Family Project
Suas Educational Development
Teachers' Union of Ireland
Terenure Rugby Football Club
The Ark, A Cultural Centre for Children
The Guardian Children's Project
The Prevention and Early Intervention Network
The UNESCO Child and Family Research Centre, NUI Galway
Traveller Visibility Group Ltd
Treoir
UNICEF Ireland
youngballymun
Youth Advocate Programme Ireland (YAP)
Youth Work Ireland

Children's Rights Alliance

7 Red Cow Lane, Smithfield, Dublin 7, Ireland

Ph: +353 1 662 9400

Email: info@childrensrights.ie

www.childrensrights.ie

1. Introduction

The Children's Rights Alliance welcomes the publication of the General Scheme of the Child Care (Amendment) Bill 2017. Reform of the existing Guardian *ad litem* (GAL) service is long overdue. It has operated without regulation since the Child Care Act 1991 provided for a child's views to be heard through a GAL in child care proceedings which was commenced in 1995.¹ The proposed legislation has the potential to make a real impact and progress the fulfilment of the constitutional right of the child to have their voice heard in child care proceedings.²

The Children's Rights Alliance commends the work of the Minister for Children and Youth Affairs, Dr Katherine Zappone TD, and her departmental officials in producing and bringing forward this important draft legislation which, in the main, is very child-focused and has been noticeably missing from the statute books.

The aim of the General Scheme of the Child Care (Amendment) Bill 2017 is to replace section 26 of the Child Care Act 1991 and 'to ensure that the Guardian ad litem service can be provided to benefit the greatest number of children and young people, so that their voices can be heard in child care proceedings and that this service will be of high quality and sustainable into the future'.³

At present, section 26 of the Child Care Act 1991 provides for the views of the child to be heard through a GAL in child care proceedings.⁴ There are approximately 65 GALs currently operating in the State: 31 working with Barnardos, 13 with The Independent Guardian Ad Litem Agency (TIGALA) and 21 GALs working as individuals or in a small group.⁵ The existing service is entirely unregulated; there are no professional standards in place and there is no statutory guidance on the eligibility criteria, functions or payment structures.⁶ The role itself is not defined in legislation and appointment of GALs in court proceedings is at the discretion of the judge, meaning that access to a GAL is inconsistent. To address the range of issues outlined above, reform in this area is critical and very welcome.

Every child has the right to have their views heard in any judicial proceedings affecting them and for those views to be given due weight in accordance with the age and maturity of the child.⁷ The UN Convention on the Rights of the Child makes specific reference to the child being heard in court proceedings either directly or indirectly through a representative body, such as a GAL.⁸ Under the Convention, the State is obliged to ensure that the child's best interests are a primary consideration in all actions and decision that impacts the child,⁹ particularly when a decision is being made in childcare proceedings to take the child into care.¹⁰

1 Statutory Instrument No 258/1995, Child Care Act 1991 (Commencement) Order 1995
<<http://www.irishstatutebook.ie/eli/1995/si/258/made/en/print>> accessed 1 March 2017.

2 Irish Constitution, Article 42A.4.2°.

3 Department of Children and Youth Affairs, Reform of Guardian ad litem arrangements in child care proceedings'
<<http://dcya.gov.ie/viewdoc.asp?fn=%2Fdocuments%2F26092016ReformofGuardianAdlitemArrangements.htm>> accessed 1 March 2017.

4 Child Care Act 1991, s 26.

5 Comptroller and Auditor General, 'Report on the Accounts of the Public Services 2015' <<http://bit.ly/2ljBmcG>> accessed 6 February 2017, 133.

6 See Prof Geoffrey Shannon, *Seventh Report of the Special Rapporteur on Child Protection: A Report Submitted to the Oireachtas* (DCYA 2014) and Carol Coulter, *Final Report* (Child Care Law Reporting Project 2015) 80, and Carmel Corrigan, *The Construction and Impact of Children's Participation through the Guardian ad litem in Child Protection Cases: The Views of District Court Judges, Guardians ad litem and children* (unpublished Phd thesis, Trinity College Dublin 2015).

7 UN Convention on the Rights of the Child (20 November 1989) 1577 UNTS 3 (UNCRC) Art 12.

8 *ibid* Art 12(2).

9 UN Convention on the Rights of the Child (20 November 1989) 1577 UNTS 3 (UNCRC) Art 3.

10 UNCRC 'General Comment No. 12 on the Right of the Child to be heard' (2009) UN Doc CRC/C/GC/12 para 53.

The UN Committee on the Rights of the Child notes that to be eligible for appointment as a child's representative, a person must have sufficient knowledge and understanding of the various aspects of the decision-making process and experience in working with children.¹¹ The representative must be aware that she or he represents exclusively the interests of the child and not the interests of other persons (parent(s)), institutions or bodies (e.g. residential home, administration or society).¹² The UN Committee is clear that '[i]f the hearing of the child is undertaken through a representative, it is of utmost importance that the child's views are transmitted correctly to the decision maker by the representative'.¹³

In 2016, the UN Committee called on Ireland to '[t]ake measures to ensure the effective implementation of legislation recognizing the right of the child to be heard in relevant legal proceedings, particularly family law proceedings, including by establishing systems and/or procedures for social workers and courts to comply with the principle'.¹⁴ In *Better Outcomes, Brighter Futures: The National Policy Framework for Children and Young People 2014 - 2020* the Government commits to creating mechanisms to provide children with the opportunity to be heard in judicial proceedings affecting them and this includes independent representatives where appropriate.¹⁵

The Children's Rights Alliance notes that while the Government has given further effect to Article 42A.4 in private law proceedings under the Children and Family Relationships Act 2015, which provides that the court can 'appoint an expert to determine and convey the child's views'.¹⁶ This provision has yet to be commenced. However, the cost of the child views expert must be borne by the parties to the case so there is a real concern that a child's voice will not be heard if parents cannot afford to pay for an expert. In 2016, the UN Committee on the Rights of the Child recommended that the State should cover the cost of this service. The establishment of a national service provides an opportunity to address the disparity between hearing the voice of children in public law and private law proceedings to ensure that all children are afforded the same opportunity to have their voice heard under Article 42A.4 of the Irish Constitution.

11 ibid para 36.

12 ibid para 37.

13 ibid para 36.

14 UNCRC 'Concluding Observations: Ireland' (2016) UN Doc CRC/C/IRL/CO/3-4 para 32(a).

15 Department of Children and Youth Affairs, *Better Outcomes, Brighter Futures: The National Policy Framework for Children and Young People 2014-2020* (DCYA 2014) Commitment G18.

16 Children and Family Relationships Act 2015, s 32(b).

2. Positive aspects of the General Scheme of the Child Care (Amendment) Bill 2017

There are a number of positive provisions in the General Scheme that the Alliance welcomes and recommends the retention of these.

- **A national GAL service will be established**

Guidelines developed by the Children Acts Advisory Board on the qualifications, criteria for appointment, training and role of GALs appointed under the Child Care Act 1991 were published in 2009 but were never placed on a statutory footing.¹⁷ The General Scheme proposes to establish a nationally organised and managed GAL service through a contract with the Minister for Children and Youth Affairs.¹⁸ Its functions may include tasks such as the recruitment and selection of GALs, implementing performance management and supporting the professional development of GALs as well as monitoring service delivery and quality assurance, providing in-house legal advice and representation where necessary.¹⁹

- **The role of the GAL will be defined in legislation**

The role of the GAL is not currently defined in legislation.²⁰ The General Scheme of the Child Care (Amendment) Bill 2017 sets out that the function of a GAL is to 'enhance the decision-making capacity of the court' by: (a) informing the court of the child's views, and (b) advising the court on what is in the child's best interests' in light of having considered the child's views.²¹ In carrying out this role, it provides that the GAL will, amongst other things, 'promote and facilitate the child's right to a voice and to have his or her views considered', 'regard the best interests of the child as the paramount consideration', ensure the child is informed, ascertain his or her views, as far as practicable, having regard to the child's age and maturity, and inform the court of those views. Clarifying and defining the functions of the GAL is a welcome development and should be retained in any future iteration of the Bill.

- **There will be a presumption in favour of the appointment of a GAL in all child care proceedings**

In child care proceedings at present, it is at the discretion of the judge to appoint a GAL if he or she is satisfied that it is necessary in the interests of the child and in the interests of justice.²² However, GALs were appointed in only 53 per cent of cases attended by the Child Care Law Reporting Project with considerable variations in different locations across the country, ranging from a high of 79.8 per cent of children being appointed a GAL in Louth to a low of 13.3 per cent in Galway.²³ Under the General Scheme, there is a welcome presumption in favour of appointing a GAL in all child care proceedings.²⁴ Where a court declines to appoint a GAL, it must provide reasons for its decision in open court.²⁵ A GAL will be appointed in all High Court Special Care proceedings, that is, those that involve the detention of a child for their own welfare and protection.²⁶

17 Child Care (Amendment) Act 2007 s 20 established the Children Acts Advisory Board (CAAB). It published CAAB, *Giving a voice to children's wishes, feelings and interests: Guidance on the Role, Criteria for Appointment, Qualifications and Training of Guardians ad Litem Appointed for Children in Proceedings under the Child Care Act, 1991* (CAAB 2009). 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" 3. It was dissolved in 2011.

18 General Scheme of the Child Care (Amendment) Bill 2017, Head 3 – Establishment of a national Guardian *ad litem* service.

19 *ibid* Head 4 - Arrangements with service providers.

20 The High Court has interpreted that 'the function of the guardian should be twofold; firstly to place the view of the child before the court and secondly to give the guardian's views as to what is in the best interests of the child'. *HSE v K (a minor)* [2007] IEHC 488.

21 General Scheme of the Child Care (Amendment) Bill 2017, Head 5 – Function of a Guardian *ad litem*.

22 Child Care Act 1991, s 26(1).

23 Carol Coulter, *Final Report* (Child Care Law Reporting Project 2015) 80.

24 General Scheme of the Child Care (Amendment) Bill 2017, Head 8.

25 *ibid*, Head 8, Subhead 4.

26 *ibid*, Head 8.

- **A child can have both legal representation and a GAL at the same time**

Under existing law, a child cannot have both legal representation and a GAL at the same time.²⁷ The General Scheme dispenses with the automatic prohibition on a child having both legal representation and a GAL concurrently. It provides that the Court will decide whether the appointment of a GAL will continue where the child becomes a party to proceedings.²⁸ This is in line with guidance from the UN Committee that provides that ‘in cases where a child is referred to an administrative or judicial procedure involving the determination of his or her best interests, he or she should be provided with a legal representative in addition to a guardian or representative of his or her voices, when there is a potential conflict between the parties in the decision’.²⁹

27 Child Care Act 1991 s 25, s 26 (4).

28 General Scheme of the Child Care (Amendment) Bill 2017, Head 8, Subhead 12. This propose to amend the Child Care Act 1991 s 26(4).

29 UNCRC General Comment No. 14 on the right of the child to have his or her best interest taken as a primary consideration, (art.3, para.1)(2013) UN Doc CRC/C/GC/14, para 96.

3. Key issues under the General Scheme of the Child Care (Amendment) Bill 2017

There are two key issues that the Children's Rights Alliance would like to highlight to the Joint Oireachtas Committee on Children and Youth Affairs under the General Scheme of the Child Care (Amendment) Bill 2017.

- **Limiting the role of the GAL to that of an 'special type of expert witness' will mean that children will lose out on the GAL as a mechanism to enforce their rights**

In practice, GALs have played a role beyond facilitating the voice of the child to be heard in courts and advising the courts on the child's best interests. They have often been given legal representation in child care proceedings and fulfilled the function of defending the rights of the child as his or her representative in proceedings.³⁰ In many cases, the role of the GAL has developed to the point where they effectively have had the same standing in child care proceedings as Tusla and the child's parents or guardians. In a recent High Court decision, Ms Justice Marie Baker considered that the current role of the GAL is 'consistent with the furtherance of the interests of justice' and was clear that the GAL 'will take a role in the proceedings not merely as a witness'.³¹ However, the General Scheme provides that the status of the GAL is that of a 'special type of expert witness',³² rather than that of party to the case as the child's representative.

Reducing the role of a GAL specifically to expert witness for the court only will have the effect of reducing a child's right to access justice and to remedies, if GALs are not given a specific role in enforcing their rights. For example, children have no standing to take legal cases and it is usually their parent/guardian who take cases on their behalf when their rights have been breached. For children in the care of the State, Tusla (the Child and Family Agency) is effectively the corporate parent. However, circumstances can emerge where Tusla and other public bodies do not deliver or fulfil a particular need of a child. To date, some GALs have used their role to make a range of applications on behalf of the child to compel a State agency to respect the rights, and needs of children in the care system.

Children in the care system are one of the most vulnerable groups of children in the country and may have experienced serious abuse and neglect. Some are also living in institutional type care settings. Who will stand up for the child when their rights are not protected? Who will hold Tusla and other public bodies accountable when the child's rights are violated? This is an important question that needs to be answered. The recent case of Grace and the treatment of other children with disabilities in the care system is important to consider here.

A High Court judge, the Honourable Ms Justice Bronagh O'Hanlon, recently noted that if the GAL is not a party to proceedings, they will not have standing in court to take the full range of applications in the welfare of the child as it may be appropriate to take, or to appeal decisions of the Court.³³ This would 'significantly weaken the participation and representation of the child in proceedings that centrally affect them'.³⁴

30 Ann McWilliams and Claire Hamilton, 'There isn't anything like a GAL': The Guardian ad Litem Service in Ireland' [2010] 10 Irish Journal of Applied Social Studies 31, 32.

31 AO'D v O'Leary & ors [2016] IEHC 555, para 57.

32 General Scheme of the Child Care (Amendment) Bill 2017, Head 6, Explanatory Note.

33 Ms Justice Bronagh O'Hanlon, 'Submission from Ms Justice Bronagh O'Hanlon in relation to the survey concerning a policy approach to the reform of *guardian ad litem* arrangements in proceedings under the Child Care Act 1991' <<http://bit.ly/2kDo9wf>> accessed 6 February 2017, 6-7.

34 *ibid.*

The child's right to fair procedures would be protected by providing that the GAL has legal standing in proceedings to represent the child, and that the child, through his or her GAL, can have equal standing in proceedings to other parties. It should be ensured that a child who requires a GAL due to age or vulnerability, is designated a party to the proceedings through their GAL so that they do not have lesser rights than a child who is joined to the proceedings in their own right.

Recommendation: Ensure the child's right to fair procedures and redress is protected by providing that the Guardian ad litem can be given legal standing in proceedings to represent the child.

- **Funding for the new GAL service should be discharged through an independent body, and not by Tusla, the Child and Family Agency**

Under the current structure, the GAL is dependent on Tusla to meet their costs. Head 9 of the General Scheme provides that funding for the new service will continue to be discharged by Tusla. The Comptroller and Auditor General noted in his 2016 report that in child care proceedings the 'position of Tusla as the party initiating the proceedings, and as paymaster of the guardian *ad litem* costs, may lead to a perceived conflict of interest'.³⁵ He recommended that the GAL service should come under the remit of 'a body that is independent of the legal proceedings' citing the CAAB guidelines which highlighted the need for the GAL 'to be independent of all other professionals and agency staff involved with the child and the family'.³⁶ Recent research on how children are heard through their GALs, which included in-depth interviews with nine District Court judges found that 'a number of the judges identified the independence of the Guardian from the parties to the case as a key factor that contributed to their usefulness to and impact on the court'.³⁷ According to the judges, one of the key reasons they valued the independence of GALs is that they considered them to be free from the 'financial constraints of the HSE, thereby leaving them free to make recommendations irrespective of the costs' involved.³⁸ This is likely to apply equally to the financial link between Tusla and GALs should Tusla fund the new GAL service as set out under the General Scheme.

The Ombudsman for Children notes that while he appreciates that efforts were made through the reforms to mitigate against the risk of perceived conflict of interest, 'the Agency should not have any role in such fee transactions and that guardians ad litem working in the context of a new national service should be paid from an independent governmental source'.³⁹ Children should be able to have confidence that their GAL or the body that regulates them has no tie to any other party to their proceedings.

To ensure the independence of the service, to avoid any real or perceived conflict of interest and to ensure that the child has confidence that there is no link between his or her representative, the body that is responsible for paying them and any other party to their proceedings, the new GAL service should be established independently and funded separately from Tusla.

Recommendation: Ensure that funding for the new national GAL service is discharged from a body other than Tusla, the Child and Family Agency.

35 Comptroller and Auditor General, Report on the Accounts of the Public Services 2015 (C&AG 2016) 132.

36 *ibid* 131.

37 Carmel Corrigan, *The Construction and Impact of Children's Participation through the Guardian ad litem in Child Protection Cases: The Views of District Court Judges, Guardians ad litem and children* (unpublished Phd thesis, Trinity College Dublin 2015), 224-225.

38 *ibid*.

39 Office of the Ombudsman for Children, 'Consultation Paper by the Department of Children and Youth Affairs on preparing a Policy Approach to Reform of Guardian ad Litem Arrangements in Proceedings under the Child Care Act 1991', <<http://dcya.gov.ie/documents/legislation/20160926OCO.PDF>> accessed 6 February 2017, 8.