

## Child Care (Amendment) Bill 2019

### Observations to the Department of Children and Youth Affairs from Maria Corbett and Carol Coulter on behalf of the Child Care Law Reporting Project

2 October 2019

In August 2019, the Minister for Children and Youth Affairs published the Child Care (Amendment) Bill 2019, which proposes to:

- Place a duty on the court to give paramount consideration to the best interests of the child
- Provide for hearing the views of a child in child care proceedings
- Provide for the appointment of a Guardian ad litem (GAL)
- Regulate Guardians ad litem (GALs).

The objectives set out in the Bill are to be welcomed, they promote compliance with Article 42A and address an area which at present is unregulated. The observations here, based on the CCLRP's experience of child protection proceedings, are confined to two of the Bill's four components – hearing the views of the child and providing for the appointment of a Guardian ad litem (GAL).

#### **A: Role of the Court in Determining the Means by which a Child will be Heard**

Under s.24A of the Child Care Act 1991, the Bill proposes to place a new duty on the court, the court must 'determine the means by which to facilitate the expression by the child of his or her views in the proceedings'.

The Bill proposes to repeal s.26 of the Child Care Act 1991 and replace it with a new provision allowing for the appointment of a GAL under s.35B. Under s 35B(5), in circumstances where the court does not appoint a GAL the court can, subject to certain conditions, determine 'the means' by which a child will be facilitated to express their views.

The Bill must be read alongside s.25 of the 1991 Act which provides that a child can be joined in proceedings as either a full or partial party to proceedings if the court is 'satisfied having regard to the age, understanding and wishes of the child and the circumstances of the case that it is necessary in the interests of the child and in the interests of justice to do so'. Practice indicates that its usage is a rarity (with the exception of older children in Cork). If the child is joined as a party, he/she is entitled to fair procedures in the same way as any other party. The making of any such order shall not require the intervention of a next friend in respect of the child.

## Observation

While the s.24A and s.35(B) are welcome provisions in principle, we are concerned that inadequate legal provisions will frustrate their implementation. Neither the Act nor the Bill provides the mechanisms necessary to enable the court to comply with its new duties under the Bill. The new court powers are situated in a policy and legislative vacuum.

### **GAP 1 – What are the other means by which a child may be heard?**

The Bill includes provisions under s.25 (party to proceedings) and s.35B (GAL) for hearing the views of the child. However, it is not clear if these are the only two options available to the court or if the court may determine other means to facilitate a child to express his or her views during proceedings.

In *Child Care Proceedings: A Thematic Review of Irish and International Practice*, the authors outline some mechanisms used in other jurisdictions to hear the views of the child,<sup>1</sup> these include:

- A meeting between the child and the judge
- The child providing the court with a personal letter, a video or drawing
- The child responding to a questionnaire
- The child communicating his or her views through an advocate (such as a youth worker)
- The child communicating his or her views through his or her social worker

The different means of engaging run along a continuum with participating in the proceeding as a party to those proceedings at one end of the continuum and having your views heard by your social worker at the other.

### **GAP 2 – How will the child know of these means and which one to choose?**

A child, who is the subject of child care proceedings, has no entitlement to be informed about the suite of options available to facilitate him or her to be heard in the proceedings, and the implications of choosing one of these options over another. Access to information is an essential pre-requisite to support a child to engage in decision-making.

### **GAP 3 – Who will ascertain the child's views and communicate them to the court?**

The Bill places duties on the court to determine the means by which to facilitate the expression by the child of his or her views in the proceedings:

---

1 Corbett and Coulter (2019) *Child Care Proceedings: A Thematic Review of Irish and International Practice*, commissioned by the Department of Children and Youth Affairs <https://www.dcy.gov.ie/cat/EN/Departement-of-Children-And-Youth-Affairs/1603.htm>

- s.24(2)(c) – When the court is determining what is in the best interests of the child, it must have regard to the views of the child where he or she has chosen to express such views.
- s.35B(4)(e) & (f) – When the court is determining whether or not to make an order to appoint a GAL, it must have regard to the views of the child (whether the granting of an order would assist a child to be heard by the court and whether the child supports the granting of such an order).
- s.35B(5)(b) – Where the court decides not to appoint a GAL and is satisfied that a child is capable of forming his or her own views in the proceedings, the court must determine the means by which to facilitate the expression by the child of those views.

These duties can only be met if the court has knowledge of the child's views. As the judge does not have an opportunity to meet with a child prior to proceedings commencing, the court has no way of knowing the child's wishes unless it is informed by the Child and Family Agency (CFA) or another party to the proceedings. For the court to have knowledge of the views of the child, someone has to:

- a) assess the child as capable of forming his or her own views
- b) inform the child of the options available to him and her
- c) consult the child on whether he or she would like to express views
- d) provide additional supports to a child who faces communications difficulties (such as a very young child or a child with a disability) to ensure their views can be ascertained
- e) ascertain their views, and
- f) communicate these views to the court.

Under s.9(4) of the Child and Family Act 2014, when performing its functions in respect of an individual child under the Child Care Act 1991, the CFA must 'ensure that the views of that individual child, where that child is capable of forming and expressing his or her own views, be ascertained and given due weight having regard to the age and maturity of the child'. This implies that a social worker should consult a child on their views prior to making an application under the 1991 Act. However, the CFA is not obliged to communicate the child's views to the court. There is no obligation on the CFA to include the views of the child in their grounding affidavit to the court. Anecdotal evidence from the Child Care Law Reporting Project and research findings indicate that the CFA do not communicate the views of the child to the court in a systematic and structured way.

In addition, the Bill does little to strengthen the child's access to justice. The child can express a view that he or she would like a GAL but the child has no right to make an application to the court to either seek or refuse the appointment of a GAL. It would be difficult (if not impossible) for a child to initiate an appeal or judicially review a case where the child does not have a GAL and/or legal representation.

### Recommendations

Consideration should be given to amending the Bill to:

- Provide in law a list of possible options by which the child's views can be heard by the court, including, but not limited to, the appointment of a GAL.
- Place a duty on the CFA to assess the child's capacity to form views.
- Place a duty on the CFA to put in place appropriate supports to enable a child with communications difficulties to express his or her views.
- Place a duty on the CFA to inform the child, in age appropriate, child-friendly and accessible language, of the methods by which he or she can participate/be heard in the proceedings and the likely implications of utilising one method over another.
- Place a duty on the CFA to consult the child to ascertain if, and how, he or she wishes to participate/be heard in child care proceedings. It should be possible for a child to indicate that he or she does not want to express any views or engage in any way with the proceedings.
- Place a duty on the CFA to make an application to the court on behalf of the child under either s.25 or s.35B, setting out if the child wishes to be heard and the means by which the child wishes to be heard or participate in proceedings. If the CFA's view on the making of an order differs from that of the child, the CFA should state that and give their reasoning.
- Empower the court to either grant or refuse the CFA application, seek further information or make a decision on his or her own motion.

## **B: Appointment of a GAL in the District Court**

Under the Bill, the appointment of a GAL remains at the discretion of the sitting District Court judge. However, the Bill introduces three new elements:

- a) It provides guidance for the court on how to determine whether or not a GAL should be appointed
- b) In circumstances where the court decides not to make an order appointing a GAL, it requires the court to give reasons and
- c) It requires the court to determine the means by which to facilitate the expression by the child of those views.

The vast majority of decisions are given verbally, although a DAR recording is created. The Bill does not provide that there needs to be a written record of this decision: this matter could be set down in a Court Rule.

The Bill provides no guidance on the use of the court's power to grant a child party rights under s.25.

### Recommendation

Consideration should be given to amending the Bill to include another factor – that in all cases concerning an application under the EU Brussels II bis Regulation (BIIbis)<sup>2</sup>, the court must either appoint a GAL or grant the child party status under s.25. The rationale for this inclusion is that under this Regulation the views of the child must be ascertained in specific cases and this requirement has been strengthened under the Recast, which will come into effect in three years' time.

---

<sup>2</sup> Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

## C: Fair Procedure Rights in High Court Proceedings

Under the Bill, in all High Court proceedings, the appointment of a GAL along with legal advice and legal representation is automatic. However, under s.35E(9), the GAL is prohibited from being appointed a party to proceedings. Such High Court cases include applications for a Secure Care order.

### Observation

In Secure Care applications in the High Court the CFA is the applicant. No respondent is identified under statute in relation to these cases, but on the court list the child is named as the other party, and in published secure care judgments on the Courts Service website the child (under their initials) is described as the “defendant”, sometimes with the addition of “represented by his/her (names) guardian ad litem”. The HSE may be a notice party if its services are involved.

The child is the *dominus litis* (the person with the real interest in the decision of a case), their rights to life and liberty are being considered by the court, and their right to liberty is likely to be taken away. The threshold for granting a Secure Care Order focuses on the child’s behaviour and risk of harm and care needs. Unlike District Court child care proceedings, there is no requirement to establish that the parents of the child have failed in their parental duty towards the child. The child’s parents must be consulted (s23F(3)) and are notice parties (s.23G(1)). The granting of the order does impact on the parental rights as once an order is made the CFA assumes ‘like control over the child as if it were a parent of that child’ (s. 23ND(1)). The granting of a Special Care order does not require consent from the parent or a direction dispensing with parental consent. We argue that the parents are not the *dominus litis* in such cases.

In practice, the child is either identified as the respondent/defendant (sometimes with the addition of the GAL) or granted rights akin to a respondent/defendant. The child must be consulted (s23F(3)) and the GAL is a notice party (s.23G(1)).

It is usual practice in these High Court cases that a GAL is appointed for the child and the GAL is granted legal representation. In practice, the GAL in these proceedings, as the representative of the child named in the case, has full party rights and can make applications. The Bill proposes to change this practice, removing the party rights of the GAL and therefore the GAL’s ability to vindicate the rights of the child in the proceedings.

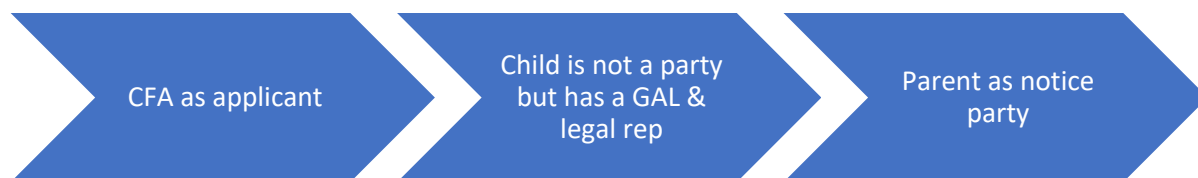
In addition, in a small number of cases, the child had been made a party to proceedings under s.25 and he or she instructed their own legal representation, in addition to a GAL being appointed, as the child’s views on her welfare differed from those of the GAL. While the use of s.25 may work in some

cases, it will not be appropriate or workable in most cases. Often these children are in crisis, leading chaotic lives, being at risk to themselves and others and may also be deemed not have capacity to give instructions.

According to the proposed Bill, in circumstances where it is not appropriate for the child to be made a party under s.25, the High Court will have no mechanism by which to protect the child's right to fair procedures, as set out by Justices Finlay Geoghegan and Marie Baker. This risks breaching the principle of *Audi alteram partem* (both sides must be fairly heard). The State is then vulnerable to a legal challenge taken on behalf of a child as the *dominus litis* claiming he or she has no means to vindicate his or her constitutional right to fair procedures and also the right to fair trial under Article 6 of the European Convention on Human Rights.

Under the Bill, three scenarios may arise in relation to Secure Care cases. These scenarios assume that a parent/s will be participating in each case. While not included below, the HSE is often a notice party in these cases.

*Secure Care Scenario 1*



*Secure Care Scenario 2*



*Secure Care Scenario 3*



Recommendation

Serious consideration should be given to amending the Bill to delete s.35E(9) which states that the GAL 'is not a party to proceedings'. This is particularly important in High Court proceedings where the child is the respondent. The decision as to whether to grant party status to the child through his or her GAL should be left to the discretion of the sitting judge.



## D: Role of the GAL in the District Court

In District Court proceedings the parties are the CFA (applicant) and the parents (respondents), whose parental rights are at stake. However, the proceedings profoundly affect the rights of the child to the society of his or her parents and wider family, and to have their health, development and welfare etc protected. According to the Baker judgment, “the entitlement to be heard is one that arises only in regard to a party, or any person whose rights or interests may be affected by the litigation.”<sup>3</sup> The child may not be a party, but is a person whose rights or interests may be affected by the litigation. The child is the *dominus litis*.

Under s.34E(1) of the Bill, the first function of the GAL is to support the court in its decision-making. The GAL must ascertain the views of the child in relation to matters to which the proceedings relate and having considered those views make recommendations to the court regarding what he or she considers to be in the child’s best interest. The GAL is obliged to submit a report to the court which will be shared with the other parties and may be accepted as evidence. The GAL also has a duty to inform the court of any additional matters that came to his or her knowledge while performing the GAL role.

Under s.34E(2), the second function performed by the GAL will be to inform the child of the recommendations made in his or her report to the court, the outcome of the proceedings and other matters of relevance to the proceedings the GAL ‘considers appropriate’.

Under s.34E(8), in perform his or her functions, the GAL must be independent and under s.34E(3) the GAL must consider the child’s best interests as ‘the paramount consideration’.

Under s.34E(9), the GAL is not a party to proceedings.

### Observation

It is assumed that in all circumstances the GAL will be a notice party to the proceedings with access to all relevant court documents, but this is not specified in the Bill: this issue could be addressed in Court Rules.

The role of the GAL under the Bill is a hybrid between an expert witness and a party. It is usual that an expert witness would prepare a report and present it to the court. The primary mode of communication between the GAL and the court will be the GAL's written report. Similar to other witnesses, the court or any party may call the GAL to provide testimony. However, as the GAL is not a party, he or she does not have an automatic entitlement to be heard in oral testimony. In practice, when the GAL is called to give evidence on his or her report, it can be an important opportunity for the GAL to explain their thinking to the court and to raise other issues of importance, such as whether the child is receiving adequate services and supports.

Under s.35F, following consultation with the other parties, the GAL may make an application to the court on a matter 'relating to his or her functions', including to procure a report on any question affecting the welfare of the child (where no report exists or the information is out of date) or to acquire information. This power is not afforded to an expert witness and is limited to a party to proceedings under s.27(1) of the 1991 Act.

The key differences between the GAL as a party to proceedings and the GAL as envisaged under the Bill appears to be that under the Bill, the GAL would not have a right to:

- Provide oral testimony on their report
- Call and/or cross examine witnesses.

The Baker judgment in *AOD V OL* provided the court with flexibility to make a GAL a party to proceedings depending on the circumstances of the case. The Baker decision positions the GAL as an entity that can be granted party status or a lesser status depending on the case and the court's requirements. It is likely that there would be many cases where the GAL would have a limited role. The question of whether or not the GAL will have legal representation, and the extent of that representation, would flow from the status granted to the GAL by the court.

Under current practice, in line with the Baker judgment, the judge may decide to make the GAL a party to proceedings. Under s.34E(9), this will no longer be possible under any circumstances. We believe that a GAL does not need to be a party to proceedings in every case, however, it may be necessary in some cases. Thus, we do not support removing this discretionary power from the District Court. In highly contentious and complex cases, the court may wish to grant a child party rights, through their GAL, to protect the child's constitutional and ECHR rights to fair procedures.

Similar to the discussion in relation to High Court cases, the use of s.25 may not be considered to be appropriate in some cases, for example it is likely the court would deem its use inappropriate in cases concerning an infant or young child under the age of ten years. Another consideration is in some cases there is no respondent as the parent is dead, missing or does not have legal capacity. In such cases there is only one party, the CFA as the applicant, who are in the role of *de facto* guardian of the child. However, according to the principles of natural justice and *audi alteram partem*, it would be important for the court to hear a second independent view.

In *AOD V OL*, Baker J described the GAL as 'representing the interests of the child'. If challenged it is arguable that in a complex case a GAL who is not a party to proceeding may be considered an inadequate mechanism to carry out fully the role of representing the interests of the child.

### Recommendations

- Serious consideration should be given to amending the Bill to retain the existing court power to determine whether or not a child should be made a party to proceeding through his or her GAL.
- Clarify in the Bill or Court Rules that the GAL is a notice party to the proceedings and has access to all relevant court documents.

## E: Appointment of Legal Representation for a GAL

Under the Bill, the appointment of a GAL is a two-step process, the court makes an order that a GAL should be appointed for the child who is the subject of the proceedings and then the Minister appoints a specific GAL for that child and notifies that court of the appointment.

Under s.35D of the Bill, the power to provide, or arrange for the provision, of legal advice and legal representation to the GAL rests with the Minister, not the court. The GAL may request such advice and/or representation from the Minister.

### Observation

We believe the proposal that the Minister determines whether or not the GAL can be appointed legal representation to be problematic for two reasons.

Firstly, we question whether the proposal in the Bill concerning legal representation breaches the *in camera* rule. Under s.35B(6)(a), the Minister is entitled to be serviced with documentation relating to the proceedings to enable the Minister to appoint an individual GAL for the child. In such circumstances the information provided to the Minister could be framed in a manner that is non-identifying. This could include the geographical location of the child, the child's age, whether the child has a disability or communication issue and the nature of the allegation (physical abuse etc). The function being carried out relates to workforce planning - for example, there are ten GALs available in that region and three have qualifications and expertise with that age group and one is free to take on the case, etc.

Under s.35D(3), when determining whether or not to grant a request for legal representation, the Minister is obliged to assess the specifics of a case including whether legal representation is in the child's best interests and is supported by the court; whether the GAL intends to make an application or holds an opinion on other applications; a failure to appoint representation would be 'unreasonable' given the 'complexity' of the case; or the appointment would be 'appropriate' given special circumstances of the case. To perform this duty, the Minister must have in-depth knowledge of the case. As the Minister is not a party to the proceedings, the question arises as to whether the communication of this information to the Minister would breach the *in camera* rule.

Secondly, the role of the GAL is to assist the court with its decision making. The issue of legal representation should flow from the purpose for which the GAL was appointed. The judge should have the power to specify what he or she wants the GAL to do to assist the court. The role of the GAL in a case involving a young child with disabilities would be very different to the role of a GAL in a case involving an articulate teenager with no special needs and a clear care pathway, where the judge might only ask the GAL for a report and to convey the views of the child to the court.

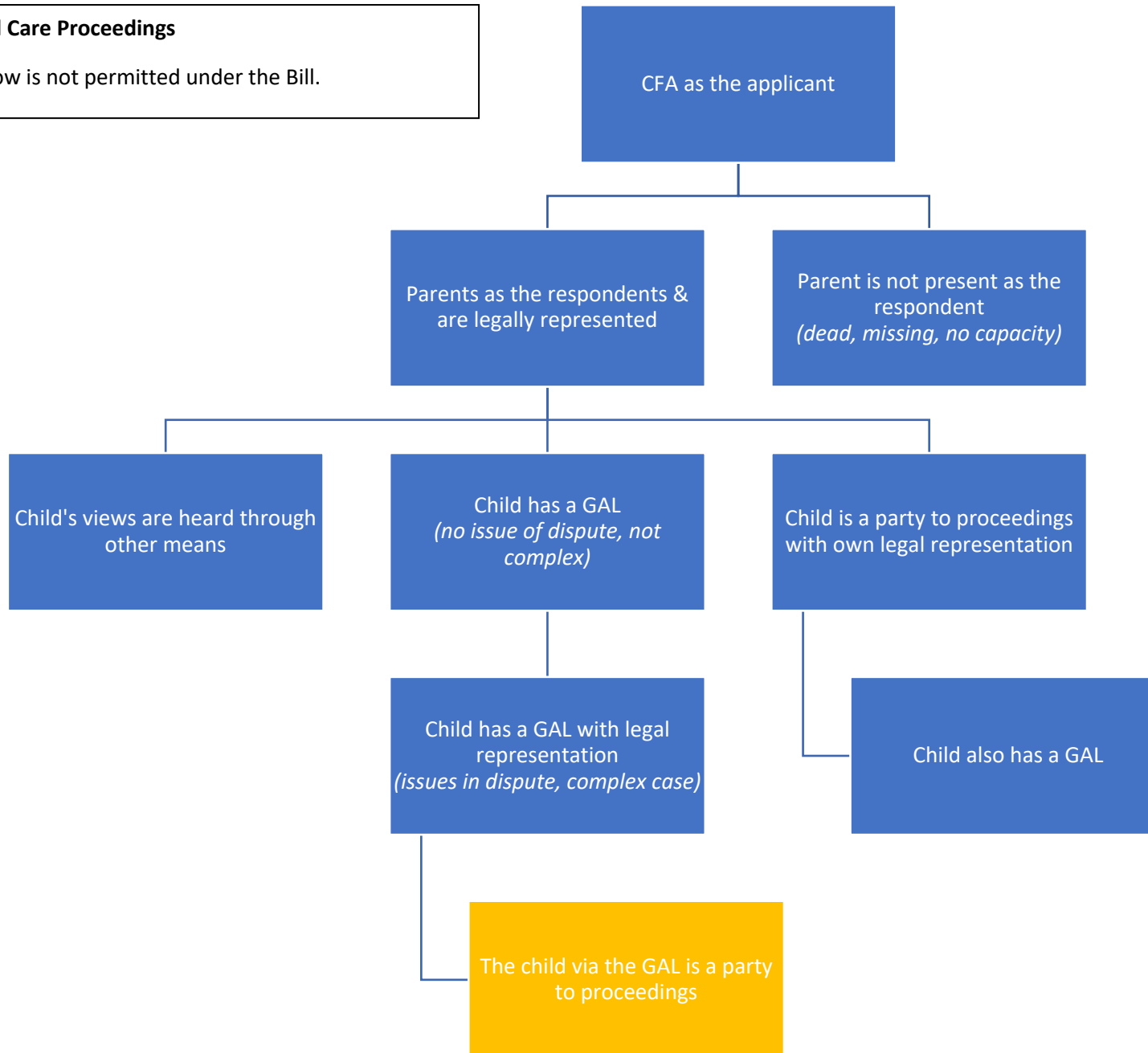
In circumstances where the GAL is not supporting the order being sought by the CFA, or favours a modification of the order, it would be more appropriate for the court to be the decision-maker on whether or not legal representation is granted than the Minister, who must pay the costs of both the GAL and the legal representation.

#### Recommendations:

- Serious consideration should be given to amending the Bill to leave in the hands of the court the decision to either appoint or refuse legal representation to the GAL.
- Once a national Family Court is in place, consideration should be given to amending the Bill to transfer the role of matching a GAL to the specific case to the new court.

**Roles within Child Care Proceedings**

The option in yellow is not permitted under the Bill.



## Options for the Views of the Child to be Heard

The option in yellow is not permitted under the Bill.

