

General Scheme of the Child Care (Amendment) Bill 2018

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Head 1 – Short title, collective citation, construction and commencement

Provide that:

- (1)** This Act may be cited as the Child Care (Amendment) Act [2018].
- (2)** The Child Care Acts 1991 to 2015 and this Act may be cited together as the Child Care Acts 1991 to [2018].
- (3)** This Act shall come into operation on such day or days as the Minister for Children and Youth Affairs 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 - Interpretation

Provide that:

'Agency' shall be construed in accordance with section 2 of the Child and Family Agency Act 2013;

'care order' shall be construed in accordance with section 18 of the Child Care Act 1991;

'child' means a person under the age of 18 years other than a person who is or has been married;

'Child and Family Agency' shall be construed in accordance with section 7 of the Child and Family Agency Act 2013;

'Court' means the District, Circuit or High Court;

'document' means –

- (a) a book, record, or other written or printed material,
- (b) a photograph,
- (c) any information stored, maintained or preserved by means of any mechanical or electronic device, whether or not stored, maintained or preserved in legible form and
- (d) any audio or video recording;

'Guardian *ad litem*' means a person assigned by the Minister to perform functions in accordance with Head 4 pursuant to an order of a Court under Head 7;

'interim care order' will be construed in accordance with section 17 of the Child Care Act 1991,

'interim special care order' will be construed in accordance with section 23A of the Child Care Act 1991;

'legal services' means legal services provided by a person, whether as a solicitor or as a barrister;

'Minister' means the Minister for Children and Youth Affairs;

'national Guardian *ad litem* service' means the national service established by the Minister under Head 3;

'panel of approved Guardians *ad litem*' means a panel established by the Minister under Head 3 of persons who satisfy the eligibility requirements of Head 6;

'panel of solicitors' means a panel established by the Minister under Head 3 of solicitors eligible to act on behalf of Guardians *ad litem*;

'panel of barristers' means a panel established by the Minister under Head 3 of barristers eligible to be instructed on behalf of Guardians *ad litem*;

'personal data' shall be construed in accordance with Article 4 of the General Data Protection Regulation;

'prescribed' means prescribed by Regulations made under Head 11;

'Principal Act' means the Child Care Act 1991;

'proceedings' mean proceedings and applications under Parts IV, IVA or VI of the Child Care Act 1991;

'sensitive personal data' shall be construed in accordance with Article 9 of the General Data Protection Regulation;

'special care order' shall be construed in accordance with section 23A of the Child Care Act 1991;

'supervision order' shall be construed in accordance with section 19 of the Child Care Act 1991.

Explanatory Note:

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

Head 3 - Establishment of a national Guardian *ad litem* service

- (1) The Minister will establish a national Guardian *ad litem* service to:
 - (a) enable and facilitate the child's views to be heard in proceedings under the Child Care Act 1991;
 - (b) enhance the decision making capacity of the Courts regarding the child's views and best interests in such proceedings; and
 - (c) support Guardians *ad litem* in carrying out their functions under Head 4.

- (2) The provision of a Guardian *ad litem* service will comprise the management and operation of a national service on such terms and conditions as the Minister may, with the consent of the Minister for Public Expenditure and Reform, determine.

- (3) Without prejudice to the generality of subhead (2), the '*management and operation of a national service*' may include the following:
 - (a) the selection and appointment of Guardians *ad litem* who shall be employed on such terms and conditions as the Minister may, with the consent of the Minister for Public Expenditure and Reform, from time to time determine and who may be assigned by the Minister in proceedings where a Court has, under Head 7, ordered the appointment of a Guardian *ad litem* in proceedings;
 - (b) the establishment of a panel containing a list of names of Guardians *ad litem* who have made an application to be included on the panel and who may be engaged under contracts for services on such terms and conditions as the Minister may, with the consent of the Minister for Public Expenditure and Reform, from time to time determine and who may be assigned by the Minister in proceedings where a Court has, under Head 7, ordered the appointment of a Guardian *ad litem* in proceedings ;

- (c) assigning Guardians *ad litem* in proceedings where a Court has ordered the appointment of a Guardian *ad litem* under Head 7;
- (d) supporting the performance of Guardians *ad litem* through best practice and professional development in accordance with any Regulations made under Head 11(1), paragraphs (a) and (d);
- (e) monitoring service delivery and implementing quality assurance processes;
- (f) the selection and recruitment of in-house legal advisors on such terms and conditions as the Minister may, with the consent of the Minister for Public Expenditure and Reform, from time to time determine;
- (g) the establishment of a panel (to be known as “the solicitors' panel”) containing a list of names of solicitors who are willing to provide legal services, and the establishment of a panel (to be known as “the barristers' panel”) containing a list of names of barristers who are willing to provide legal services, on such terms and conditions as the Minister may, with the consent of the Minister for Public Expenditure, from time to time determine;
- (h) the provision of legal advice and assigning solicitors and barristers in accordance with any Regulations made under Head 11(1)(b) to Guardians *ad litem* assigned in proceedings in accordance with paragraph (c);
- (i) information and records management including in relation to personal data;
- (j) implementing financial management and controls; and
- (k) operating a complaints procedure in accordance with any Regulations made under Head 11(1)(f).

Explanatory Note:

Subhead (1) will enable the Minister to put in place a nationally organised and managed Guardian *ad litem* service to enable and facilitate the child's views to be heard in proceedings (District, Circuit and High) under the Child Care Act 1991, to enhance the decision making capacity of the Courts regarding the child's views and best interests and support Guardians *ad litem* in carrying out their functions under Head 4.

Subhead (2) clarifies that such a service will comprise the management and operation of a national service on such terms as the Minister may determine with the consent of the Minister for Public Expenditure and Reform.

Subhead (3) provides a non-exhaustive list of what the management and operation of a national service entails. The Minister will recruit Guardians *ad litem* who will be employed and will also establish a panel of Guardians *ad litem* who will provide services as independent contractors and who may be assigned in proceedings where a Court has ordered the appointment of a Guardian *ad litem*. The Minister will also establish an in-house legal team to enable the Guardians *ad litem* to have access to legal advice and establish panels of solicitors and barristers to advise and represent Guardians *ad litem*.

Head 4 – Functions of a Guardian *ad litem*

Provide that:

- (1)** The functions of a Guardian *ad litem* on his/her appointment by a Court in proceedings under the Child Care Act 1991 will be to:

 - (a) inform the Court of any views expressed by the child, and
 - (b) make recommendations to the Court on what is in the child's best interests in the proceedings before the Court having considered any views expressed by the child.

- (2)** Without prejudice to the generality of subhead (1), in the performance of his or her functions, a Guardian *ad litem* will:

 - (a) promote and facilitate the child's right to a voice and to have any views expressed by him/her considered in the proceedings;
 - (b) regard the best interests of the child as the paramount consideration;
 - (c) ensure that the child is informed of matters relevant to the proceedings having regard to the child's age and maturity including an explanation of how the views of the child were considered;
 - (d) ascertain the views of the child, as far as practicable, having regard to the child's age and maturity, and accurately inform the Court of any views expressed by the child in relation to the matters to which the proceedings relate;
 - (e) provide the Court with such assessment of the child's situation as it may request or as may be appropriate in the circumstances including in relation to the care plan for the child for the purpose of consideration and determination of the proceedings before it;
 - (f) provide the Court with a response to any specific question it has raised or any information, including opinion, it has sought in

relation to the views and best interests of the child in the proceedings before it;

- (g) bring to the attention of the Court any information or matter that s/he considers pertinent to the proceedings before the Court;
- (h) provide a written report to the Court and recommend to the Court a course of action that, in the professional opinion and experience of the Guardian *ad litem*, would be in the best interests of the child, and
- (i) inform the child of the outcome of the proceedings in language appropriate to the age and maturity of the child.

(3) For the purposes of the performance of his or her functions under subhead (1), a Guardian *ad litem* in respect of a child who is the subject of proceedings under the Child Care Act 1991 may:

- (a) make enquiries orally or in writing of any person as may be appropriate, including the parents of the child who is the subject of the proceedings;
- (b) seek a direction from a Court in relation to procuring copies of existing reports from any person relating to the child and/or the child's circumstances relevant to the welfare and protection of the child including but not limited to school reports and medical reports;
- (c) seek a direction from a Court in relation to procuring a report, including medical, psychological, psychiatric or other report, from a person relating to the child and/or the child's circumstances, where such a report does not currently exist or exists but is no longer relevant and where consultation in relation to procuring such a report has taken place with the Child and Family Agency;

- (d) cross-examine only in the following circumstances:
 - (i) where the Guardian *ad litem* intends to give evidence on a particular matter which may conflict or contradict the evidence being given by a party or witness, s/he shall put such evidence to the witness or party by way of cross-examination; and
 - (ii) where a party or a witness to the proceedings gives evidence that impugns the conduct, reputation or good name of the Guardian *ad litem*, the Guardian *ad litem* shall be permitted to cross-examine the party or witness; and
 - (e) seek legal advice and representation to be engaged through the national service established by the Minister under Head 3.
- (4)** Where information requested by a Guardian *ad litem* under subhead (3)(a) is not provided, the Guardian *ad litem* may seek a direction from the Court in relation to the provision of the information by the person to whom the enquiry was directed.
- (5)** A Guardian *ad litem* will, when performing his/her functions in respect of a child have regard to the following:
- (a) the principle that it is generally in the best interests of a child to be brought up in his/her own family (s. 3(2)(c) of the Child Care Act 1991); and
 - (b) that the Child and Family Agency in the performance of its functions in respect of an individual child under the Child Care Act 1991 regards the best interests of the child as the paramount consideration (s. 9(2) of the Child and Family Agency Act 2013).
- (6)** In determining for the purposes of exercising his or her function, what is in the best interests of a child, the Guardian *ad litem* will have regard to all of the factors or circumstances that it regards as relevant to the child concerned and his or her family including the following:
- (a) the child's age and maturity and any special characteristics;

- (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 concerned where s/he has chosen to express such views;
- (d) the physical, psychological and emotional needs of the child;
- (e) the child's social, intellectual and educational needs;
- (f) the child's religious, spiritual, cultural and linguistic upbringing and needs;
- (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, and
- (h) any other particular circumstances pertaining to the child concerned.

Explanatory Note:

The core objective and focus of a Guardian *ad litem* is to inform the Court of any views expressed by the child and make recommendations on what, in his or her professional opinion, is in the child's best interests having considered any views of the child.

Subhead (1) provides that the functions of a Guardian *ad litem* on his/her appointment by a Court in proceedings before it under the Child Care Act 1991 is to inform the Court of the child's views and make recommendations on what is in the best interests of the child. The Guardian *ad litem* will hear any views expressed by the child and have regard to them in formulating his/her report for the Court and the Guardian *ad litem* will advise the Court in his or her professional opinion on what is in the best interests of the child. The Guardian *ad litem* is not constrained by any views of the child in formulating his/her opinion on what is in the best interests of the child.

Subhead (2) provides for the statutory duties of a Guardian *ad litem* as follows:

- promoting and facilitating the child's right to a voice in proceedings and to have his/her views considered;
- ensuring that the child is fully informed in relation to the proceedings before the Court having regard to his/her age and maturity;
- regarding the best interests of the child as the paramount consideration;
- ascertaining the child's views and accurately informing the Court of any views expressed so that due weight may be given to them, having regard to the age and maturity of the child;
- answering any specific questions posed by the Court and bringing to the Court's attention any information or matter that s/he thinks pertinent to the proceedings before the Court including in relation to the child's care plan; and
- providing a written report and recommending to the Court a course of action that, in the professional opinion and experience of the Guardian *ad Litem*, would be in the best interests of the child.

Subhead (3) sets out the powers of a Guardian *ad Litem* and provides that in carrying-out his/her role, the Guardian *ad litem* will have the power in the course of his/her appointment to:

- make enquiries orally or in writing of any person including the parents of the child who is the subject of the proceedings (The provision of information from the Child and Family Agency to the Guardian *ad litem* is provided for under Head 8);
- seek a direction from a Court in relation to procuring copies of existing reports of any person in relation to the child and/or the child's circumstances including school reports and doctor's reports;
- seek a direction from a Court relating to procuring a new or revised report from a person in respect of the child and/or the child's circumstances following consultation with the Child and Family Agency. It is intended that the reference to the '*child's circumstances*' captures reports on parents and others in the child's life while not explicitly naming such persons;

- cross-examine only in the following circumstances:
 - (i) where the Guardian *ad litem* intends to give evidence on a particular matter which may conflict or contradict the evidence being given by a party or witness, in accordance with the rule in *Browne v Dunn*, the Guardian *ad litem* will be permitted to put such evidence to that witness by way of cross-examination in order to afford that person an opportunity of commenting on same; and
 - (ii) where a party or a witness to the proceedings gives evidence that impugns the conduct, reputation or good name of the Guardian *ad litem*; and
- seek legal advice or representation to be engaged through the national service.

It is intended that a panel of solicitors and a panel of barristers willing to represent Guardians *ad litem* in child care proceedings will be established by the Minister. A Guardian *ad litem* seeking legal advice will firstly access in-house legal advice from the service's in-house legal facility. Where further legal services are sought and where it is deemed appropriate in accordance with any Regulations made by the Minister, an in-house solicitor or a solicitor from the panel and a barrister, as appropriate, may be assigned to the Guardian *ad litem*. The appointment of legal representation under section 25(2) of the Child Care Act 1991 for a child who is made a party to the proceedings does not automatically mean the appointment of legal representation for a Guardian *ad litem* who remains appointed for the child in the proceedings notwithstanding the child being made a party. The Minister may make Regulations providing for the circumstances in which a Guardian *ad litem* will be assigned legal representation. The Regulations may include arrangements for a Guardian *ad litem* to access solicitor and/or counsel in the course of the hearing of proceedings (as appropriate in accordance with the relevant jurisdiction) to enable the Guardian *ad litem* to cross-examine in accordance with subhead (3)(d).

Under Head 3(3)(g), the Minister may, with the consent of the Minister for Public Expenditure, set the terms and conditions of the solicitors and barristers on the panels.

Subhead (4) provides that where information has been sought by a Guardian *ad litem* from any person including the parents of the child and the information has not been provided, the Guardian *ad litem* may seek a direction from the Court in relation to the provision of the information by that person.

Subhead (5) provides for particular statutory provisions to which the Guardian *ad litem* will have regard when performing his/her functions in respect of a child.

Subhead (6) provides for a non-exhaustive list of factors that the Guardian *ad litem* will have regard to in considering the best interests of the child who is the subject of the proceedings.

Head 5 - Status of a Guardian *ad litem*

Provide that:

- (1) A Guardian *ad litem* will be independent in the exercise of his or her functions.
- (2) A Guardian *ad litem* will not be a party to the proceedings.
- (3) In carrying out his/her role, a Guardian *ad litem* will:
 - (a) only deal with matters, and express opinions, that fall within the limits of his/her professional competence;
 - (b) give a balanced opinion, well-reasoned and honestly held, and explain how s/he has arrived at that view;
 - (c) make his/her report independently and impartially having considered any views expressed by the child who is the subject of the proceedings, and
 - (d) avoid a conflict of interest and disclose any potential conflict to the Court.
- (4) If a particular question arises which falls outside the area of competence and experience of a Guardian *ad litem*, s/he will make that known to the Court.
- (5) The Court will determine the weight to be given to the evidence of a Guardian *ad litem*.
- (6) A Guardian *ad litem* may not:
 - (a) subject to Head 4, subhead (3)(d), cross-examine parties or witnesses, or
 - (b) subject to seeking a direction from the Court in accordance with Head 4, subhead (3)(c), request that the child undergo medical, psychiatric, psychological or other professional assessment for the purposes of preparing his or her report for the Court where such a report does not exist or exists but is no longer relevant and where consultation in relation to procuring such a report has taken place with the Child and Family Agency.

Explanatory Note:

The proposed role of the Guardian *ad litem* is that s/he will inform the Court of any views expressed by the child and make recommendations on what is in the child's best interests having considered any views expressed by the child. The role of the Guardian *ad litem* is similar to an expert witness in that s/he is engaged to give an expert opinion on what is in the best interests of the child based on experience, knowledge and expertise. However, his/her role goes further than the role of an expert witness in that in order to provide an expert opinion, s/he firstly engages with the child who is the subject of the proceedings to ascertain their views should they wish to express views. Guardians *ad litem* have a duty to the Court to provide independent, impartial and unbiased evidence having considered any views expressed by the child who is the subject of the proceedings. The Guardian *ad litem* shall at all times regard the best interests of the child as the paramount consideration in the exercise of his/her functions. Unlike an expert witness as it is generally understood, the Guardian *ad litem* is not engaged by either of the parties to the proceedings and will be assigned by the Minister following an order for the appointment of a Guardian *ad litem* by a Court.

The Guardian *ad litem* is not in the nature of an assessor in admiralty or competition proceedings who is solely there to assist the Court in understanding or clarifying a matter, or evidence in relation to a matter in respect of which that person has skill or experience.

Subhead (1) asserts the independence of a Guardian *ad litem* in the exercise of his/her function in ascertaining any views of the child and making recommendations on what is in the best interests of the child. Although the Minister will employ Guardians *ad litem* and engage the services of Guardians *ad litem* as independent contractors as may be required to provide the service and implement performance management incorporating best practice, the

independence of the Guardian *ad litem* in the exercise of his/her functions will be protected.

Subhead (2) provides that a Guardian *ad litem* will not be a party to proceedings.

Subheads (3) and (4) set out some guiding principles in relation to the exercise of the Guardians *ad litem* Court role and the presentation of his/her evidence to the Court.

Subhead (5) clarifies that the Court determines the weight to be given to the evidence of the Guardian *ad litem*. The decision making function of the Court will not be usurped by the Guardian *ad litem*, and it remains at all times the duty of the Court to determine the matter at hand. The evidence of a Guardian *ad litem* will therefore only be of persuasive, not binding effect, to be taken into account with all the other evidence in the case.

Subhead (6) clarifies that, subject to Head 4, subhead (3)(d), a Guardian *ad litem* may not cross-examine parties or witnesses. This is consistent with the role proposed for the Guardian *ad litem* that s/he is independent and is not a party to proceedings. However, in order to safeguard the procedural rights of the Guardian *ad litem*, parties or witnesses to the proceedings, cross-examination by a Guardian *ad litem* is permitted in two particular circumstances as provided for in Head 4, subhead (3)(d).

Subhead (6) also clarifies that subject to seeking a direction from the Court under Head 4, subhead (3)(c), a Guardian *ad litem* may not request that the child undergo medical, psychiatric, psychological or other professional assessment for the purposes of procuring a report (where such a report does not already exist or exists but is no longer relevant). Seeking a direction from the Court will help to avoid multiple assessments in respect of a child and will take account of the GDPR in terms of the Court order imposing a legal obligation on third parties to provide such information to the Guardian *ad litem*.

Other provisions enable the Guardian *ad litem* to apply to a Court for an order for the release of personal data relating to the child and the child's circumstances from the Child and Family Agency (Head 8) and to seek a direction from a Court in relation to procuring copies of existing reports from any person in relation to the child (Head 4, subhead (3)(b)). While seeking a direction from a Court in relation to existing reports and new/revised reports will be a new practice for Guardians *ad litem*, this takes account of the General Data Protection Regulation. In this context, Head 4 only provides a legal basis for the Guardian *ad litem* to process personal data including sensitive personal data and it does not impose a legal obligation on third parties to provide such information to the Guardian *ad litem* and a Court order or express provision in legislation is required. Head 4, subheads (3)(b) and (3)(c) are intended to provide that the legal obligation will stem from the Court order.

Head 6 - Qualifications & eligibility for appointment of Guardian *ad litem*

Provide that:

- (1)** A person will not be eligible for appointment by the Minister as a Guardian *ad litem* under Head 3(3)(a) or be eligible for inclusion on the panel of Guardians *ad litem* established by the Minister under Head 3(3)(b), unless:

 - (a) s/he has a relevant qualification in:

 - (i) social work;
 - (ii) social care;
 - (iii) psychology, or
 - (iv) psychiatry, and
 - (b) s/he has been the subject of a vetting disclosure in accordance with section 14(4)(a) or a vetting disclosure under section 14(4)(b) of the National Vetting Bureau (Children and Vulnerable Persons) Act 2012 which is extant.
- (2)** Where a person holds a relevant qualification in accordance with subhead (1)(a)(i), s/he is required to have engaged in the practice of the profession of social worker, as it relates to the provision of social work services to children and has at least 5 years post graduate experience in child welfare and child protection.
- (3)** Where a person holds a relevant qualification in accordance with subhead (1)(a)(ii), s/he is required to have engaged in the practice of the profession of social care worker as it relates to the provision of social care services to children and has at least 5 years post graduate

experience in (i) child welfare and child protection and/or (ii) family support.

- (4) Where a person holds a relevant qualification in psychology under subhead (1)(a)(iii), s/he is required to have practiced child and adolescent clinical psychology for a period of at least 5 years.
- (5) Where a person holds a relevant qualification in psychiatry under subhead (1)(a)(iv), s/he is required to have practiced child and adolescent psychiatry for a period of at least 5 years.
- (6) A reference in subheads (2) to (5) to 'of at least 5 years' includes a reference to periods, which, when taken together amount to not less than 5 years.
- (7) A person who on the date of the commencement of this section:
 - (a) holds a qualification other than one within the meaning of subhead (1)(a)(i) to (iv), or
 - (b) who holds no professional qualification, and
 - (c) who satisfies the following conditions:
 - (i) s/he has been appointed by a Court as a Guardian *ad litem* on at least 9 occasions over the preceding 36 months;
 - (ii) not less than 3 of those appointments occurred in the preceding 18 months; and
 - (iii) s/he holds a vetting disclosure in accordance with section 14(4)(a) or a vetting disclosure under section 14(4)(b) of the National Vetting Bureau (Children and Vulnerable Persons) Act 2012 which is extant;

shall, on application to the Minister within 12 months of the commencement of this section, be eligible for appointment as a Guardian *ad litem* by the Minister under Head 3(3)(a) or be eligible for inclusion on

the panel of Guardians *ad litem* established by the Minister under Head 3(3)(b).

- (8) A person who falls within subhead (7) and is appointed as a Guardian *ad litem* by the Minister under Head 3(3)(a) or who is included on the panel established by the Minister under Head 3(3)(b), may be required to successfully complete such induction or other training as may be deemed necessary by the Minister in accordance with Regulations made by him/her under Head 11.
- (9) The Minister may prescribe additional relevant qualifications and the duration of the post graduate experience required in respect of additional categories of persons who are eligible for appointment as a Guardian *ad litem* under Head 3(3)(a) or eligible for inclusion on the panel of persons eligible for assignment as a Guardian *ad litem* under Head 3(3)(b).

Explanatory Note:

The qualifications required for a person to be eligible to act as a Guardian *ad litem* with the new national service (as the only source from which such appointments may be made) will be in either social work, social care, child psychology or psychiatry.

Subhead (1) provides for the qualifications and experience requirements to be eligible for appointment as a Guardian *ad litem* by the Minister under Head 3(3)(a) or be eligible for inclusion on the panel established by the Minister under Head 3(3)(b).

The Guardian *ad litem* must also have been the subject of a vetting disclosure. All decisions in respect of the suitability of an applicant to be appointed or included on the panel following a vetting disclosure will be a matter for the Minister.

Subheads (2) to (5) set out the post graduate experience required in respect of each profession referred to in subhead (1).

Subhead (6) clarifies that the reference to 5 years post graduate experience is not required to be one continuous period but may be made up of a number of smaller periods which in total amount to 5 years.

Subhead (7) provides for particular transitional arrangements for existing Guardians *ad litem*. Where existing Guardians *ad litem* satisfy certain criteria, they will, on application to the Minister, within 12 months of the commencement of the section, be eligible for appointment as a Guardian *ad litem* by the Minister under Head 3(3)(a) or be eligible for inclusion on the panel established by the Minister under Head 3(3)(b).

Subhead (8) provides that a person who falls within the transitional arrangements provided for under subhead (7) may be required to undergo further training deemed necessary by the Minister in accordance with any Regulations made by him/her under Head 11.

Subhead (9) provides that the Minister may prescribe additional relevant qualifications and the duration of the post graduate experience required in respect of additional categories of persons who are eligible for appointment as a Guardian *ad litem* under Head 3(3)(a) or eligible for inclusion on the panel of Guardians *ad litem* established under Head 3(3)(b). The option of the Minister making Regulations will provide the flexibility to include other professions as may be identified by the service as it becomes fully operational.

Head 7 - Appointment and cessation of appointment of a Guardian *ad litem* by a Court

Provide that:

- (1)** Subject to subhead (7), the High Court will order the appointment of a Guardian *ad litem* in all proceedings under Part IVA of the Child Care Act 1991.
- (2)** Subject to subhead (8), in proceedings under Parts IV or VI of the Child Care Act 1991, the District Court or Circuit Court of its own motion or on the application of any party may order the appointment of a Guardian *ad litem*.
- (3)** Without prejudice to the generality of subhead (2), the Court in determining whether to make an order for the appointment of a Guardian *ad litem* under that subhead, will consider the following:
 - (a) the age and maturity of the child;
 - (b) the opportunity for the child to be heard directly or by other means and whether the making of the order will assist the expression by the child of his or her views in the proceedings where s/he wishes to do so;
 - (c) any previous report of a Guardian *ad litem* on a question affecting the welfare of the child;
 - (d) the nature of the issues in dispute in the proceedings; and
 - (e) the views expressed by child and the parties to the proceedings in relation to the appointment of a Guardian *ad litem*.
- (4)** Where the District Court or Circuit Court declines to make an order for the appointment of a Guardian *ad litem* pursuant to subhead (2) having regard to subhead (3), it will state:
 - (a) in open Court its reasons for declining to make such an order, and
 - (b) the mechanism by which it intends to hear any views that the child may wish to express.

- (5)** Subject to subheads (7), (8) and (9) and Head 10 (transitional provision), the appointment of a Guardian *ad litem* will cease:
- (a) on a determination by a Court to:
 - (i) refuse an interim care order;
 - (ii) refuse an interim special care order;
 - (iii) grant a care order, a supervision order or a special care order;
 - (iv) refuse a care order, a supervision order or a special care order;
 - (b) on a determination by a Court of applications under sections 22, 37 and 47 of the Child Care Act 1991;
 - (c) by direction of a Court, or
 - (d) where the child attains the age of 18 years.
- (6)** Where the appointment of a Guardian *ad litem* ceases under paragraphs (a), (b), or (c) of subhead (5), the Guardian *ad litem* will, as soon as practicable inform the child of the cessation of his/her appointment by virtue of the determination of the proceedings including the determination of any application before the Court or the cessation of his or her appointment by direction of the Court in a manner appropriate to the child's age and maturity.
- (7)** Where a Guardian *ad litem* is appointed pursuant to subhead (1), in an application for an interim special care order under section 23L of the Child Care Act 1991, the appointment of a Guardian *ad litem* will not cease on the granting of an interim special care order or the granting of any extension or extensions of the period of the order and the appointment will cease on the determination of the special care order application pursuant to section 23H of the Child Care Act 1991 or where there are no further special care proceedings under that Act.

- (8)** Where a Guardian *ad litem* is appointed pursuant to subhead (2), in an application for an interim care order pursuant to section 17 of the Child Care Act 1991, the appointment of a Guardian *ad litem* will not cease on the granting of an interim care order or the granting of any extension or extensions of the period of the order and the appointment will cease only on the determination of the care order application pursuant to section 18 of the Act or where there are no further care proceedings under that Act.
- (9)** Notwithstanding subhead (5), a Court may determine that the appointment of a Guardian *ad litem* will continue where any of the following circumstances apply:
- (a) where a matter is kept under review by a Court order,
 - (b) where the matter is subject to statutory review in accordance with section 23I of the Child Care Act 1991 (as amended by the Child Care (Amendment) Act 2011), or
 - (c) where an order is under appeal.
- (10)** Where, having regard to subhead (9), the Court determines that the appointment of a Guardian *ad litem* will continue beyond the determination of the matters referred to in subhead (5), it shall state its reasons for doing so in open Court.
- (11)** Notwithstanding the cessation of an appointment of a Guardian *ad litem* under subhead (5), where a Court orders the appointment of a Guardian *ad litem* in different proceedings in respect of the same child, the Minister will seek, in as far as practicable and subject to the views of the child expressed verbally or in writing to the Court, to assign the same Guardian *ad litem* to the child in the proceedings before it.

(12) Where a child in respect of whom an order has been made under subhead (1) or subhead (2) is a party to the proceedings in question (whether by way of an order under section 25(1) of the Child Care Act 1991 or otherwise), the Court may determine that the appointment of the Guardian *ad litem* may continue or cease, as it may consider appropriate.

Explanatory Note:

Subhead (1) provides, subject to subhead (7), that the High Court will as a matter of course order the appointment of a Guardian *ad litem* in special care proceedings.

Subhead (2) provides, subject to subhead (8), that the District Court or Circuit Court may on its own motion or on the application of any party order the appointment of a Guardian *ad litem*.

Subhead (3) provides that the District Court or Circuit Court in determining whether to make an order to appoint a Guardian *ad litem* will have regard to certain matters. The intention is that the appointment of a Guardian *ad litem* will be the norm in District and Circuit Court proceedings unless the Court having considered particular matters as provided for under this subhead declines to make the appointment. Subhead (3) is in the main consistent with section 32 of the Guardianship of Infants Act 1964 as amended by the Children and Family Relationships Act 2015¹ in relation to the matters to which the Court will have regard in determining whether to, *inter alia*, appoint an expert to determine and convey the views of the child.

¹ Section 63

Subhead (4) provides that where the Court declines to make an order for the appointment of a Guardian *ad litem* in District or Circuit Court proceedings, it must state its reasons for doing so in open Court and state the mechanism by which it intends to hear any views that the child may wish to express.

Subhead (5) provides that, subject to the particular circumstances in subheads (7), (8) and (9) and Head 10, the appointment of a Guardian *ad litem* will cease on the determination of certain applications for particular care orders (District, Circuit and High) including the determination of various applications relating to the variation and discharge of orders, access to children in care and for directions from the Court. The appointment may also cease by direction of the Court or where the child attains 18 years of age.

The Guardian *ad litem* has a very specific role under Head 4 in terms of informing the Court of the child's views and making recommendations on what is in the child's best interests in proceedings under the Child Care Act 1991. The intention is that where the appointment of a Guardian *ad litem* is ordered by a Court, it will, in the main, cease on the determination of the proceedings before the Court. The exceptions to this are where there is an interim care order or there is an interim special care order and also where the specific circumstances under subhead (9) apply. In addition, Head 10 is a transitional provision to ensure the non-disruption of existing Guardian *ad litem* appointments and legal representation appointments where proceedings are underway at the time of the establishment of a national service by the Minister.

The proposal that in the main, the appointment of a Guardian *ad litem* will cease on the determination of the proceedings before the Court takes account of the mandatory appointment of a Guardian *ad litem* in all special care proceedings (and applications) and the creation of a presumption in favour of the appointment of a Guardian *ad litem* in all other proceedings. Where there are subsequent proceedings relating to a child and a Court orders the appointment of a Guardian *ad litem* and where a Guardian *ad litem* was previously appointed, it is intended that there will be no loss of continuity in

terms of the same Guardian *ad litem* being assigned by the Minister in the new proceedings in as far as practicable as provided for under subhead (11) subject to the views of the child as expressed to the Court.

Subhead (6) provides that a Guardian *ad litem* will inform the child as soon as practicable of the cessation of his/her appointment by virtue of the determination of the proceedings including any applications before the Court or the cessation of his/her appointment by direction of the Court in a manner appropriate to the child's age and maturity.

Subhead (7) provides clarity that the appointment of a Guardian *ad litem* will not cease on the determination of a Court to grant an interim special care application and will cease only on the determination of the special care application or where there are no further special care proceedings.

Subhead (8) provides clarity that the appointment of a Guardian *ad litem* will not cease on the determination of a Court to grant an interim care application and will cease only on the determination of the care application or where there are no further care proceedings.

Subhead (9) provides a discretion for the Court to order contrary arrangements where particular circumstances apply but it is intended that the cessation/termination of appointment of a Guardian *ad litem* on the determination of the proceedings provided for at subhead (5) will be the norm. Paragraph (b) referring to statutory review under section 23I (in Part IVA of the Child Care Act 1991 as amended by the Child Care (Amendment) Act 2011) was commenced by SI 637/2017.

Subhead (10) provides that where contrary arrangements to the norm relating to the cessation of appointments are made under subhead (9), the Court will be required to state its reasons in open Court for continuing the appointment of a Guardian *ad litem*.

Subhead (11) clarifies that where a Court orders the appointment of a Guardian *ad litem* in different proceedings in respect of the same child, the Minister will seek, in as far as is practicable and subject to the views of the child as expressed to the Court, to assign the same Guardian *ad litem* to the child.

Subhead (12) provides that where a child becomes a party to the proceedings, the Court may determine that the appointment of the Guardian *ad litem* under subheads (1) or (2), may continue or cease, as it may consider appropriate.

It is proposed to change the automatic prohibition in section 26(4) of the Child Care Act 1991 whereby a child cannot have a Guardian *ad litem* and be a party to proceedings at the same time in favour of a position where it will be a matter for a Court to decide whether or not a Guardian *ad litem* should be discharged in circumstances where the child becomes a party.

Head 8 - Provision of information from the Child and Family Agency to a Guardian *ad litem*

Provide that:

- (1)** Where a Guardian *ad litem* appointed by a Court seeks the provision of all or any personal data from the Child and Family Agency including sensitive personal data relating to the child and/or the child's circumstances relevant to the welfare and protection of the child who is the subject of the proceedings before the Court, s/he shall apply to the Court for the release of the data and the Court may order the release of such data as it deems appropriate in the particular circumstances of the case.
- (2)** Where a Court has ordered the release of personal data under subhead (1), the Child and Family Agency will, as soon as is reasonably practical, provide to a Guardian *ad litem*, in the course of his/her appointment, periodic updates comprising documents and information relating to a child who is the subject of the proceedings inclusive of information on any material change to a child's circumstances relevant to the proceedings before the Court.
- (3)** Nothing in this Head will be taken to compel the production by the Child and Family Agency of any document which the Agency would be exempt from producing in proceedings in a Court on the ground of legal professional privilege.
- (4)** Where in any proceedings under Part IV, IVA or VI of the Child Care Act 1991, a question arises as to whether a document is or is not subject to legal professional privilege, the Guardian *ad litem* in asserting such privilege may apply to the Court which has *seisin* of the proceedings for the determination of any matter relating to such document and the Court may make such order as it considers appropriate.

Explanatory Note:

This Head reflects the policy intent in respect of the provision of personal information by the Child and Family Agency to a Guardian *ad litem* including personal data relating to the child and/or the child's circumstances. The Head is intended to incorporate requirements under the General Data Protection Regulation which will apply from May 2018.

It is proposed that Guardians *ad litem* will have access to relevant case records of the Child and Family Agency (i.e. those not subject to legal privilege). It is proposed that where the information sought relates to the child and/or the child's circumstances, an application to the Court seized of the proceedings will be made by the Guardian *ad litem* and the Court may order the release of such information as it deems appropriate in the circumstances. The obligation on the Child and Family Agency to provide the information will flow from the order of the Court.

It is also proposed that where a Court has ordered the release of personal data relating to a child, the Guardian *ad litem* will be entitled to receive in the course of his or her appointment, periodic updates from the Child and Family Agency comprising documents and information inclusive of information on any material change to a child's circumstances relevant to the proceedings before the Court.

Subhead (1) provides for an application to a Court by a Guardian *ad litem* for the provision of personal information relating to a child including information on the child's circumstances. The Court may order the release of such information as it deems appropriate in the circumstances.

Subhead (2) provides that where a Court has ordered the release of personal information under subhead (1), the Child and Family Agency will provide a Guardian *ad litem* in the course of his/her appointment with updates on the

child's situation including information on any material change to the child's circumstances which is relevant to the proceedings before the Court.

Subhead (3) provides for the exclusion of documents falling within legal professional privilege from the obligation on the Child and Family Agency to provide to a Guardian *ad litem*.

Subhead (4) provides for an application by the Guardian *ad litem* to the Court seized of the proceedings where a question arises relating to the Agency's assertion of legal professional privilege in respect of a document and the Court may make such order as it considers appropriate.

Head 9 - Provision of information to a child relating to the report of a Guardian *ad litem*

Provide that:

- (1)** A copy of a report submitted to a Court by a Guardian *ad litem* will, except in the case of a child who is a party, be given to the parties to the proceedings.
- (2)** A Guardian *ad litem* will, as may be appropriate, having regard to the age and maturity of the child, inform a child in language appropriate to the child's age and maturity, of the contents of his/her report relating to (i) any views expressed by the child and (ii) the recommendations to the Court on the course of action that s/he considers to be in the child's best interests in the proceedings before the Court.
- (3)** A child to whom a Guardian *ad litem* was appointed under Head 7 may, on attaining 18 years of age, apply to the Court seised of the original proceedings, on notice to the parties to the proceedings and the Guardian *ad litem*, for a copy of the Guardian *ad litem* report.
- (4)** On application made under subhead (3), the Court will order the release of the report of the Guardian *ad litem* unless it considers that there is a risk to the health or welfare of the applicant or any other person.

Explanatory Note:

The legislation will provide that having attained the age of 18 years it will be open to the person to whom a Guardian *ad litem* was appointed in child care proceedings to apply to the Court seised of the original proceedings for a copy

of the report of the Guardian *ad litem* and notice of such an application would be provided to the parties to the proceedings and the Guardian *ad litem*. It is envisaged that the Court will make the report available unless it considers that there are reasons for not doing so relating to the safety and welfare of the applicant or of any other person. The measure will only apply prospectively under the amending legislation i.e. where Guardian *ad litem* reports have been made under the reformed arrangements.

Subhead (1) provides that a copy of the report of a Guardian *ad litem* will be given to the parties to the proceedings except in the case of a child who is a party to the proceedings.

Subhead (2) provides that a Guardian *ad litem* will share with the child, in language appropriate to the child's age and maturity the contents of his/her report to the Court relating to (i) any views expressed by the child and (ii) the recommendations to the Court on the course of action that s/he considers to be in the child's best interests.

Subhead (3) provides that having attained the age of 18 years, it will be open to a person to whom a Guardian *ad litem* was appointed under Head 7 to apply to the Court seised of the original proceedings for a copy of the report of the Guardian *ad litem* and notice of such an application would be provided to the parties to the proceedings and the Guardian *ad litem*. This measure would only apply prospectively under the amending legislation i.e. where an order for the appointment of a Guardian *ad litem* has been made under the reformed arrangements.

Subhead (4) provides that on application under subhead (3), the Court will make the report available unless it considers that there are reasons for not doing so relating to the health or welfare of the applicant or of any other person.

This provision is consistent with SI No. 83/1989 which provides that a data subject access request will not be acceded to in respect of social work data if it would be likely to cause serious harm to the physical or mental health or emotional condition of the data subject.²

² Data Protection (Access Modification) (Social Work) Regulations, 1989

Head 10 - Transitional provision - continuation of existing appointment of a *Guardian ad litem* and continuation of legal representation

Provide that:

- (1)** A *Guardian ad litem* who was appointed in proceedings under the Child Care Act 1991, before the establishment under Head 3 of a national *Guardian ad litem* service, may continue to act in that capacity under their existing terms and conditions for the purposes of the proceedings before the Court and the appointment will cease in accordance with Head 7(5).
- (2)** Where the appointment of a *Guardian ad litem* continues under subhead (1), legal representation engaged by a *Guardian ad litem* may continue until the cessation of the appointment of a *Guardian ad litem* pursuant to Head 7(5) or may be terminated at the discretion of the Court.
- (3)** Subhead (1) applies subject to the *Guardian ad litem* being the subject of a vetting disclosure in accordance with section 14(4)(a) or a vetting disclosure under section 14(4)(b) of the National Vetting Bureau (Children and Vulnerable Persons) Act 2012 which is extant.

Explanatory Note:

The purpose of this Head is to ensure the non-disruption of existing *Guardian ad litem* appointments and legal representation appointments where proceedings are underway at the time of the establishment of a national service by the Minister.

Subhead (1) provides that a Guardian *ad litem* who was appointed in proceedings under the Child Care Act 1991 before the coming into force of a national service will continue to act in that capacity for the purpose of the specific proceedings before the Court and the appointment will cease in accordance with Head 7(5). The objective is to ensure continuity of arrangements where a Guardian *ad litem* is already appointed at the time reformed arrangements take effect under Head 3.

Subhead (2) provides that where the appointment of a Guardian *ad litem* continues under subhead (1), legal representation already engaged by the Guardian *ad litem* may continue until the cessation of the appointment of the Guardian *ad litem* pursuant to Head 7(5) or may be terminated at the discretion of the Court.

Subhead (3) provides clarification that the appointment of a Guardian *ad litem* will only continue subject to the Guardian *ad litem* being in possession of a current Garda Vetting disclosure which falls to the Minister to review in accordance with the National Vetting Bureau (Children and Young Persons) Act 2012.

Head 11 – Regulations

Provide that:

- (1) The Minister may make such regulations as are necessary for the purpose of giving effect to this Part or to be prescribed to give effect to this Part including the following:
 - (a) matters relating to best practice in the exercise of the functions of a Guardian *ad litem* which has the best interests of the child as the paramount consideration;
 - (b) the circumstances in which a Guardian *ad litem* may obtain or be provided with legal advice or representation by a solicitor employed by the Minister or solicitor or barrister or on the panel established by the Minister under Head 3;
 - (c) the relevant qualification from an educational body that will satisfy qualification requirements under Head 6(1)(a) for appointment as a Guardian *ad litem* under Head 3(3)(a) or inclusion on the panel established by the Minister under Head (3)(3)(b);
 - (d) matters relating to the continuing professional development, training and standards;
 - (e) matters relating to induction or additional training in respect of persons who satisfy the transitional arrangements provided for at Head 6(7); and
 - (f) matters relating to complaints and quality assurance processes.

- (2) Without prejudice to any provision of this Act, any regulations under this Head may contain such incidental, consequential, transitional or supplementary provisions as may appear to the Minister to be necessary or expedient for the purposes of this Part.

- (3) Every regulation made by the Minister under this Part shall be laid before each House of the Oireachtas as soon as may be after it is made and, if a resolution annulling the regulation is passed by either such House within the next 21 days on which that House sits after the regulation is laid before it, the regulation shall be annulled accordingly, but without prejudice to the validity of anything previously done thereunder.

Explanatory Note:

This Head is a standard provision to empower the Minister to make regulations to give effect to this Bill.

Head 12 – Amendment of section 23NK of the Principal Act

Provide that:

The following section is substituted for section 23NK of the Child Care Act 1991:

“23NK.- Where a child is in the care of the Child and Family Agency pursuant to a special care order or an interim special care order, the High Court may –

- (a) of its own motion, or
- (b) on the application of the Child and Family Agency, a parent, the guardian of the child, a relative or a Guardian *ad litem*,

give directions or make an order on any question affecting the welfare of the child as the High Court thinks proper and may vary or discharge any such direction or order.”

Explanatory note:

Section 23NK was commenced on 31 December 2017 by SI 637/2017. The provision as it currently is on the Statute Book does not provide for a Guardian *ad litem* to make an application for directions or make an application for an order in special care cases. It is proposed to provide for Guardians *ad litem* to make an application for directions or apply for an order on any question affecting the welfare of the child or apply to vary or discharge any such direction or order where a child is in care.

Heretofore, the role, function and powers of the Guardian *ad litem* were not set out and this influenced the drafting of section 23NK (which was incorporated into the Child Care Act 1991 by section 10 of the Child Care (Amendment) Act 2011) by limiting the Guardians *ad litem* involvement in proceedings to making recommendations in relation to the appropriateness of making of a special care

order, resulting in the involuntary admission of a child to a special care unit which would provide safe care in a secure therapeutic environment.

To support the newly defined role and functions of the Guardian *ad litem* (Heads 4 and 5) and in the best interests of the child, it is considered both necessary and appropriate that a Guardian *ad litem* should have the power to apply to the High Court for directions in relation to the care and welfare of the child (e.g. in relation to services and supports for the child or his/her parents that will assist them in caring for the child that the Guardian *ad litem*, through his/her interaction with the child and enquiries of appropriate persons, considers necessary).

Such a provision is particularly important in special care proceedings involving the involuntary detention of a child, so that such services and supports, if deemed required by a Court, can be put in place as quickly as possible.

It is also intended to make a similar provision in respect of District Court proceedings (S47) – see Head 15.

Head 13 – Amendment of section 24 of the Principal Act

Provide that:

The following section is substituted for section 24 of the Child Care Act 1991:

- “(1) In any proceedings before a Court under this Act in relation to the care and protection of a child, the Court, having regard to the rights and duties of parents, whether under the Constitution or otherwise, shall –
- (a) regard the best interests of the child as the paramount consideration,
- and
- (b) in so far as practicable, give due consideration, having regard to his/her age and maturity, to any views expressed by the child.
- (2) In any proceedings referred to in subsection (1), the Court will provide the child with the opportunity to have their views heard and will consider the most appropriate means to hear the child’s views having regard to the age and maturity of the child.”

Explanatory Note:

Subhead (1) provides that in child care proceedings, the Court will regard the best interests of the child as the paramount consideration and in so far as practicable having regard to the child’s age and maturity give due consideration to any views expressed by the child. This subsection is being substituted for the existing section 24 to reflect Article 42A which was incorporated into the Constitution by the Children’s Referendum.

Subhead (2) provides that the Court must consider how best to hear the child’s views e.g. appointment of a Guardian *ad litem*, meeting the child in chambers,

child addressing the Court, child writing a letter to the judge etc. This provision is incorporated as it is considered that the Court is best placed to determine how the child's views may be made known to the Court. In determining this matter, the Court will have regard to the age and maturity of the child.

Head 14 – Amendment of section 27 of the Principal Act

Provide that section 27 is amended as follows:

(1) In subsection (3), insert the words “and a Guardian *ad litem*, if any, appointed under Head 7, subhead (2)” after “that party”.

(2) Insert the following after subsection (5):

“(6) In this section, a reference to a “*party*” does not include a Guardian *ad litem*, appointed under Head 7, subheads (1) or (2) in respect of the proceedings concerned.

(7) In this section, where the proceedings are proceedings under Part IVA (as amended by the Child Care (Amendment) Act 2011), ‘court’ means the High Court.”

Explanatory Note:

Head 5 clarifies that a Guardian *ad litem* will not have ‘*party status*’. S/he is more in the nature of an expert witness albeit that the role of a Guardian *ad litem* goes further than that of an expert witness and s/he has a role engaging with the child to ascertain his/her views and communicate them to a Court.

A new subsection (6) to be inserted into section 27 by section 14(b) of the *Child Care (Amendment) Act 2011* (19/2011), proposed that in section 27, a reference to the party or parties includes a Guardian *ad litem*, if any, appointed in accordance with section 26. This amendment has not yet been commenced (most recent SI does not commence 14(b) – SI 637/2017) and it is proposed to repeal it as the provision is contrary to the current proposal that the Guardian *ad litem* will not be a party.

Subhead (1) will provide for a copy of any report procured under section 27 to be made available to a Guardian *ad litem* in addition to the parties where a Guardian *ad litem* is appointed. This will enable a Guardian *ad litem* to receive a copy of any report procured under section 27 notwithstanding that s/he does not have party status.

Subhead (2) provides for the insertion of a revised subsection (6) to clarify that a reference to 'party' in section 27 does not include a Guardian *ad litem*. The policy approach chosen is that a Guardian *ad litem* is more in the nature of an expert witness who has a role engaging with the child to ascertain their views and making recommendations on what is in the child's best interests having regard to any views expressed by the child. Section 14b of the Child Care (Amendment) Act 2011 which has not been commenced also provides for a new subsection (7) to be inserted into section 27 of the Child Care Act 1991 to clarify that a reference to 'Court' in Part IVA means the High Court. This provision will be carried through in the amendment proposed to section 27 by this Bill as section 14b of the Child Care (Amendment) Act 2011 is being repealed in its entirety.

Under this Bill, in addition to Guardians *ad litem* getting a copy of any report procured under section 27 by virtue of the amendment proposed at subhead (1) above, Guardians *ad litem* will also, under Head 4, subheads (3)(c) and (3)(d) have the power to seek a direction from a Court in relation to procuring an existing, new or revised report from a person for the purposes of exercising his/her functions under Head 4(1).

Head 15 - Amendment of section 47 of the Child Care Act 1991

Provide that the following section is substituted for section 47:

47.— Where a child is in the care of the Child and Family Agency, the District Court may, of its own motion or on the application of any person including a Guardian *ad litem*, give such directions and make such order on any question affecting the welfare of the child as it thinks proper and may vary or discharge any such direction or order.

Explanatory Note:

To support the newly defined role and functions of the Guardians *ad litem* (Heads 4 and 5) and in the best interests of the child, it is considered both necessary and appropriate that a Guardian *ad litem* should have the power to apply to the District Court for directions in relation to the care and welfare of the child (e.g. in relation to services and supports for the child or his/her parents (that will assist them in caring for the child) that the Guardian *ad litem* has identified through his/her interaction with the child and enquiries of appropriate persons or where the Guardian *ad litem* considers it imperative that a case be prioritised due to particular circumstances).

In addition, it should be noted although it is not explicitly provided for currently in section 47, Guardians *ad litem* use section 47 to make such applications and it is intended to regulate this practice by making provision for an explicit power for the Guardian *ad litem* in this regard.

Head 16 - Amendment of section 25 of the Mental Health Act 2001

Provide that:

Section 25 of the Mental Health Act 2001 is amended by the substitution of the following for subsection (14):

“The provisions of sections 21, 22, 24, 25, 27 to 35, 37 and 47 and Part XX (save for Head 7(2)) of the [Child Care Act 1991](#), shall apply to proceedings under this section as they apply to proceedings under those sections with the modification that references to proceedings or an order under Part III, IV or VI of that Act shall be construed as references to proceedings or an order under this section and with any other necessary modifications.”

Explanatory Note:

Section 26 of the Child Care Act 1991 will be repealed in its entirety on enactment of this Bill and replaced by a new *Part* to be inserted into the Child Care Act 1991 to provide for more extensive arrangements in relation to a reformed *Guardian ad litem* service.

This Head proposes to substitute a new section 25(14) for the existing section 25(14) of the Mental Health Act 2001. The revised section 25(14) will not contain any reference to section 26 of the Child Care Act 1991 as it is being repealed. Instead, the revised section 25(14) will include a reference to the new '*Part*' (this Bill) to be inserted into the Child Care Act 1991 to replace section 26 and the sections of the Child Care Act 1991 that will continue to apply to the involuntary admission to approved centres of children who have a mental disorder will remain in the substituted section. All of the sections of the Child Care Act 1991 that currently have application to proceedings under section 25 by virtue of section 25(14) will continue to apply save for section 26 which is being repealed.

The application of this Bill (as a *Part* of the Child Care Act 1991) to proceedings under section 25 of the Mental Health Act 2001 is intended, *inter alia*, to:

- provide for the mandatory appointment of a Guardian *ad litem* in all proceedings under section 25 and notwithstanding that such proceedings are instituted in the District Court. It is considered appropriate that as section 25 proceedings may give rise to an order for the detention of a child to an approved centre, the appointment of a Guardian *ad litem* should be mandatory similar to the mandatory appointment of Guardians *ad litem* in special care High Court proceedings. It is proposed, therefore, that Head 7(2) providing for a discretionary element to the appointment of Guardians *ad litem* in proceedings in the District and Circuit Court (such proceedings do not relate to civil detention) will not have application to proceedings under section 25 of the Mental Health Act 2001;
- facilitate the continuation of a Guardian *ad litem* in proceedings under section 25 including where matters are kept under review by a Court as provided for in Head 7(9)(a) subject to a determination of the Court under that Head.

Section 16 of the Children Act 2001 inserted new Parts IVA (relating to special care) and IVB (relating to private foster care) into the Child Care Act 1991 and these were in the main commenced by SI No 64 /2007 (save for section 16, in so far as it relates to the insertion of section 23D of the Child Care Act 1991). Subsequently, special care was determined under the inherent jurisdiction of the High Court rather than under Part IVA (as inserted by the Children Act 2001).

Section 267 of the Children Act 2001 amended certain provisions of the Child Care Act 1991. It also clarified at subsection (2) that references in Part V of the Act of 1991 (relating to Jurisdiction) to Part IV of that Act shall be construed as including references to Parts IVA and IVB as inserted by section 16.

Section 267(2) of the Children Act 2001 was amended by section 34 of the *Child Care (Amendment) Act 2011* (19/2011) as commenced by SI 637/2017 . A revised section 267(2) of the Children Act as amended by section 34 of the Child Care (Amendment) Act 2011 does not now contain any reference to Part IVA. A new Part IVA has been inserted by section 10 of the Child Care (Amendment) Act 2011. Consequent on the amendment to section 267 by section 34 of the Child Care (Amendment) Act 2011, references in Part V of the Child Care Act 1991 to Part IV (Care Proceedings) shall be construed as including references to Part IVB only (Private Foster Care).³ A specific reference to 'Part IVA' has been inserted into sections 24-28 and 30-33 of the Child Care Act 1991⁴.

³ Law Reform Commission revision of 267(2) of the Children Act 2001 suggests it will read as (2) References in Part V (Jurisdiction and Procedure) of the Act of 1991 to Part IV of that Act shall be construed as including references to 1 [Part] IVB (inserted by [section 16](#)) thereof.

⁴ By the Child Care (Amendment) Act 2011 – sections 11-19.

Head 17 - Repeals

Provide that:

- (1) Section 26 of the Child Care Act 1991 is repealed.
- (2) Section 13(b), (c) and (d) of the Child Care (Amendment) Act 2011 is repealed.
- (3) Section 14(b) of the Child Care (Amendment) Act 2011 is repealed.

Explanatory Note:

Section 26 of the Child Care Act 1991 relates to the original provision in the Child Care Act 1991 providing for the appointment of a Guardian *ad litem* in childcare proceedings which is being replaced by this General Scheme which will insert a new Part into the Child Care Act 1991 and it is therefore proposed to repeal section 26 in its entirety.

Section 13 of the Child Care (Amendment) Act 2011 relates to amendments proposed to section 26 of the Child Care Act 1991 and paragraphs (b), (c) and (d) which have not been commenced will not now be required as they are being replaced more extensively by this General Scheme. Paragraphs (a) and (c) were commenced by SI 637/2017. The revised section 26 of the Child Care Act 1991 will be repealed by subsection (1) above.

Section 14(b) of the Child Care (Amendment) Act 2011 proposed to amend section 27 to clarify that a reference in that section to a 'party' includes a reference to a Guardian *ad litem*. That amendment has not been commenced and will not be required as arrangements for Guardians *ad litem* are being replaced by this General Scheme.

The General Scheme clarifies that a Guardian *ad litem* will not have party status as s/he is more in the nature of an expert witness (although s/he will

have some powers generally associated with party status such as the power to cross-examine in particular circumstances and seek directions from a Court as set out at Head 4(3), Head 12 and Head 15). The amendment proposed by section 14(b) of the Child Care (Amendment) Act 2011 is not, therefore, consistent with the proposed policy direction and is being repealed. Provision is being made at Head 14(1) to include a reference to a Guardian *ad litem* in section 27(3) to ensure that a Guardian *ad litem* appointed in proceedings will receive a copy of any report procured under that section.