

Child Care (Amendment) Act 2019

Guardian ad litem Arrangements

Regulatory Impact Analysis

Department of Children and Youth Affairs

Child Care Legislation and Children’s Rights Policy Unit

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Contents

Section 1: Summary of the Regulatory Impact Analysis (“RIA”) 2
Section 2: Description of Policy Context and Objectives 6
Section 3: Identification of Policy Options 8
Section 4: Analysis of Costs, Benefits and Impacts 10
Section 5: Consultation 133
Section 6: Enforcement and Compliance 133
Section 7: Review 133
Section 8: Publication 133

Section 1: Summary of the Regulatory Impact Analysis (“RIA”)

Department/Office: Department of Children and Youth Affairs	Title of Legislation: Child Care Act Amendment Bill 2019
Stage: Bill drafted by OPC and agreed by DCYA. RIA to be published alongside finalised Bill.	Date: June 2019
Related Publications: <ul style="list-style-type: none"> • Child Care Amendment Bill 2019 	
Available to view or download at: http://www.dcy.gov.ie	
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<p>POLICY OBJECTIVES</p> <p>Guardian <i>ad litem</i> (GAL) arrangements for children who are the subject of public law care proceedings are currently provided for under the Child Care Act 1991 (1991 Act). Section 26 of the 1991 Act provides for the appointment of a GAL in respect of care proceedings where a child is not party to those proceedings and where the court is satisfied that it is necessary in the best interests of the child and in the interests of justice to have a GAL appointed. The GAL is independent of the parties to the proceedings. The task of the GAL is to ensure that the views of the child and the child’s best interests are brought to the attention of the court in relation to care arrangements.</p> <p>There is a broad consensus that the legislative provision which provides for the appointment of GALs needs to be strengthened. There is also evidence of considerable variations in GAL appointments at District Court level where the vast majority of public law child care proceedings are heard.</p> <p><i>Better Outcomes Brighter Futures</i> – the national policy framework for children and young people 2014-2020 sets out the overarching vision to be achieved for children and young people in Ireland. It provides that the Government commit to the review and reform, as necessary, of the Child Care Act 1991. The <i>Programme for a Partnership Government</i> (2016) commits to “reviewing the operation of GAL to ensure that a child’s view is always effectively represented in court proceedings.”</p> <p>In December 2017, the Government approved the establishment a new national GAL service within an executive office of the DCYA on an interim basis with a view to longer term arrangements for the office being dealt with in the context of the proposed transition to a reformed Family Courts System. This decision reflects the recommendations of the Joint Oireachtas Committee on Children and Youth Affairs.</p> <p>The Policy intent of this Bill is to address significant inadequacies in the existing arrangements for the appointment of GALs (Section 26 of the Child Care Act, 1991), establish a national system for service management and delivery that is accountable to the Minister, and provide optimum</p>	

assurance regarding the quality and sustainability of services into the future. Measures to be implemented will ensure capability to extend GAL services to the greatest possible number of children and young people, consistent with the available finite resources. This new legislation will replace the existing limited provision in Section 26 of the 1991 Act, 'Appointment of a GAL for a child'.

The establishment of the GAL Executive Office will put in place a legislative and operational framework that will allow a consistent and high quality GAL service to be delivered on a cost-effective basis, which meets the needs of vulnerable children and young people. It will result in a substantial increase in the appointment of GALs in proceedings on a basis that is financially sustainable.

This in turn will support the higher-level objectives of:

- realising the protections for children's rights as enshrined in Article 42A of Bunreacht na hÉireann following the Children's Referendum in 2012; and
- providing enhanced and improved arrangements for the delivery of an effective, quality assured, and standardised front-line GAL service for children in child care proceedings.

THREE POLICY OPTIONS IDENTIFIED

1. No change

This is not an option as a decision not to amend the existing limited provisions contained in Section 26 of the Child Care Act, 1991 would mean a failure to implement the commitment set out in the *Programme for a Partnership Government* or *The National Strategy for Children and Young People's Participation in Decision-making 2015-2020*.

No change would mean that present service arrangements, which are unregulated and unsustainable, including from a financial perspective, would continue. The uneven appointment of GALs in child care proceedings across geographical locations would also continue. This option would run contrary to previous Government approvals for the reform of this system (S180/20/10/1695) and the recommendations in the Joint Oireachtas Committee's May 2017 Report on the General Scheme.

2. Make legislative changes

Making the required legislative changes will ensure that the service can be extended to benefit the greatest number of children and young people consistent with the available finite resources. The legislative changes will establish an accountable and regulated national system for service management and delivery and provide optimum assurance regarding the quality and sustainability of services into the future.

In particular, legislative changes to Section 26 of the Child Care Act, 1991 will provide a clear framework for the establishment of a National Guardian *ad litem* Service and for the appointment of a GAL in child care proceedings. It will allow for regulations and policies governing the role and status of a GAL and the qualifications and experience required to act as a GAL. It will also provide for access to legal advice and representation for GALs *when required*.

3. Public Procurement Process

This option provides for the establishment of a nationally organised, managed, and delivered GAL service by way of public procurement.

The possibility of engaging a national service provider through a public procurement process was considered by the Department as a possible interim step towards the finalisation of arrangements for a settled national service. In this instance, the service contract would be between the Minister and the national service provider.

Two major drawbacks were identified for this option:

- Given the limited numbers of service providers currently operating in this area, there is a high possibility that no application would meet the requirements of the tender process.
- Once a tender is granted it would create a monopoly, with knock-on effects for any future tender process.

Preferred Option: Make legislative changes (Option 2 above).

Costs, Benefits, and Impacts of Policy Options

Option 1 – No Policy Change

COSTS	BENEFITS	IMPACTS
Potential for existing expenditure for this demand-led service to increase as the fees paid to GALs are currently unregulated. Fees paid for legal advice/representation and engagement of same are also currently unregulated.	None	<p>Current arrangements which are unsustainable and unregulated will continue.</p> <p>The arrangements will not be reformed to benefit the greatest number of children in child care proceedings. The system will not be reformed to provide a high quality service that is accountable with proper governance structures.</p> <p>An opportunity to reform existing arrangements so as to give greater effect to Article 42A of Bunreacht na hÉireann, inserted following the Children’s Referendum on 10th November 2012, will have been missed.</p> <p>Failure to carry out Action G14.42 of the National Strategy for Children and Young People’s Participation in Decision-making 2015-2020 and the relevant commitment in the Programme for a Partnership Government</p>

Option 2 – Make Legislative Changes

COSTS	BENEFITS	IMPACTS
While the level of GAL appointments nationally will rise, the potential increase in costs accruing will be mitigated by the	National, accountable and regulated service established.	<p>Significant shortcomings in the existing GAL arrangements will be addressed and the service will be made fit for purpose.</p> <p>The service will be extended to benefit the</p>

<p>regulation of GAL fees and the standardisation of access to and fees for legal advice and representation for the GAL.</p> <p>Costing projections indicate that the new service can initially be provided within existing resources and the restructuring of the service will provide scope to extend the service to all children who are the subject of child care proceedings within the current expenditure envelope.</p>		<p>greatest number of children and young people consistent with the available finite resources.</p> <p>Assurance regarding the quality and sustainability of services into the future will be provided.</p> <p>The rights of children and families under Bunreacht na hÉireann and international obligations will be upheld.</p> <p>Action G14.42 of <i>The National Strategy for Children and Young People's Participation in Decision-making 2015-2020</i> and the <i>Programme for a Partnership Government</i> will be implemented.</p>
<p>Option 3 – Public Procurement Process</p>		
<p>COSTS</p>	<p>BENEFITS</p>	<p>IMPACTS</p>
<p>This approach would require the Department to prepare and issue a Request for Tender on behalf of the Minister and put in place a comprehensive contractual arrangement. There is a risk that the costs associated with the delivery of a procured service could exceed the current costs.</p>	<p>This would be a possible interim step towards the finalisation of arrangements for a settled national service.</p>	<p>This may entail the procurement of a national service provider on more than one occasion (possibly at intervals of 4 years) until such time as arrangements could be made to locate the service in an existing or new public body.</p> <p>Given the limited numbers of service providers currently operating in this area, there is a possibility that no application would meet the requirements of the tender process.</p> <p>Once a tender is granted it has the potential to create a monopoly, with knock-on effects for any future tender process.</p>

Section 2: Description of Policy Context and Objectives

2.1 Policy Context

GAL arrangements for children in child care public law proceedings are currently provided for under Section 26 of the Child Care Act, 1991. The GAL is independent and is not a party to proceedings. While there is currently no significant statutory underpinning for the role, the GAL is to ascertain and inform the Court of the views, wishes and feelings of the child and provide the Court with an independent professional assessment of what course of action is in the best interests of the child.

The present service arrangements are unregulated, fragmented and unsustainable, including from a financial perspective. This has given rise to the service being provided on an *ad hoc* basis, with no discernible organised, transparent or accountable base. There is uneven appointment of GALs across geographical locations. There is no provision in current legislation for the status and/or function of the GAL nor are the professional qualifications and practical experience required to be eligible to act as a GAL set out.

There is no legal provision or statutory guidance in force regarding the engagement of legal services by GALs. While significant expenditure of public funds is incurred annually on activities of this kind, there are no assurance arrangements covering access to and use of such funding.

In its 2015 Annual Report, the Comptroller and Auditor General (C&AG) included a chapter in relation to the GAL Service. The report noted the lack of national management structures charged with the oversight of GAL services. The report stated that while Tusla was the only State body in a position to gain an insight into GAL activity levels it did not have a role in the management or monitoring of the service. In this regard, any information captured was purely for financial control.

The report recommended that Tusla should utilise the available information to develop a range of performance metrics, in order to identify outliers and gain assurance that costs over and above average are appropriate. It recommended that responsibility for the management and supervision of the service should be assigned to a single entity, and preferably a body that is independent of the legal proceedings. It also recommended that the Department should examine the options for engagement of GAL legal representatives by way of a competitive tendering process.

Costs to the Exchequer

The 1991 Act obliges the Agency to pay costs (fees, travel, and legal representation) incurred by GALs in the performance of their functions and otherwise gives it no role.

In 2018, expenditure on GALs and attendant arrangements amounted to €14.65m. This was comprised of €8.45m in respect of GAL fees and expenses and €6.2m on legal advice/representation engaged by GAL. The corresponding total expenditure of public funds in the three previous years ranged from €14m to €15.2m.

2.2 Objective of the Bill

The Bill addresses significant inadequacies in the existing arrangements. It introduces a clear legal framework which provides for a GAL service that is fit for purpose and which will benefit the greatest number of children and young people consistent with the available finite resources.

It will facilitate the establishment, as an executive office within the Department, of a nationally organised, managed and delivered service that is of consistently high quality and is sustainable into the future. It provides guidance to the Court on the appointment of a GAL in child care proceedings.

It specifies the role and status of a GAL, the qualifications and experience required to act as a GAL and sets out procedures for access to legal advice and representation by GALs.

These legislative changes will provide the necessary assurance and transparency in relation to public expenditure incurred in the provision of this service and will facilitate the reporting of information (non-identifying data) regarding the work of the national service and enable the sharing of any accrued knowledge/learning for the State's benefit. The Bill will provide the national GAL service with the requisite legislative basis for the processing of personal data under the General Data Protection Regulation.

Section 3: Identification of Policy Options

3.1 Option 1 – No Policy Change

The present GAL service arrangements are unregulated, fragmented and unsustainable, including from a financial perspective. It is widely agreed among all interests that reform of the relevant provisions, i.e. section 26 of the 1991 Act, relating to GAL services is necessary to address significant shortcomings.

If change is not made and the current unregulated and *ad hoc* approach to the provision of a GAL service continues to operate, then the following impacts will occur:

- A significant number of children in proceedings under the Child Care Act, 1991 and the Mental Health Act, 1991 will not have access to a GAL;
- The status and role of GAL will continue to be undefined;
- The professional qualifications and practical experience required to be eligible to act a GAL will not be set out;
- Legislative provision or statutory guidance for the engagement of legal representation by GALs will not be put in place; and
- A high quality and sustainable national service that will benefit the greatest number of children will not be put in place.

This would result in the current unsustainable arrangements, which operate without a discernible organised, transparent or accountable base, prevailing.

This is not an option as a decision not to amend the existing very limited provisions contained in Section 26 of the 1991 Act would mean failure to implement the commitment which is set out in *The National Strategy for Children and Young People's Participation in Decision-making 2015-2020* and the Programme for Government commitment to "review the operation of Guardian Ad Litem (GAL) to ensure that a child's view is always effectively represented in court proceedings".

3.2 Option 2 - Make legislative changes and establish Guardian Ad Litem Executive Office – Preferred Option

This option, which is the option chosen by the Minister, involves amending Section 26 of the Child Care Act, 1991 to provide for a presumption in favour of the appointment of a GAL in all cases. It also provides for the mandatory appointment a GAL in all proceedings under Section 25 of the Mental Health Act, 2001 (involuntary admission of a child who has a mental disorder to an approved centre). This is similar to the existing requirement for the mandatory appointment of a GAL in special care proceedings.

In addition to providing for a presumption in favour of appointment of a GAL in all child care proceedings, the policy will require the court to say how it intends to hear the views of the child if it declines to appoint a GAL.

This will ensure that the service can be extended to benefit the greatest number of children and young people consistent with the available finite resources and provide a service that is high quality and sustainable into the future.

The policy is to put in place a nationally organised, managed and delivered service. This policy will involve the recruitment of employed GALs who will form the core of the service. They will be supported by an in-house legal team as well as a panel of self-employed GALs. This will ensure access to additional GALs during particularly busy Court periods.

The Bill contains a regulation making power which will allow the Minister to prescribe the professional background, qualifications, experience and training required before a person can be authorised as a GAL. By setting these matters out in regulations rather than in the Bill, the Minister will have the flexibility to prescribe in future additional categories of professionals who are not as yet within the scope of the legislation regulating health professionals. This will help ensure the diversity and responsiveness of the new service to children with different needs. The Minister is proposing to prescribe the professions of social work and psychiatry, and, when they become regulated professions, social care and psychology.

The Bill provides the Minister may make regulations in respect of training and continuous professional development, codes of conduct for GALs, performance monitoring, complaints procedures and the provision of legal advice and representation.

Under this proposal Tusla will have no role in relation to the new GAL service as the relevant expenditure will be moved from Tusla to the Department of Children and Youth Affairs.

3.3. Option 3 - Public Procurement Process

The possibility of engaging a national service provider through a public procurement process was considered by the Department as a possible interim step towards the finalisation of arrangements for a settled national service.

In this instance, the service contract would have been between the Minister and the national service provider appointed after a tendering process. This approach would have required the Department to prepare and issue a Request for Tender on behalf of the Minister and put in place a comprehensive contractual arrangement. This approach, if adopted, would have entailed the procurement of a national service provider for a period of four years.

Following a detailed analysis, two significant drawbacks were identified for this option. Firstly, given the limited numbers of service providers currently operating in this area, the Department was advised that there was very likely that no application would meet the requirements of the tender process. Secondly, once such a tender was granted it would have created a GAL service monopoly, with knock-on effects for performance management of the contract and the success and costs of any future tender process.

This policy was considered by the Joint Oireachtas Committee on Children and Youth Affairs as part of the pre-legislative scrutiny process. The Committee recommended that the GAL service should not be subject to a procurement process, but instead be set up under a statutory body. It also recommended that there should be no involvement of Tusla in the provision of the GAL service.

Preferred option: An amendment to Section 26 of the Child Care Act, 1991, as outlined above in Section 3.2. – Option 2. Following robust analysis and consultation by the Department, the preferred course of action is the establishment of an executive office within the DCYA which will provide and manage a national GAL service.

Section 4: Analysis of Costs, Benefits and Impacts

4.1 Costs

4.1.1 Option 1 – Do nothing

The full year costs of the current *ad-hoc* service range from €14-€15m. This includes the costs of the appointment of GALs and associated legal costs. According to the 2015 report of the Child Care Law Reporting Project, GALs were appointed in the region of 53% of child care proceedings at which they attended.

Research undertaken by the Department shows that if the Courts were to appoint GALs in all proceedings in line with the current operation of GAL services, GAL services would cost approximately €28.3 million per annum. It is important to note that if solicitors were to be used in 100% of cases, fees could potentially increase to almost €12.2 million. This would bring the overall cost of provision to almost €30.5 million.

4.1.2 Option 2 – Establish Guardian Ad Litem Executive Office – Preferred option

In Option 2 the cost of providing the GAL service as an executive office with full-time employed GALs was examined.

Research was undertaken by the Department's Research and Evaluation Unit in 2017. The research examined the costs associated with both the delivery of GAL services and the associated legal costs. It examined a number of policy options, including one similar to Option 2.

The research suggested that with a State Body with employed GALs it would be possible for GALs to be involved in the vast majority of child-care cases at a lower cost than the current system. It found that the overall cost of delivering the service (salaries, overheads and legal costs etc.) potentially ranged from €11m to €14.9m at current levels of child care proceedings.

The overall payroll costs based on these staff numbers will amount to approximately €6.2m. This compares favourably with international peers such as Northern Ireland Guardian Ad Litem Agency (NIGALA) and Children and Family Court Advisory and Support Service "CAFCASS" (England and Wales). This would address the concerns expressed by the C&AG about the pay costs for the current GAL system.

In addition to the recruitment of full time GALs, the proposed legislation provides for the Executive Office to recruit and maintain a panel of GALs who will provide services as independent contractors. This panel will, for example, facilitate the appointment of GALs in areas of the country where there is no need to have a full time GAL. It will also ensure access to additional GAL resources during particularly busy Court periods. It will provide an option to retain the services of a number of experienced GALs who might not want to work full time for the Executive Office. These GALs would have significant experience dealing with complex cases, particularly those at High Court level.

The Department propose that the use of the team of in-house solicitors will significantly reduce the need to avail of panel solicitors. In-house solicitors will provide legal advice, support and representation to GALs. They will also provide training to all GALs on issues such as courtroom skills.

Where there is a need for a GAL to be represented by a solicitor in court, it is proposed that a solicitor be drafted from a panel created for the GAL service, in a manner or model similar to that of

the Legal Aid Board. The Office would use a similar fee structure to the fee structure the Legal Aid Board pays to the solicitors for parents in child care cases.

Overall, costing projections indicate that the new service can be provided within existing resources and the restructuring of the service will provide scope to extend the service to all children who are the subject of child care proceedings within the current expenditure envelope.

4.1.3 Option 3 – Public Procurement Process

A number of risks had been identified with the procurement option. By establishing the service through procurement, the State would in effect be creating a monopoly. This would make it difficult for the State to manage the service effectively. Such a provider would have little real incentive to improve the cost-effectiveness, consistency and quality of the service in the medium to long term, or to undertake a significant change management programme in how GAL services are delivered across the State. In addition, this scenario would have created difficulties around ensuring that the private provider sets salaries within required limits.

A Request for Information issued to GAL service providers and other interested parties in 2017. Analysis of responses received from existing providers showed that they did not envisage any significant change to the way the GAL service was being delivered. The process supported the assertion that there was little incentive for service providers to undertake a significant change programme as under procurement rules the contract could only be awarded for a relatively short period, up to four years.

Given the demand-led nature of the service and the obligation on the State to pay for it, the analysis showed that the service provider would have little obvious incentive to minimise costs or seek to make the service more cost-effective. This would have led to an escalation in costs given the provision of a presumption in favour of the appointment of a GAL in all public law child care cases in the legislation.

It is reasonable to assume that the legal and overall costs associated with this option would have been considerably greater than those of Option 2.

4.2 Benefits

4.2.1 Option 1- Do nothing

There are no benefits associated with this option. As highlighted above, the current arrangements have been identified as unsustainable from a financial perspective. Based on the Department's extensive engagement with stakeholders over the past number of years, it has become clear that the current system is not serving the needs of vulnerable young people involved in care proceedings.

Courts operate in the absence of clear guidance while Tusla, who have no role in the planning or delivery of the service, are obliged to fund the service. As the fees currently paid to GALs and those paid for legal advice/representation and engagement on their behalf are unregulated, there is potential within the existing arrangements for expenditure for this demand-led service to increase, without accountability or transparency.

4.2.2 Option 2 - Establish Guardian Ad Litem Executive Office – Preferred Option

Under the amended legislation, the level of GAL appointments nationally will rise.

Costing projections prepared by the Department indicate that the new service can be provided by a national executive office of the Department within existing resources and the restructuring of the service will provide scope to extend the service to all children who are the subject of child care proceedings within the current expenditure envelope. This will be achieved as a result of the reduction in GAL salaries and fees and in legal costs. This service will be designed to be dynamic and, using the panel of GALs, it will be in a position to respond to spikes in demand.

Quality assurance will be central to the role of the Executive Office and continuous professional development of the GAL will be a priority for the Executive Office.

Under the reformed GAL service it is proposed that there will be an in-house legal team, providing legal advice (and in some cases representation) to support GALs in their work and also to represent GALs on occasion. This will reduce the need for GALs to seek the aid of a solicitor in court, provide better value for money and maintain a high quality service.

4.2.3 Option 3 - Public Procurement Process

As with Option 2, the level of GAL appointments nationally will rise.

Analysis conducted by the Department suggested two main advantages in establishing a national service through public procurement. Firstly, it would represent a move towards independence of the new service from Tusla and address criticisms around conflicts of interest.

However, establishing the Service within an executive office will also ensure that Tusla has no role in paying the fees of GALs.

Secondly, it was envisaged that this approach would allow for speedier reform of the service while a permanent home for the service was established. However, any potential advantage of speed will not be realised if the State does not receive an acceptable bid. Evidence suggests that an executive office can be set up within a similar timeframe to a procured service if an acceptable bid were to be received. Any advantage of speed is outweighed by the disadvantages of procurement and the adoption of an interim solution that will delay the permanent establishment of the service within the State.

4.3 Impacts

4.3.1 National competitiveness

There are no direct impacts relating to national competitiveness, North-South or East West relations, employment, Gender Equality, people with disabilities, industry costs or rural communities.

4.3.2 Socially Excluded and Vulnerable Groups

The Bill will have a very beneficial impact on children involved in child care proceedings as it underpins the provision of a high quality GAL service to the greatest number of children in such proceedings, within the finite resources available.

4.3.3 The Rights of Citizens

The rights of children under Bunreacht na hÉireann and international obligations will be upheld. Action G14.42 of *The National Strategy for Children and Young People's Participation in Decision-making 2015-2020* will be implemented.

Section 5: Consultation

In order to inform policy proposals, the Department developed a detailed consultation paper spanning fifteen key areas of reform for dissemination to a wide range of stakeholders. This consultation took place from October 2015 to May 2016. In total, 26 responses were submitted. These included responses from the Ombudsman for Children's Office, Children Rights/Advocacy Groups, State Agencies, GAL practitioners and legal and other interests. As part of this consultation process, the Department met with a number of respondents. The content and depth of the responses and the follow-up meetings provided further insight and detail on a number of key aspects of significance to a reformed model of service.

Consultations have also taken place with the Office of the Attorney General, Office of Data Protection Commissioner, Office of Government Procurement, the Legal Aid Board, the Child and Family Agency, the Department of Justice and Equality, the Courts Service, the Department of Health, CORU, the Office of Parliamentary Counsel, the Department of Public Expenditure and Reform and the Mental Health Commission.

The Department, in close consultation with Hub na nÓg and the Agency, is carrying out a series of consultation sessions directly with children and young people who have experienced the current GAL service. A report of this consultation will be published on the Department's website, in due course.

Section 6: Enforcement and Compliance

The Department will monitor the operation and implementation of the legislation. The Executive Office of the DCYA will submit periodic management and operational reports, annual financial reports on expenditure and a detailed annual service delivery activity report (non-identifying) on GAL case work to the Management Board of the Department.

Section 7: Review

The operation and implementation of the legislation will be reviewed by the Department and the Minister will be advised of relevant issues. This review will inform any decision on the need for secondary or tertiary legislation.

Section 8: Publication

The Regulatory Impact Assessment ("RIA") will be published on the Department's website (www.dcy.gov.ie). This will be done to coincide with the publication of the Child Care (Amendment) Bill 2019.