

## GENERAL SCHEME OF THE CHILD CARE (AMENDMENT) BILL 2021

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## **Head 1            Short title, collective citation and commencement**

### ***Provide that:***

- (1) This Act may be cited as the Child Care (Amendment) Act [2021].
- (2) The Child Care Acts 1991 to 2015 and this Act, other than section [x] may be cited together as the Child Care Acts 1991 to [2021].
- (3) This Act shall come into operation on such day, days as the Minister for Children, Disability, Equality, Integration and Youth, may appoint by order, or orders either generally or with reference to any particular purpose or provision and different days may be so appointed for different purposes or provisions.

### **Explanatory Note:**

**Subhead (1)** is a standard provision to provide for the short title of the Bill.

**Subhead (2)** will provide for an updated collective citation for the Child Care Acts following enactment of the Bill.

**Subhead (3)** provides for the Minister to make an order or order(s) in relation to the commencement of the provisions of the Bill.

## **Head 2        Definition**

### ***Provide that:***

In this Act, “Principal Act” means the Child Care Act 1991.

### **Explanatory Note:**

Head 2 is to provide for the definition of terms used in the Bill.

### Head 3      Repeals

***Provide that:***

- (1) Section 26 of the Child Care Act is repealed.
- (2) Subsections 13(b), (c), (d) and 14(b) of the Child Care (Amendment) Act 2011 are repealed.

***Suggested text:***

The relevant text from the Child Care (Amendment) Bill, 2019 is as follows:

- “3.      The following provisions are repealed:
  - (a) section 26 of the Principal Act;
  - (b) sections 13(b), (c) and (d) and 14(b) of the Child Care (Amendment) Act 2011.”

**Explanatory note:**

**Subhead (1)** provides that section 26 of the Principal Act will be repealed. Section 26 provides for the appointment of a guardian *ad litem* in childcare proceedings. This repeal of this section is necessary as it will be replaced by the provisions in this Bill.

**Subhead (2)** provides that subsections 13(b), (c), (d) and 14(b) of the Child Care (Amendment) Act 2011 are also repealed.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.

## **Head 4            Amendment of section 24 of Principal Act**

### ***Provide that:***

Section 24 of the Principal Act is amended by the substitution of the text of section 4 of the Child Care (Amendment) Bill 2019 for the existing text.

### ***Suggested text:***

The relevant text from the Child Care (Amendment) Bill 2019 is as follows:

“The Principal Act is amended by the substitution of the following section for section 24:

“24.

- (1) In any proceedings before a court under this Act in relation to the care and protection of a child, including proceedings before the High Court under Part IVA in relation to special care, the court shall regard the best interests of the child as the paramount consideration in the resolution of any such proceedings.
- (2) In determining for the purposes of subsection (1) what is in the best interests of the child, the court shall have regard to all of the factors or circumstances that it considers relevant to the child including, where relevant—
  - (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 as a result of household violence, and the protection of the child’s safety and psychological well-being.
- (3) In this section ‘household violence’ has the same meaning as it has in section 31(7) of the Guardianship of Infants Act 1964.”

**Explanatory Note:**

Head 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”).

## **Head 5       Views of child**

### ***Provide that:***

The Principal Act is amended by the insertion of the text of section 5 of the Child Care (Amendment) Bill 2019, after section 24.

### ***Suggested text:***

The relevant text from the Child Care (Amendment) Bill, 2019 is as follows:

“The Principal Act is amended by the insertion of the following section after section 24:

“24A.       Where in any proceedings before a court under this Act in relation to the care and protection of a child, including proceedings before the High Court under Part IVA in relation to special care, the child is capable of forming his or her own views, the court, in so far as practicable shall—

- (a) determine the means by which to facilitate the expression by the child of his or her views in the proceedings, and
- (b) give such views as the child wishes to express due weight, having regard to the age and maturity of the child.”

### **Explanatory Note:**

Head 5 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.

## Head 6      Amendment of section 29 of Principal Act

### ***Provide that:***

Section 29 of the Principal Act is amended by the insertion of the suggested text below. This text, as drafted by OPC, was to be brought as a report stage amendment to the Child Care (Amendment) Bill 2019 before it lapsed.

### ***Suggested text:***

“Section 29 of the Principal Act is amended-

- (a) in subsection (5), by the substitution of “relevant documents” for “relevant court documents”,
  - (b) by the insertion of the following subsection after subsection (5A):
    - (5B) (a) Nothing contained in this section shall, unless in the special circumstances of the matter the court, for reasons which shall be specified in the direction, otherwise directs, operate to prohibit such officers of the Minister as the Minister considers appropriate and who, subject to *paragraph (b)*, are authorised in writing by the Minister, from attending, in accordance with rules of court and subject to any directions the court may give, proceedings referred to in *subsection (1)*.
    - (b) The Minister may authorise an officer referred to in *paragraph (a)* for the purposes of that paragraph where the Minister is satisfied that the attendance by the officer is likely to provide-
      - (i) information which will assist in the promotion of high professional standards and good practice by guardians *ad litem* in the performance of their functions under this Act, or
      - (ii) information which will assist in the better operation and review of this Act in particular in relation to the care and protection of children.
    - (c) In this subsection, ‘proceedings’ include proceedings commenced but not completed before the commencement of this subsection.”,
- and
- (c) by the substitution of the following subsection for subsection (9):
    - “(9) In subsection (5)-  
  
‘proceedings’ include proceedings commenced but not completed before the commencement of that subsection;  
  
‘relevant documents’, in relation to any proceedings referred to in that subsection-
      - (a) subject to paragraph (b), means-



- (i) the originating document in the proceedings,
- (ii) pleadings and other documents (including reports prepared in accordance with this Act and the terms of settlement, if any) produced to or lodged with the court, or included in the book of pleadings, in the course of the proceedings,
- and
- (iii) any order or judgment of the court in the proceedings,
- and
- (b) does not include any document the contents of which are expressed to be without prejudice or in terms having a like effect.”.

### **Explanatory Note:**

The purpose of this amendment is twofold. It is intended to provide clarification on the documents that the Child Care Law Reporting Project [CCLRP] may access, as a recent court ruling has called into question the documents that the CCLRP and similar projects are entitled to access to under existing legislation. It is also intended to provide that officials may attend child care proceedings for certain defined purposes.

1. Under the Child Care Act 1991 as amended, reporters may attend court, prepare reports and have access to “relevant court documents”. The CCLRP brought an application to the District Court to have access to “relevant court documents”, including social work reports and reports from guardians *ad litem*, in a case being attended by its reporters.

Whereas neither the Child and Family Agency or solicitors for the parents opposed the application, the District Court judge insisted on a “legitimus contradictor” who would argue against and appointed a guardian *ad litem* for the children. It was then heard by the President of the District Court, Judge Rosemary Horgan.

Section 29(5)(i) of the Child Care Act 1991 states that specified people may attend child care proceedings in order to prepare reports, and Section 29(5)(ii) states that those attending may have access to “relevant court documents. Judge Horgan stated:

*“The kernel of the issue in this case is that s. 3 of the Child Care (Amendment) Act 2007 amending s 29 (5) of the 1991 Act only permits application for access to ‘any relevant court documents’ in child care cases.”*

She further stated that relevant court documents include notices of applications, affidavits and summons but not social work reports, reports from guardians *ad litem* and experts, or correspondence handed into court. In contrast, a researcher reporting under section 40 of the Civil Liability and Courts Act 2004 relating to private family law proceedings could apply for access to ‘any relevant documents’ subject to any directions the court may give in that regard. Judge Horgan stated that the legislature had made a clear distinction between family law proceedings and child care proceedings by inserting

the word 'court' and that the Oireachtas must be presumed to have intended that the word 'court' be given its ordinary meaning.

2. The proposed 5(B) is intended to provide that officials may attend child care proceedings in in order to:
  - (a) facilitate the proper management of the guardian *ad litem* service, including the supervision and training of guardians *ad litem*.
  - (b) inform evidence-based policy making by allowing officials to assess the operation of the existing provisions of the Child Care Act 1991 and to use this to inform the better operation of the Act and the design of required legislative amendments to the Act.

Following a comprehensive review and public consultation process, DCEDIY is currently drafting the Heads and General Scheme to amend the Child Care Act 1991. However, as Department officials are not currently permitted to attend child care proceedings, they have encountered difficulties assessing the current operation of the Act within the court system. Given the nature of child care proceedings, the court would maintain final say over the admittance of Department officials on a case by case basis.

The national guardian *ad litem* office will also require the attendance of supervisors at proceedings in order to support, supervise and train guardians *ad litem*, as well as to inform the development of policies and training material. It is anticipated that a significant proportion of guardians *ad litem* recruited into the national service will be new to the role. New standardised practices are also planned which will require changes even for more experienced guardians *ad litem*. In the interest of sound public administration it will be necessary for supervisors to be able to attend court and to monitor practice.

## Head 7 Interpretation (Part VA)

### ***Provide that:***

The Principal Act is amended by the insertion of a new Part VA, Guardians *ad litem* after Part V, and by the replication of the section entitled Interpretation (Part VA) from the Child Care (Amendment) Bill.

### ***Suggested text:***

The relevant text from the Child Care (Amendment) Bill, 2019 is as follows:

“35A. (1) In this Part—

‘appointed’ means appointed under section 35C(1);

‘authorisation’ means an authorisation issued under section 35L(1);

‘child’, in relation to a guardian *ad litem*, means the child to whom the proceedings under Part IV, IVA, IVB or VI relate, and for whom the guardian *ad litem* is, or is to be, appointed;

‘Data Protection Regulation’ means Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016<sup>1</sup> on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation);

‘guardian *ad litem*’ means a person in respect of whom an authorisation is issued;

‘information’ means information contained in a document, a computer or otherwise;

‘relevant date’ means the date on which Part 2 of the Child Care (Amendment) Act 2021 comes into operation;

(2) In this Part—

(a) a reference to the District Court shall be construed as including a reference to the Circuit Court on appeal from the District Court, and

(b) where the proceedings are proceedings under Part IVA, ‘court’ means the High Court.”

### **Explanatory note:**

Head 7 provides that the interpretation section contained in section 6 of the Child Care (Amendment) Bill 2019 is replicated here as it sets out the definitions to be used in this Part.

## Head 8      Order directing appointment of guardian *ad litem*

### ***Provide that:***

- (1) A guardian *ad litem* shall not be appointed for a child in proceedings under Part IVA, IV, IVB or VI unless an order directing such appointment has been made under this section.
- (2) In proceedings under Part IVA the High Court shall by order direct that a guardian *ad litem* be appointed for a child.
- (3) In proceedings under Part IV, IVB or VI the District Court shall by order direct that a guardian *ad litem* be appointed for a child, unless the court—
  - (a) is satisfied that the best interests of the child can be determined without such appointment being made and,
  - (b) in respect of a child who is capable of forming his or her own views in the proceedings, has determined the means by which to facilitate the expression by the child of those views.
- (4) Where the District Court decides not to make an order under subsection (3), the court shall give reasons for its decision in writing.
- (5) Where a court makes an order under subsection (2) or (3), the court shall give directions relating to—
  - (a) the service of such documents relating to the proceedings on the Minister as the Minister may require for the performance by the Minister of his or her function under section 35C(1), and
  - (b) the service of documents relating to the proceedings on such guardian *ad litem* as may be appointed.

### **Explanatory Note:**

Head 8 is based on section 35B of the Child Care (Amendment) Bill 2019, with the following changes:

**Subhead (1)** inserts a reference to child care proceedings under Parts IVA, IV, IVB or VI of the Principal Act on foot of stakeholder concerns that the 2019 provision could be interpreted as meaning that a guardian *ad litem* can only be appointed in child care proceedings.

**Subhead (3)** is intended to provide that the court shall appoint a guardian *ad litem* unless it is satisfied that the child's best interests can be determined without such an appointment

being made and alternative arrangements have been made to hear the views of those children who are capable of forming their own views and who wish to express them. As the policy intention is to introduce a presumption in favour of appointment, it is considered that the provisions of section 35B(4) of the 2019 Bill are now unnecessary.

**Subhead (4)** provides that when the court makes a decision not to appoint a guardian *ad litem*, it shall set out the reasons for its decision in writing.

## **Head 9      Appointment of guardian *ad litem* for child**

### ***Provide that:***

The Principal Act is amended by the insertion of the text of 35C from section 6 of the Child Care (Amendment) Bill 2019.

### ***Suggested text:***

The relevant text from the Child Care (Amendment) Bill, 2019 is as follows:

“35C.

- (1) Where an order under section 35B(2) or (3), as the case may be, is made, the Minister shall appoint a guardian *ad litem* for the child to whom the order relates.
- (2) The Minister shall notify the court that made the order under section 35B(2) or (3), as the case may be, of an appointment under subsection (1) as soon as practicable thereafter.
- (3) The power to appoint a guardian *ad litem* under subsection (1) includes the power to appoint a guardian *ad litem* in place of the guardian *ad litem* who stands appointed under that subsection.”

### **Explanatory note:**

This Head 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.

## Head 10      Legal advice and legal representation

### ***Provide that:***

- (1) Where an order under section 35B(2) is made, the Minister shall provide, or arrange for the provision, to the guardian *ad litem* appointed for the child, of legal advice and legal representation.
- (2) Following the making of an order under section 35B(3), the Minister shall at the request of the guardian *ad litem* appointed for the child provide, or arrange for the provision to the guardian *ad litem* of legal advice.
- (3) Following the making of an order under section 35B(3), the Minister may at the request of the guardian *ad litem* appointed for the child provide, or arrange for the provision, to the guardian *ad litem* of such legal representation as the Minister considers appropriate having regard to the matters specified in subsection (4).
- (4) The following matters are specified for the purposes of subsection (3):
  - (a) whether it is in the best interests of the child that legal representation be provided;
  - (b) any views in relation to legal representation for the guardian *ad litem* expressed by the court that made the order;
  - (c) whether the guardian *ad litem* intends to make an application under this Act in relation to the child;
  - (d) the opinion of the guardian *ad litem* in relation to any application in the proceedings by the Child and Family Agency;
  - (e) whether it would be unreasonable to expect the guardian *ad litem* to deal with the matter to which the proceedings concerned relate without legal representation, because of its complexity or for any other reason;
  - (f) whether there are special circumstances that make it appropriate for legal representation to be provided;
  - (g) such other matters as the Minister considers appropriate.

### **Explanatory Note:**

Head 10 is based on section 35D of the Child Care (Amendment) Bill 2019. The changes from the 2019 Bill are at subheads (2) and (3) and are intended to clarify the position with

regard to the provision of legal advice and legal representation to guardians *ad litem* appointed under section 35B(3).

**Subhead (2)** provides that a guardian *ad litem* appointed under section 35B(3) may request legal advice which the Minister will be required to provide, or arrange to be provided. It is the policy intent that legal advice should be readily available to a guardian *ad litem*.

**Subhead (3)** provides that a guardian *ad litem* appointed under section 35B(3) can also request legal representation which the Minister may provide, or arrange to be provided, having regard to the list of specified factors in subhead (4).



## Head 11      Functions of guardians *ad litem* appointed for children

### ***Provide that:***

- (1) The functions of a guardian *ad litem* appointed for a child shall be—
  - (a) in so far as practicable and where the child is capable of forming his or her own views, to ascertain any views expressed by the child in relation to the matters to which the proceedings relate,
  - (b) having considered the views, referred to in paragraph (a), to make recommendations to the court regarding what is in the best interests of the child and,
  - (c) to make recommendations to the court regarding what is in the best interests of a child who—
    - (i) is not capable of expressing their views by reason of age or disability or,
    - (ii) is unwilling to express their views.
- (2) Without prejudice to the generality of subsection (1), a guardian *ad litem* appointed for a child shall—
  - (a) furnish to the court a report that—
    - (i) conveys to the court any views expressed by the child in relation to the matters to which the proceedings relate, and
    - (ii) contains the recommendations of the guardian *ad litem* regarding what is in the best interests of the child and the reasons for those recommendations,
  - (b) having regard to the age and maturity of the child, inform him or her of—
    - (i) the recommendations referred to in paragraph (a)(ii),
    - (ii) the outcome of the proceedings, and
    - (iii) such other matters relevant to the proceedings as the guardian *ad litem* considers appropriate,
  - (c) inform the court of any additional matters, relevant to the best interests of the child, coming to his or her knowledge as a result of the performance by the guardian *ad litem* of his or her functions,

and

- (d) carry out such further duties as a court may, where it is satisfied having regard to the circumstances of the proceedings that it is necessary in the interests of the child and in the interests of justice to do so, order whether generally or confined in such fashion as the court may direct.
- (3) A guardian *ad litem*, in the performance of his or her functions under this section, shall regard the best interests of the child as the paramount consideration.
- (4) In determining for the purposes of this section what is in the best interests of the child, a guardian *ad litem* appointed for the child shall have regard to all of the circumstances that he or she considers relevant to that child including the matters referred to in paragraphs (a) to (g) of section 24(2).
- (5) A copy of a report furnished to the court under subsection (2)(a) shall be made available to the counsel or solicitor, if any, representing each party in the proceedings, or, if any party is not so represented, to that party and may be received in evidence in the proceedings.
- (6) The court or any party to the proceedings may call a guardian *ad litem* appointed for a child as a witness.
- (7) The court to which a report is furnished under subsection (2)(a) may, where it considers appropriate, order that such part of the report as is specified in the order shall be omitted from a copy made available under subsection (5).
- (8) A guardian *ad litem* appointed for a child shall be independent in the performance of his or her functions.
- (9) A guardian *ad litem* appointed for a child is not a party to the proceedings, but the court may, where it is satisfied having regard to the circumstances of the proceedings that it is necessary in the interests of the child and in the interests of justice to do so, authorise the guardian *ad litem* to exercise such rights of a party to the proceedings as may be determined by the court, for either the entirety of the proceedings or in relation to such issue or issues in the proceedings as the court may direct.

### **Explanatory Note:**

Head 11 is based on section 35E of the Child Care (Amendment) Bill 2019. The changes from the 2019 Bill are at subheads (1)(c), (2)(d) and (9) and are detailed below:

**Subhead (1)** inserts a new subparagraph (c) in response to stakeholder concerns. It is intended to clarify that a guardian *ad litem* is required to make recommendations to the court regarding what is in the best interests of those children who are not capable of expressing their views by reason of age or disability or who are unwilling to express their views.

**Subhead (2)** inserts a new subparagraph (d) in response to stakeholder suggestions that the functions of a guardian *ad litem* should be set out in a non-exhaustive list. Following

consideration of this issue and on foot of advice from the Attorney General's Office it is proposed to insert an omnibus provision at (d), which will empower the court to direct the guardian *ad litem* to carry out such further duties, as the court considers necessary in the interests of the child and in the interests of justice.

**Subhead (9)** has been amended following concerns expressed by stakeholders about the status of guardians *ad litem* in child care proceedings. While it remains the policy position that a guardian *ad litem* is not a party to proceedings, subhead (9) is intended to reflect the existing position whereby the court is entitled to regulate the manner in which evidence before it is adduced.

## Head 12 Powers of guardians *ad litem* appointed for children

### ***Provide that:***

The Principal Act is amended by the insertion of the following text which is based on section 35F of the Child Care (Amendment) Bill 2019 with the addition of new subsections at (9), (10), and (11).

- (1) A guardian *ad litem* appointed for a child may make an application to the court—
  - (a) subject to subsection (3), to procure a report on any question affecting the welfare of the child where—
    - (i) there is no report on the question concerned, or
    - (ii) the information in a report on the question concerned is out of date,
  - (b) for the provision of information to the guardian *ad litem* by any person, or
  - (c) in relation to any other matter relating to his or her functions.
- (2) A court may by order—
  - (a) on an application under subsection (1)(a), direct the Child and Family Agency to procure a report from such person as the court may nominate on any question affecting the welfare of the child,
  - (b) on an application under subsection (1)(b), direct such person as the court considers appropriate to provide specified information to the guardian *ad litem* appointed for the child, and
  - (c) on an application under subsection (1)(c), give such directions as the court considers appropriate.
- (3) A guardian *ad litem* appointed for a child shall consult the parties to the proceedings or the counsel or solicitor, if any, representing such parties before making an application under subsection (1)(a).
- (4) Where a court by order gives a direction under subsection (2), a person to whom the direction is made shall, subject to subsection (8), comply with such direction.
- (5) A copy of a report prepared pursuant to a direction under subsection (2)(a) shall be made available to the guardian *ad litem* appointed for the child, the counsel or solicitor, if any, representing each party in the proceedings or, if any party is not so represented, to that party and may be received in evidence in the proceedings.
- (6) The court may where it considers appropriate order that such part of a report, prepared pursuant to a direction under subsection (2)(a), as is specified in the order shall be omitted from a copy made available under subsection (5).

- (7) Where a person prepares a report pursuant to a direction under subsection (2)(a)—
- (a) the fees and expenses of the person shall be paid by such party or parties to the proceedings as the court shall order, and
  - (b) the court, the guardian ad litem or any party to the proceedings may call the person as a witness.
- (8) Nothing in this section shall operate to require a person to provide a guardian *ad litem* appointed for a child with any information that the person would be entitled to refuse to provide on the grounds of legal professional privilege.
- (9) Information contained in a report prepared pursuant to a direction under subsection (2)(a) shall not be disclosed to a third party by the parties to the proceedings, or by the counsel or solicitor, if any, representing such parties, save in accordance with law or under and in accordance with an authorisation under subsection (10).
- (10) The court may authorise in writing the disclosure of information referred to in subsection (9) subject to such conditions (if any) as the court considers appropriate and specifies in the authorisation.
- (11) A person who fails to comply with subsection (9) shall be guilty of an offence and shall be liable on summary conviction to a class A fine or imprisonment for a term not exceeding 6 months or both.

#### **Explanatory Note:**

This Head is based on section 35F of the Child Care (Amendment) Bill 2019. That section set out the powers of a guardian *ad litem* and is largely replicated here.

The new subsections at (9), (10) and (11) have been included following concerns expressed by stakeholders regarding the sharing of sensitive personal information contained in reports by lay litigants in child care proceedings. This issue was also the subject of a Committee Stage amendment to the 2019 Bill.

As the Department shares the concern of stakeholders and Deputies, the new subsections are intended to provide that information contained in a report prepared under subsection 2(a) shall not be disclosed to a third party unless in accordance with the law or in circumstances where the disclosure is authorised in writing by the court. A person who fails to comply with this section is guilty of an offence and liable to a class A fine or imprisonment for a term not exceeding 6 months or both.

## **Head 13      Provision of information by Child and Family Agency**

### ***Provide that:***

The Principal Act is amended by the insertion of the text of 35G from section 6 of the Child Care (Amendment) Bill 2019.

### ***Suggested text:***

The relevant text from the Child Care (Amendment) Bill 2019 is as follows:

“35G.

- (1) A guardian *ad litem* appointed for a child may request the Child and Family Agency to provide to him or her any information relating to the welfare of the child necessary for the performance by the guardian *ad litem* of his or her functions under this Act.
- (2) Notwithstanding anything contained in any other enactment or rule of law, but subject to the Data Protection Regulation and the Data Protection Act 2018, the Agency shall comply with a request under subsection (1).
- (3) The Child and Family Agency, in complying with a request under subsection (1), is not required to furnish information that would be exempt from production in proceedings in a court on the grounds of legal professional privilege.
- (4) The Child and Family Agency shall provide a guardian *ad litem* with the reasons for any refusal by the Agency to comply with a request under subsection (1).”

### **Explanatory Note:**

This Head, which was section 35G of the Child Care (Amendment) Bill 2019, 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.

## **Head 14      Cessation of effect of order under section 35B(2) or (3)**

### ***Provide that:***

The Principal Act is amended by the insertion of the following which is based on the text of 35H of section 6 of the Child Care (Amendment) Bill, and includes revisions in subsections (4) and (5):

(1) Subject to subsections (4) and (5), an order under section 35B(2) ceases to have effect—

(a) where the High Court makes a special care order—

- (i) on the expiration of the period specified in the special care order or such extended period (within the meaning of section 23J(9)), if any, for which the special care order has effect, or
- (ii) upon the discharge of the order under section 23NE, whichever is the sooner,

(b) where the High Court makes an interim special care order—

- (i) on the expiration of the period specified in the interim special care order or such extended period (within the meaning of section 23N(9)), if any, for which the interim special care order has effect, or
- (ii) upon the discharge of the order under section 23NE, whichever is the sooner,

(c) upon a determination by the High Court not to make a special care order or an interim special care order, as the case may be, in respect of the child to whom the order relates,

(d) by direction of the High Court, or

(e) when the child to whom the order relates attains the age of 18 years, whichever is the sooner.

(2) Subject to subsections (4) and (5), an order under section 35B(3) ceases to have effect—

(a) where the District Court makes an interim care order under section 17, on the expiration of the period specified in the interim care order or any extension of such period under subsection (2) of that section,

(b) upon a determination by the District Court to refuse to make an interim care order under section 17,

- (c) upon a determination by the District Court of an application under section 18(1) for a care order,
  - (d) upon a determination by the District Court of an application under section 19(1) for a supervision order,
  - (e) upon a determination by the District Court of an application under paragraph (a), (b) or (c) of section 22, section 43A or 43B(1),
  - (f) other than where the child to whom the order relates is in the care of the Child and Family Agency under section 17, upon a determination by the District Court of an application under section 37(2) or (3) or 47,
  - (g) by direction of the District Court, or
  - (h) when the child to whom the order relates attains the age of 18 years, whichever is the sooner.
- (3) In subsections (1) and (2), a reference to an order, a determination or a direction is a reference to such order, determination or direction in relation to which, at the expiration of the time for bringing an appeal against it, no such appeal has been brought or, if such an appeal has been brought, it has been abandoned or determined by the court.
- (4) Where a court by order directs that proceedings in which an order has been made under section 35B(2) or (3) be kept under review, the court may—
- (a) direct that the order under section 35B(2) or (3) as the case may be, ceases to have effect until such time as the review is to be heard and,
  - (b) not later than 4 weeks prior to the date of the review hearing, direct the reappointment of the guardian *ad litem* previously appointed for the child in the proceedings.
- (5) Where a child in respect of whom a court has made an order under section 35B(2) or (3), as the case may be, becomes a party to the proceedings by order under section 25(1), or otherwise than by reason of such an order, the court that made the order under the section concerned, when determining when such an order ceases to have effect, shall have regard to the matters referred to in paragraphs (a) to (g) of section 24(2).
- (6) For the purposes of subsection (1)(b)(i), where the High Court, pursuant to an application to which subsection (2)(b) or (5)(b) of section 23NJ applies, makes a special care order (in this subsection referred to as the “subsequent care order”), a reference in subsection (1)(b)(i) to the expiration of the period specified in a special care order shall be construed as including a reference to the expiration of the period specified in the subsequent care order and a reference to the expiration of an extended period for which the special care order has effect shall be construed as



including a reference to the expiration of an extended period for which the subsequent care order has effect.

- (7) Where an interim special care order referred to in subsection (1)(c) is an order made in accordance with section 23L(3), a reference in the aforesaid subsection to an interim special care order shall be construed as including a reference to such interim special care order that the High Court may make at a hearing referred to in section 23M(1)(a).

#### **Explanatory Note:**

**Subhead (4)** had been amended following further consideration of section 35H(4) from the 2019 Bill. The Department was concerned that the 2019 provision could be interpreted as meaning that the appointment of a guardian *ad litem* would not cease until the conclusion of a review. As some reviews may be scheduled to take place in one or two years, the guardian *ad litem* could potentially be working on a file for an extended length of time. The updated subhead (4) is intended to permit the court to direct that the order appointing the appointment of the guardian *ad litem* ceases to have effect until such time as the review is to be heard and to reappoint the guardian *ad litem* in advance of the review within the timeframe specified.

**Subhead (5)** has been amended on foot of a recommendation from the Special Rapporteur for Child Protection that provisions relating to a child party retaining a guardian *ad litem* could be reframed in a more positive fashion. Subhead (5) provides that the court that made a child a party to proceedings will determine when the order appointing a guardian *ad litem* ceases to have effect, and that when considering this matter, the court will be required to have regard to the best interest factors in listed section 24.

Stakeholders have also expressed concerns that the court should be able to retain a guardian *ad litem* for a period following the expiry of a special care order for the purpose of assisting in any review of how a child's transition out of special care is being managed. The Department shared this concern and sought the advice of external counsel who formed the view that the provisions of section 35H of the 2019 were consistent with the findings of Faherty J., in *CFA vs S'OL*. The policy position is that the proposed amendments to section 35H are not intended to prevent the court from retaining a guardian *ad litem* in the circumstances outlined.

## Head 15      Costs

### ***Provide that:***

The Principal Act is amended by the insertion of the text of 35I from section 6 of the Child Care (Amendment) Bill 2019.

### ***Suggested text:***

The relevant text from the Child Care (Amendment) Bill 2019 is as follows:

“35I.

- (1) Any costs or expenses reasonably incurred by a guardian *ad litem* in the exercise of his or her functions under this Act shall 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.
- (2) The court may, on the application to it in that behalf by the Minister, order any party to proceedings in which a guardian *ad litem* is appointed to pay to the Minister any costs or expenses payable by the Minister under subsection (1).
- (3) In this section, ‘costs and expenses’ means costs and expenses in respect of work done on or after the relevant date.”

### **Explanatory Note:**

This Head 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.

## Head 16      Regulations

### ***Provide that:***

The Principal Act is amended by the insertion of the text of 35J from section 6 of the Child Care (Amendment) Bill 2019.

### ***Suggested text:***

The relevant text from the Child Care (Amendment) Bill 2019 is as follows:

“35J

- (1) The Minister may, for the purpose of promoting high professional standards and good practice, make regulations relating to the performance by guardians *ad litem* of their functions under this Act, and, without prejudice to the generality of the foregoing, such regulations may—
  - (a) specify the standards to be applied by guardians *ad litem* to the performance by them of their functions under this Act;
  - (b) make provision for the training of guardians *ad litem*;
  - (c) make provision for codes of conduct for guardians *ad litem*;
  - (d) 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;
  - (e) make provision for the establishment and administration of a system of investigation and adjudication of complaints against guardians *ad litem*;
  - (f) make provision for the procedures that are to apply in respect of the keeping of records by guardians *ad litem*;
  - (g) 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*;
  - (h) 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*;
  - (i) 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.

- (2) Regulations under this section may make different provision in relation to different classes of persons and different classes of proceedings, and contain such incidental, supplementary and consequential provisions as appear to the Minister to be necessary or expedient for the purposes of the regulations.”

**Explanatory note:**

The purpose of this Head 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).

## **Head 17      Provision of information by guardians *ad litem* to Minister**

### ***Provide that:***

The Principal Act is amended by the insertion of the text of 35K from section 6 of the Child Care (Amendment) Bill 2019.

### ***Suggested text:***

The relevant text from the Child Care (Amendment) Bill 2019 is as follows:

“35K

- (1) The Minister may request a guardian *ad litem* to provide the Minister with such information relating to the performance of the functions of the guardian *ad litem* under this Act (including information relating to the proceedings in which he or she has been appointed for a child) as is necessary for the performance by the Minister of his or her functions under this Part.
- (2) Notwithstanding anything contained in any other enactment or rule of law, but subject to the Data Protection Regulation and the Data Protection Act 2018, a guardian *ad litem* shall comply with a request under subsection (1).
- (3) The Minister may use such information furnished under subsection (2) as the Minister requires for the performance of his or her functions under this Part.”

### **Explanatory Note:**

This Head 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.

## Head 18      Authorisation

### ***Provide that:***

The Principal Act is amended by the insertion of the text of 35L from section 6 of the Child Care (Amendment) Bill 2019.

### ***Suggested text:***

The relevant text from the Child Care (Amendment) Bill 2019 is as follows:

“35L

- (1) Subject to this section, the Minister may issue an authorisation in writing to such and so many persons as the Minister considers appropriate to perform the functions conferred on a guardian *ad litem* by or under this Act.
- (2) A person will not be considered appropriate for the purposes of subsection (1) unless—
  - (a) the person is a member of a class prescribed under subsection (3)(a), and
  - (b) subject to such exemptions as may be provided for under subsection (3)(c), the person satisfies such requirements as may be specified under subsection (3)(b).
- (3) The Minister may by regulations—
  - (a) prescribe a class or classes of persons, who in the opinion of the Minister, are suitable to be guardians *ad litem*,
  - (b) specify the requirements that a member of a class or classes prescribed under paragraph (a) shall satisfy in order to be considered appropriate for the purposes of subsection (1), and
  - (c) provide for exemptions from any requirement referred to in paragraph (b) for a specified class or classes of persons.
- (4) When prescribing a class or classes of persons under subsection (3)(a), the Minister shall have regard to—
  - (a) the functions to be performed by guardians *ad litem* under this Act, and
  - (b) the qualifications, minimum level of professional experience, training and expertise of such class or classes of persons.
- (5) When specifying requirements under subsection (3)(b) and providing for exemptions under subsection (3)(c) in respect of such requirements, the Minister shall have regard to—
  - (a) the functions to be performed by guardians *ad litem* under this Act, and
  - (b) the promotion of high professional standards and good practice.

- (6) Where the Minister is considering issuing an authorisation to a person, the Minister may request the person to provide the Minister with such information as the Minister may require in order to decide whether to issue the authorisation and the person shall comply with the request concerned.
- (7) Where in the opinion of the Minister a person fails without good cause to comply with a request under subsection (6), the Minister may have regard to such failure when considering whether to issue an authorisation to the person.

**Explanatory Note:**

This Head 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. This Head 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.

## **Head 19      Notification of relevant matters**

### ***Provide that:***

The Principal Act is amended by the insertion of the text of 35M from section 6 of the Child Care (Amendment) Bill 2019.

### ***Suggested text:***

The relevant text from the Child Care (Amendment) Bill 2019 is as follows:

“35M

- (1) A guardian *ad litem* shall notify the Minister in writing of any relevant matter in relation to him or her which would be likely to affect his or her authorisation, as soon as practicable and in any event not later than 14 days after that matter comes to the knowledge of the guardian *ad litem*.
- (2) In this section ‘relevant matter’, in relation to a guardian *ad litem*, includes 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.”

### **Explanatory note:**

This Head 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.



## **Head 20      Revocation of authorisation**

### ***Provide that:***

The Principal Act is amended by the insertion of the text of 35N from section 6 of the Child Care (Amendment) Bill 2019.

### ***Suggested text:***

The relevant text from the Child Care (Amendment) Bill 2019 is as follows:

“35N.

The Minister may revoke an authorisation issued in respect of a person if it appears to the Minister that—

- (a) any requirement for the granting of the authorisation is no longer satisfied,
- (b) the person has failed to comply with section 35M(1),
- (c) the person has committed a serious breach of regulations made under this Part,
- (d) the person has become incapable through ill-health of performing the functions of a guardian *ad litem* under this Act, or
- (e) there are other good and sufficient reasons to do so.”

### **Explanatory note:**

This Head sets out the circumstances in which the Minister may revoke the authorisation of a guardian *ad litem*.

## Head 21      Cessation of authorisation

### ***Provide that:***

The Principal Act is amended by the insertion of the text of 35O from section 6 of the Child Care (Amendment) Bill 2019.

### ***Suggested text:***

The relevant text from the Child Care (Amendment) Bill 2019 is as follows:

“35O

- (1) An authorisation issued in respect of a person shall cease—
  - (a) where it is revoked under section 35N,
  - (b) in the case of a person who is an officer of the Minister, where the person ceases to be an officer of the Minister,
  - (c) in the case of a person with whom the Minister has entered into a contract for services under section 35P, on the expiry of the period of the contract, or such further period as the Minister may direct in accordance with subsection (3), or
  - (d) at the request of the person.
- (2) Where an authorisation ceases in accordance with subsection (1) and the person in respect of whom the authorisation was issued stands appointed for a child, the person concerned shall cease to be so appointed.
- (3) Where the period of a contract referred to in subsection (1)(c) is due to expire before the conclusion of proceedings in which a person is appointed for a child, the Minister may direct that the authorisation issued in respect of the person shall continue for such period as the Minister considers necessary having regard to the proceedings concerned.”

### **Explanatory note:**

This Head 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.

## Head 22      Contracts for Services

### ***Provide that:***

The Principal Act is amended by the insertion of the text of 35P from section 6 of the Child Care (Amendment) Bill 2019.

### ***Suggested text:***

The relevant text from the Child Care (Amendment) Bill 2019 is as follows:

“35P

- (1) The Minister may enter into contracts for service with such and such number of persons as the Minister considers necessary for the performance by him or her of the functions under section 35C(1) or 35L(1) and contracts with such persons shall contain such terms and conditions as the Minister may, with the consent of the Minister for Public Expenditure and Reform, determine.
- (2) The Minister may issue an authorisation to a person with whom the Minister has entered into a contract for services under subsection (1) to perform any of the functions of a guardian *ad litem* under this Act.”

### **Explanatory note:**

This Head 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 35M(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.

## Head 23      Transitional and saving provisions (Part VA)

### ***Provide that:***

The Principal Act is amended by the insertion of the text of 35Q from section 6 of the Child Care (Amendment) Bill 2019.

### ***Suggested text:***

The relevant text from the Child Care (Amendment) Bill 2019 is as follows:

“35Q.

- (1) Where immediately prior to the relevant date a person—
  - (a) stands appointed under section 26 as a guardian *ad litem*,
  - (b) is a person in respect of whom the Minister has received a vetting disclosure, and
  - (c) is a person who the Minister is satisfied is a fit and proper person to be a guardian *ad litem*, then on and from that date the appointment shall be deemed to be an appointment under section 35C(1).
- (2) Where an appointment is deemed under subsection (1) to be an appointment under section 35C(1) this Part shall apply to the person concerned subject to the following and any other necessary modifications—
  - (a) an order made by a court prior to the relevant date under section 26—
    - (i) in the case of a person appointed to act as a guardian *ad litem* in any proceedings under Part IVA, shall be treated as if it was an order under section 35B(2), and
    - (ii) in the case of a person appointed to act as a guardian *ad litem* in any proceedings under Part IV, IVB or VI, shall be treated as if it was an order under section 35B(3),
  - (b) an order referred to in paragraph (a)(i) shall cease to have effect—
    - (i) in accordance with section 35H(1), or
    - (ii) after a period of 12 months commencing on the relevant date if no authorisation is issued in respect of the person in that period, whichever is the sooner,
  - (c) an order referred to in paragraph (a)(ii) shall cease to have effect—
    - (i) (i) in accordance with section 35H(2), or

- (ii) (ii) after a period of 12 months commencing on the relevant date if no authorisation is issued in respect of the person in that period, whichever is the sooner, and
  - (d) where prior to the relevant date the person had instructed a solicitor or counsel, or both, to represent him or her in the proceedings concerned, on and from that date, the solicitor or counsel, or both, as the case may be, may continue to represent the person in such proceedings for such period as the order has effect, in accordance with paragraph (b) or (c), as the case may be.
- (3) In this section, 'vetting disclosure' has the same meaning as it has in the National Vetting Bureau (Children and Vulnerable Persons) Act 2012."

**Explanatory note:**

This Head 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.

## Head 24      Miscellaneous amendments to Principal Act

### ***Provide that:***

Amendments to the Principal Act which are required in order to make reference to sections inserted by this Bill, and which were set out in Part 1 of the Schedule to the Child Care (Amendment) Bill 2019, are to be included in a Schedule to this Bill.

### ***Suggested text:***

The relevant text from the Child Care (Amendment) Bill 2019 is as follows:

“The provisions of the Principal Act specified in column (2) of Part 1 of the Schedule to the Child Care (Amendment) Bill 2019 are amended to the extent specified in column (3) of that Part.”

Item (1)	Provision affected (2)	Amendment (3)
1	section 23G	Subsection (1)(c) is amended by the substitution of “Part VA in respect of proceedings under this Part” for “ <i>section 26</i> (amended by the Child Care (Amendment) Act 2011) in respect of proceedings under this Part and whose appointment has effect in accordance with section 26(4)”.
2	Section 23M	Subsection 1(c) is amended -
		(a) by the substitution of “a person is appointed under section 35C(1) pursuant to an order under section 35B(2)” for “it makes an appointment under <i>section 26</i> (as amended by the Child Care (Amendment) Act 2011)”, and
		(b) by the substitution of “the person so appointed” for “a person appointed under that section”.
3	section 23NK	Paragraph (b) is amended by the substitution of “the guardian of the child, a guardian <i>ad litem</i> , where such guardian <i>ad litem</i> is appointed in accordance with Part VA in respect of proceedings under this Part” for “the guardian of the child”.
4	section 27	The following subsections are inserted after subsection (5):  “(6) In subsection (3), a reference to a party includes a reference to the guardian <i>ad litem</i> , if any, appointed in accordance with Part VA in respect of the proceedings concerned.  (7) In this section, where the proceedings are proceedings under Part IVA, ‘court’ means the High Court.”.

Item (1)	Provision affected (2)	Amendment (3)
5	section 28	Subsection (3)(c) is amended by the insertion of “Part V (as amended by the Child Care (Amendment) Act 2011) or VA” for “Part V (as amended by the Child Care (Amendment) Act 2011)”.
6	section 33	<p>Subsection (1) is amended—</p> <p>(a) by the substitution of “IV, VA” for “IV”, and</p> <p>(b) by the insertion of the following subsection after subsection (3):</p> <p>“(4) In subsection (2), a reference to parties to proceedings includes a reference to the guardian <i>ad litem</i>, if any, appointed in accordance with Part VA in respect of the proceedings concerned.”.</p>

**Explanatory note:**

This Head makes provision for certain technical amendments to the Principal Act that are required in order to make reference to sections inserted by this Bill.

## Head 25 Amendments to other Acts

### ***Provide that:***

Amendments to the other Acts which are required in order to make reference to the provisions of this Bill, and which were set out in Part 2 of the Schedule to the Child Care (Amendment) Bill 2019, are to be included in a Schedule to this Bill.

### ***Suggested text:***

The relevant text from the Child Care (Amendment) Bill 2019 is as follows:

“Each Act specified in columns (2) and (3) of Part 2 of the Schedule to the Child Care (Amendment) Bill 2019 is amended to the extent specified in column (4) of that Part.”

Item (1)	Number and Year (2)	Short title (3)	Amendment (4)
1	No. 24 of 2001	Children Act 2001	Section 71 is amended in subsection (1)(a) by the substitution of “Part III, IV, V or VA of the Act of 1991” for “Part III, IV or V of the Act of 1991”.
2	No. 25 of 2001	Mental Health Act 2001	<p>Section 25 is amended by the substitution of the following subsection for subsection (14):</p> <p>“(14) Sections 21, 22, 24, 25, 27 to 35Q, 37 and 47 of the Child Care Act 1991 shall apply to proceedings under this section as they apply to proceedings to which those sections apply, subject to the following modifications:</p> <p>(a) references in those sections to proceedings or an order under Part III, IV, IVA, IVB, V, VA or VI of that Act shall be construed as references to proceedings or an order under this section;</p> <p>(b) the District Court, in an application under subsection (1), shall appoint a guardian <i>ad litem</i> for the child to whom the application relates;</p> <p>(c) the guardian <i>ad litem</i> is entitled to the provision of legal representation in the proceedings for which they are appointed for the child;</p> <p>(d) any other necessary modifications.”.</p>



3	No. 47 of 2012	National Vetting Bureau (Children and Vulnerable Persons) Act 2012	Part 1 of Schedule 1 is amended by the insertion of the following paragraph after paragraph 15:  “16. Any work or activity by a guardian <i>ad litem</i> within the meaning of Part VA of the Child Care Act 1991 as such a guardian.”.
4	No. 36 of 2015	Children First Act 2015	Schedule 2 is amended by the substitution of the following paragraph for paragraph 14:  “14. Guardian <i>ad litem</i> appointed under section 35C(1) of the Child Care Act 1991.”.

**Explanatory note:**

This Head provides for the amendment of those Acts specified in Part 2 of the Schedule.