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'For some groups of children in public or private law proceedings, an advocate ... may enable better representation of the child'

Representing Children's Views and Best Interests in Court: An International Comparison

This paper provides a comparison of a number of alternative models of international practice in relation to the appointment and organization of guardians *ad litem* and other children's representatives in child care and family proceedings. The paper notes that, in their attempts to address the need for children to have representation in matters affecting their welfare, English-speaking countries have tended to conflate the two salient Articles of the United Nations Convention on the Rights of the Child, that is, Article 3, which deals with the child's best interests, and Article 12, which deals with their right to express their wishes and feelings. Where systems other than 'stand alone' legal representation have been put in place, the child's representative is charged with both assessing their *best interests* and, often as a secondary duty, communicating their *views*. The paper concludes that for some groups of children in public or private law proceedings, an advocate (rather than a best interest oriented guardian, and where necessary in addition to a legal representative) may enable better representation of the child in the courts and greater participation by children in legal proceedings, an increased role for children as citizens and a fuller implementation of their rights. Copyright © 2005 John Wiley & Sons, Ltd.

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This paper provides a review of international practice in relation to the appointment and organization of guardians *ad litem* and other children's representatives in child care and family proceedings. It is intended to provide a concise comparative framework of a number of alternative models. We have written the paper as a consequence of a recent review

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we conducted for the National Children's Office in Ireland of their Guardian Ad Litem Service (McQuillan *et al.*, 2004). During this review we were struck by how difficult it was to access sufficiently detailed information on other jurisdictions in a concise and convenient form. Yet, without such comparative perspectives, it can be difficult to open up to robust debate the current configurations of services. The review is based on a thorough search of social care and law databases and of United Nations Convention on the Rights of the Child (UNCRC) State Party Reports in a range of countries. The review is necessarily selective and is designed to provide exemplars of a range of models of service delivery.

The Rights of the Child

The United Nations Convention on the Rights of the Child has fundamental implications for those who work with children and those who set out to represent the interests of children in the arena of the courts, education, health and public policy. The main articles pertaining to children's rights in a juridical or service delivery context are Articles 3 and 12.

Article 3 reads as follows:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

It is noteworthy that this Article is concerned with ensuring that public bodies of various kinds are acting in the child's *best interests* and with the establishment of procedures to ensure that they do so.

Article 12 reads as follows:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those

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‘To ensure that, wherever the child has a view, this is heard regardless of the child’s age or maturity’

‘We have focused specifically on public law cases’

views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

This Article is concerned to ensure that, wherever the child has a view, this is heard regardless of the child’s age or maturity and that these factors are only taken into account in giving due weight to the child’s views.

Thus the Convention gives two imperatives—to act in the child’s best interests and to ensure that the child’s views are heard and duly considered. These may, of course, be perfectly compatible, but they may also at times conflict. This is a point we shall return to later, as the relative weight attached to one or the other of these imperatives very much affects the ways in which children’s needs for representation have been approached.

During the 1990s, the ratification of the Convention thus encouraged many countries to design and implement formal mechanisms for the representation of children’s views in civil cases affecting their welfare. The central problems of how to represent children’s views, while also safeguarding their ‘best interests’, have been addressed in many different ways. For example, in Australia and New Zealand, children have access only to legal representation. In France, there is a closer and more paternalistic relationship between welfare and legal concerns, with judges being used in a preventative capacity to help advise on decision-making at an early stage of intervention.

There is similar diversity internationally in relation to the appointment of guardians *ad litem* (or similar) in private law. The traditional separation of the family law and a state welfare law, with the latter focused mainly on those living in situations of relative social deprivation, has been maintained in most jurisdictions. However, as Article 12 of the UN Convention relates to all children, it is not uncommon for jurisdictions to extend the systems of representation for children in public law into private law. For example, Florida extended its guardian services to divorce-related questions in specific complex situations, and Switzerland has implemented a guardian-type representation with its divorce law reform (Salgo, 1996, 2003 (personal correspondence with S. White)). In this paper, we have focused specifically on public law cases.

What is a Guardian *ad Litem*?

Internationally, the term guardian *ad litem* has no agreed definition. Similarly, there is wide variation in terminology used to describe the function. In this article, we will use the term 'guardian' to refer to the various titles of guardians *ad litem*, children's guardians and other children's representatives. The range of qualifications required also varies: for example, many countries insist on a social work or child welfare qualification, while the USA has a system of trained volunteers, running alongside a fee-based scheme, which is sometimes used to provide additional representation for children during court and other proceedings. There are also diverse ways of organizing and delivering the service, ranging from relatively autonomous self-regulation through a national association (e.g. Germany) to a tightly managed independent government agency (e.g. Northern Ireland).

It should be noted that there is apparently something of an Anglocentric focus in much of the international literature, with the system in England and Wales frequently cited as a point of reference. For example, the German academic lawyer Professor Ludwig Salgo concludes that the system of dual representation in the UK is a model of best practice (Salgo, 1996, 1998).

'Something of an Anglocentric focus in much of the international literature'

The UK Context

The Evolution of the Guardian ad Litem Service in England and Wales

In England and Wales, the guardian role was one of the consequences of inquiries into child deaths from abuse or neglect in the 1970s. The Children Act 1975 made it possible to appoint a guardian in care and related proceedings. Had the legislation been brought into force immediately, it is possible that the guardian may have evolved into a hybrid professional, carrying out both welfare and legal representation and advocacy. However, the Act was implemented on a piecemeal basis (Hunt *et al.*, 2003) and during this time the case for children having legal representation was being strongly made, resulting in the creation of the 'tandem model' in which the guardian must appoint a solicitor for the child but in most circumstances the solicitor must take instructions from the guardian.

The Children Act 1989 made the appointment of a guardian in public law cases mandatory unless the court was satisfied that this was not necessary (Section 41(6)). The Act

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also gave guardians the responsibility to assist the court in the management of the case through, for example, advising on the timetabling and allocation of cases. Subsequent developments have resulted in further extension of the role, with guardians being asked to take the lead in the joint instruction of experts and convening experts’ meetings (Children Act Advisory Committee, 1997).

The tandem model provides dual representation for the child and, in theory, offers the possibility for lawyer and guardian to part company if a solicitor judges that the child is capable of giving his or her own instructions and if the child disagrees with the guardian’s assessment of his or her best interests. This relies on a degree of professional distance between the solicitor and the guardian, which is potentially placed under threat if the choice of guardian is left to the discretion of individual judges or solicitors. To deal with this and other problems, from 1984, local authorities were obliged to set up panels of guardians, which operated as consortia of dedicated staff employed by neighbouring local authorities. Guardians were allocated to cases on a reciprocal basis, so that no guardian was called to represent a child in cases where their employing authority was a party.

Alongside these developments in the guardian’s role came increasing direction and regulation. By the time the panels were absorbed into a non-departmental agency—the Child and Family Courts Advisory and Support Service (CAFCASS)—in April 2001, there were comprehensive practice guidance, national standards and a programme by which to operationalize the standards. Panels had established systems for appraisal, reappointment and complaints, and for training and mentoring. Under the panel system, quality assurance was largely retrospective. The panel manager’s role was advisory and there was no power to supervise. In general, this model was popular with guardians. However, panel managers expressed some frustration at the lack of managerial control over quality and cost-effectiveness (Hunt *et al.*, 2003).

The CAFCASS Service Principles and Standards (CAFCASS, 2003) embody the ambivalence towards Article 12 of the UNCRC mentioned above. The first principle ‘2.1 The interests of the child are paramount’ is unequivocal, but Article 12 is barely represented unless principle 2.4 ‘The views and needs of service users will be taken into account’ is meant to cover this. Note that this principle does not refer directly to children, leaving open the question who are the service users, and even here the views are qualified by a reference to needs—a far weaker statement than that found in Article 12 of the UNCRC and making no reference to the child’s right to be

enabled to express views in the court. Likewise, there is no direct mention of representing the child's views in the accompanying detailed service standards.

The establishment of CAFCASS was hailed as a positive step for children in court proceedings, but it has been beset by problems which are in part the result of a precipitous timescale for the creation of the service. There have been, for example, some problems in achieving consistency in relation to the time spent on each case. Department of Health research (Hunt *et al.*, 2002a, b) examined the reasons for variation in the total professional hours per case and showed that much of this variation could be explained by factors in the cases themselves and their management by the local authority and the court. This raises questions about the extent to which a professional service can really achieve consistency, because guardians, and lawyers, may well have perfectly plausible ethical reasons for wanting to continue their involvement in the case as Judge Fricker (2002) has argued:

'lawyers and others can find it easier to go on working on a case than to bring it to a conclusion—the "leave no stone unturned" culture is comforting to industrious practitioners' (cited in Hunt *et al.*, 2003, p. 106)

The service is also experiencing problems with workload, as the appointment of a guardian (now termed children's guardian) is mandatory in public law proceedings in England and Wales. In 2003, CAFCASS claimed that it needed an additional £6 million to meet demand without causing undue delay to proceedings.

CAFCASS has been beset with problems, not least of which was the substantial overspend of the budget combined with lengthy delays in allocation of cases to guardians and solicitors, lowering of standards for recruitment and lack of training of guardians (Committee on the Lord Chancellor's Department, 2003). This culminated in 2003/4 in the resignation of the board members and the appointment of Labour peer Lady Jill Pitkeathley, chairwoman of the New Opportunities Fund and a former social worker. The meltdown in CAFCASS has stimulated considerable debate about how its board should be constituted, and there are also many recommendations in the review undertaken in 2003 (Committee on the Lord Chancellor's Department) of the CAFCASS service at a time of crisis, which focus, for example, on matters of governance and organization, training, recruitment and retention. All these questions are, of course, pressing, but at no point has the crisis in the service been

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used to raise fundamental questions about the role of the guardian and whether the current service really does protect children’s rights. CAF/CASS has recently appointed a Children’s Rights Director who says her job is to ‘make sure [children’s] voice is heard’ (CAF/CASS, 2005). Perhaps this demonstrates that the time is ripe for a change of focus that will lead to children’s views, not just their needs or best interests, being represented.

Scotland: The Safeguarder, Curator ad Litem and Reporting Officer Service

In Scotland, duties similar to those of guardians *ad litem* in public law cases are carried out by Safeguarders. The Children Act (Scotland) 1995 required that children’s hearings and sheriffs consider ‘if it is necessary to appoint a person to safeguard the interests of the child in the proceedings’ and if so shall appoint a person ‘on such terms and conditions as appear appropriate’ (Section 41 (1)(b)). Their role is to provide support and advice for the proceedings. Safeguarders always provide written reports for children’s hearings, reflecting the child’s best interests. They may do so for court cases. All local authorities have a duty to maintain a panel of Safeguarders, so that a sufficient number is available to meet the need. The situation in Scotland is thus closer to the panel system that existed in England and Wales until 2001.

Northern Ireland Guardian Ad Litem Agency (NIGALA)

The Northern Ireland Guardian Ad Litem Agency, which was established in 1996, provides an example of a managed service. In public law proceedings in Northern Ireland, the child is usually provided with a guardian *ad litem*. Guardians are all qualified social workers. A solicitor is then chosen and appointed by the guardian from an accredited Children Panel of the Law Society. It is the same ‘tandem model’ system as used in England and Wales. Seventy-five per cent of guardians are on permanent contract, 25% are self-employed. NIGALA argues that having a permanent salaried workforce allows for more flexible, cost-effective and efficient delivery of the service.

We noted earlier that the UK models conflate and may indeed privilege the imperative to assess and represent the child’s best interests. That is, they conflate the duties under Articles 3 and 12, creating a potentially uneasy tension. This can be seen in other jurisdictions too.

International Alternatives: 'Best Interests' Perspectives

Germany: A National Association

In 1998, the role of guardian *ad litem* was introduced in Germany as part of the *Kindschaftsrecht* (law of filiation). The legislation outlined the situations in which a guardian should be appointed and stated that the guardian should represent the interests of the child, but did not detail what form the representation should take. There was no clarity on the rights of the guardian to have access to court and other official files, or to proceedings, and no specification of the examinations, qualifications or training a guardian would be expected to have.

There was a wide variation in practice between different courts and areas. In 1998, responsibilities for child protection were moved from guardianship courts to family courts. At this point, many family court judges were not aware of the need to appoint guardians. Moreover, guardians themselves were arguing that interpretations of their role and tasks were diverse, and that standardization was therefore needed. Following the example from America and Britain, national standards for guardians were drafted in 1998. At the same time, courses for training and qualification were developed. In February 2000, a professional association was established, the National Association of Guardians Ad Litem for Children and Young People. In February 2001, the association accepted and published the national standards.

In Germany, a guardian may be appointed in the following circumstances:

1. Courts can order a guardian for a minor in appropriate proceedings so long as this will clearly be in the child's interests.
2. The appointment is necessary when
 - (a) the interest of the child conflicts with that of his legal representative
 - (b) the aim of the proceedings, because of risk to the welfare of the child, is separation of the child from its family or the removal of responsibility for care
 - (c) the aim of the proceedings is to consider the removal of the child from his/her carer or from the spouse or person who has right of contact.

The tandem system was not adopted in Germany because of doubts about how well the relationship between lawyers and social workers would work. There is a considerable lobby to establish a tandem model (Salgo, 1998). In Germany, the

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guardians have no administrative and management backing. There is a widespread view that greater regulation is necessary (Von Strandmann, 2002; Salgo, 1998).

There has been more debate about the nature of representation for children—wishes versus welfare—in Germany than in England and Wales. German guardians are instructed to put the child's will and opinion, and their right to participation and self-determination, at the centre of the stage. The German system also allows for easier access to the judge by the child and greater opportunity for them to voice their will directly. However, the introduction of a welfare checklist similar to that in the English Children Act 1989 is being debated and this would shift attention more explicitly onto the child's best interests.

The United States: The Volunteer Model

In the United States, one of only two countries not to have ratified the UNCRC, the practice of ensuring independent representation for children was not widespread until the passage of the Child Abuse Prevention and Treatment Act (CAPTA) in 1974. The Act required that 'in every case involving an abused or neglected child which results in a judicial proceeding a guardian *ad litem* shall be appointed to represent the child in such proceedings. . . .' This requirement is a prerequisite for states to receive federal grant funds for use in prevention and treatment of child abuse and neglect. Neither the Act itself nor the implementing regulations provided guidance regarding who should serve as the guardian *ad litem* or the qualifications and responsibilities. It is also interesting to note the different focus of this legislative criterion, which is on situations where parents are accused of some form of direct or indirect lack of care.

By 1980, despite initial resistance to meeting the requirement for guardian appointment, 46 states and territories had implemented state laws that at least partially complied. The language used in the state statutes varied greatly in their interpretation of the guardian provision. Many states merely repeated or paraphrased the language of the federal statute without offering further specificity about who should serve in this role or what their duties should be. For example, in California, the child's social worker may be appointed by the court as their guardian, which is seen to compromise their independence.

In the early years of implementation, most judges appointed attorneys as guardians (Duquette, 1990). However, the search for more cost-effective methods (Davidson, 1981), and for

more complete information than attorneys often had the time or training to provide, led to the development of other models of representation. These alternative methods have since taken many forms, with the most successful being the use of trained citizen volunteers. Commonly called court appointed special advocates (CASAs) or volunteer guardians, these are currently serving in courts in every state, although many states also have paid professionals undertaking this role. Most of the programmes overseeing these volunteers are members of the National Court Appointed Special Advocates Association (NCASAA), which provides training and technical assistance to promote growth and quality of volunteers and programmes.

In a definitive 1988 study (Condelli, 1988), researchers sought to evaluate the impact of guardians in serving children's best interests and to examine the activities and responsibilities under five different models of representation: the law school clinic model (legal students undertake representation); the staff attorney model; the paid private attorney model; the lay volunteer/paid attorney model; and the lay volunteer (without attorney assistance) model. The effectiveness of the five models was compared in six areas of guardian involvement: legal activities, services and placement, timing of judicial action, case plan changes, case goals, and stability of representation. This comparative analysis determined that the volunteer models clearly excelled as an effective model of representation. The volunteer models were highly rated and exceeded the other models on the quantitative best interest outcome measures.

Similarly, Berliner and Fitzgerald (1998) suggest that the few empirical studies show that CASAs/guardians appear to be superior to lawyer guardians in the investigation and monitoring role, while lawyers are more effective in the legal representation role. Results are mixed with regard to whether cases are resolved more quickly or have better outcomes. One possible explanation is that CASAs/guardians are more often appointed in complex cases. The scientific evidence converges on the conclusion that volunteer CASAs/guardians are at least as effective as paid forms of guardian representation by lawyers. However, they also note that greater scepticism was voiced about CASAs/guardians when they venture into the formal legal arena or assume an expert role. There was a strong message from lawyers and judges that volunteer CASAs/guardians should have legal representation when they appear in court. This representation should not be provided by the attorneys general who are representing the state. The volunteers themselves expressed concern about

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court-related activities. However, it appears that volunteers seldom actually testify because most cases are resolved by out-of-court agreements.

In a comprehensive review of the research, Hertz (1993) concludes that the best interests of children are served by lawyers and volunteers working together (the equivalent of the tandem model). It is also noteworthy that the establishment of a volunteer programme requires complex infrastructure, training, management and support systems and there are likely to be high rates of attrition and the need for ongoing and vigorous recruitment campaigns. Salgo (1996, 2003 (personal correspondence with S. White)) contends that the US system illustrates how much ongoing effort and resource is required to establish and run a well-functioning volunteer system. He also notes that the role of an advice-giving or participating lawyer during the court procedure remains crucial. Moreover, he suggests that the US tradition of voluntarism and the relative absence of European-style welfare provision has been pivotal to the success of the system in the US, but is unlikely to be easily transferable to other jurisdictions.

In the US, the guardian duties are primarily to represent the *best interests* of the child. These are explicitly given paramount status over the child's wishes and feelings where the guardian believes that these conflict. In that regard, the guardian's role is similar to that in the UK models. The guardian has access to 'all information relevant to the child's and family's situation.' Much of the resource intensity of the volunteer system appears to be a consequence of its conflation with a professionalized service and the fact that the volunteers are charged with deciding on the child's *best interests* rather than advocating for their *wishes and feelings*. This leads to a tension with the inclusive qualification criteria as, in order to make a judgement about whether the child's wishes are in their own best interests, volunteers must be trained to a significant level in a variety of complex child development and welfare matters.

International Alternatives: 'Child's Voice' Perspectives

New Zealand and Australia: Legal Representation

New Zealand has well-established preventive services and their model of family group conferencing in child protection and welfare is internationally renowned. Nevertheless, inevitably some cases enter the court system and New Zealand has a comprehensive system of representation that uses lawyers to

provide individual advocacy for children in a range of court cases. In all guardianship, wardship, custody or access and child protection cases, a lawyer must be appointed to represent the child.

Ludbrook (1999) argues that this system has a number of 'serious shortcomings' (pp. 220–223), in particular that there is a lack of clarity concerning the role of advocate, with lawyers unclear whether to advocate for the child's views, for their welfare, or both. Lawyers have the advantage of knowing the court system and being effective advocates in court, but children complain that they are 'overbusy, not good listeners and controlling in their relationships' (p. 221); and they are expensive, particularly if they take the time to listen carefully to the child.

A recent New Zealand Law Commission review covered the role of lawyer advocates. It heard criticisms that some lawyers did not meet with the child they represented at all, and a survey of lawyers showed that most met with the child only once or twice. The Law Commission review (New Zealand Law Commission, 2003, p. 145) concludes:

'We recommend counsel for the child be offered more comprehensive training, covering child development and family dynamics, and techniques for interviewing children. Counsel must meet with children they represent and, following any decision, be sure the child understands what it means.'

In Australia, where there is very limited preventative case conferencing, the lawyer-led model of representation has been similarly criticized:

'Children speak to the court via their legal representative; it appeared to be taken for granted that children were able to give instructions . . . and were confident enough to question or dispute how the legal representative might interpret their experiences . . . Little account appeared to be taken by legal representatives of how children did cope with hearing disclosures about personal and family problems or of evidence that was damaging to their family, or how they made sense of the legal debate about their placement.' (Sheehan, 2003, p. 37)

Sheehan also noted that some lawyers did not see or speak to the children they were representing.

Alternative European Perspectives: France

In contrast, the system in France depends for its operation on a highly specialist judiciary. The Act of 8 January 1993 establishes the post of judge for family affairs, and incorporates into positive law the principle which is set forth in

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'The system in France is strongly focused on the requirements of Article 12'

Article 12 of the Convention concerning the recognition of the right of minors to express themselves in court. Thus, a child who is capable of forming his/her own views is entitled to be heard in any proceedings affecting them. These provisions effectively establish a right for the child to speak in proceedings, but these proceedings take place in an inquisitorial arena. This right does not confer upon the child the status of party to proceedings.

However, when a minor requests a hearing, that hearing may only be rejected by a specially reasoned decision. In a case where the child's liberty is at stake, a hearing is mandatory. The child may be heard alone, with a person of his choice, or a lawyer, and may, in the latter case, have the benefit of legal aid. When the interests of the minor are involved in proceedings, but differ from those of their parent(s), the Act of 8 January 1993 facilitates the appointment of an *ad hoc* administrator to represent the child in the proceedings. This person is designated *ex officio*, by the judge, or at the request of the child himself/herself. However, this can lead to a situation in which the person appointed is the president of the Conseil Général (local authority), who is also the *directeur* of the regional ASE responsible for the child and thus cannot be considered impartial. A particular issue arises in the case of unaccompanied minors (refugees), where the lack of ability to appoint a guardian is criticized as follows:

'The unaccompanied minor has no one guardian or adviser to advise and protect him/her, ensure that he/she has access to accommodation, education, health care, legal representation, assist him/her to deal with his/her asylum claim, possibly to explore the possibilities of family tracing and family reunification and to look for a durable solution.' (European Network on Separated Children, 2003, p. 9)

With the financial support of the authorities, highly diversified and original methods have been used to provide access to the law and legal information; in addition to the round-the-clock services available at the premises of the law courts or in bar associations, lawyers have ensured that information is accessible to minors in the places that they usually frequent. Thus, legal services also operate in high schools, the permanent reception, information and guidance offices (PAIOs), or facilities for the legal protection of young people.

Thus, the system in France is strongly focused on the requirements of Article 12, with a specialist judiciary providing support and advice at early stages of social welfare involvement and throughout any legal process, which is seen to be sufficient to protect the child's best interests. The judge operates in a conciliatory manner, trying to get the agreement

of all parties (Hetherington, 1998). This requires a specialist, trained judiciary with a thoroughgoing knowledge of child welfare and child welfare qualification training in child welfare in introducing flexibility into the system.

Models of Representation

Table 1 gives the models of representation in different countries and delineates their respective strengths and weaknesses. In addition to this overview of the different systems, our review of the international literature produces a number of themes:

- There is an international consensus in the literature that children need representation, particularly in public law proceedings affecting their care, welfare or liberty.
- There is a consensus that in the absence of special training, of smaller caseloads and of a more comprehensive role, lawyers cannot provide this service to children unless those children have the capacity to instruct a legal representative *and* are able to cope with adopting an adversarial position in relation to parents, social welfare agencies, or sometimes both (Sheehan, 2003). This may not be the case in jurisdictions with a highly specialized judiciary (e.g. France).
- There is a dominant view in the English-speaking world that a guardian should be a person who can interview relevant parties and represent the child's best interests while also attending to their views, and that such a person is likely either to have, or to need to acquire, specialist knowledge in a range of areas including child development, family dynamics, child abuse, and so forth.
- There is limited explicit discussion on the issue of dual representation in the international literature. However, where explicitly stated, opinion leans towards the adoption of the tandem model, as Salgo comments below:

‘In my view, particularly from a comparative perspective, everything speaks for retaining and indeed developing the team approach of the tandem model . . . Never touch a running system or Never [sic] change a winning team.’ (Salgo, 1998, pp. 235–236, original emphasis, see also Hertz, 1993 for US perspective)

The support for the tandem model may well be due to its commonsense moral appeal and its apparent ability to deal with both the child's best interests and their wishes and feelings. We have been unable to find a sustained critique of the model in the literature but neither have we been able to identify a rigorous research base showing its efficacy against other systems, which is surprising considering the high costs of this approach at a time when welfare budgets in many countries are under pressure.

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Table 1. Models in eight countries

	Model					
	Judge	Lawyer	Professional association	Panels of volunteers	Panels of guardians	Agency employing guardians
Country examples	France	New Zealand Australia	Germany	United States	Scotland	England and Wales Northern Ireland
Organizational structure	Special judicial system	None	National association (voluntary membership)	Agencies to recruit, manage and train volunteers	Local authorities recruit and administer lists	Independent agency to recruit, manage, train and employ
Strengths	Focuses on child's right to express views. Direct access to judge trained in child rights	Ability to represent child in court, knowledge of law and application	Self-regulation within national standards, relative autonomy of guardians	Low caseloads, availability outside court settings, low cost of guardian's direct work	Manage demand, provide oversight, relative autonomy of guardians	Consistency, clear lines of accountability, ability to manage demand, cost-effective use of resources, guardians up-to-date on policy and practice, guardians experienced and knowledgeable
Weaknesses	Need for specially trained judiciary and requires inquisitorial legal system. No independent single person to overview and promote child's best interests outside of court setting	Need for special training, expensive, role conflict between legal representation and welfare issues, problems in communicating children's wishes and understanding best interests	Low levels of consistency, no systems to recruit, monitor and manage demand, no managerial oversight, membership voluntary, no state control of organization	Problems with recruitment and retention, need legal representation in courts, comprehensive training, management and support system required	Problems with consistency between panels, experience of individual guardians can be limited, limited accountability of guardians	May compromise autonomy of guardians, incurs management overheads. High cost and concentration of experienced social workers in guardianship agency

Discussion

We have noted that in their attempts to address the need for children to have representation in matters affecting their welfare, English-speaking countries have tended to conflate the two salient Articles of the UN convention, that is, Article 3, which deals with the child's best interests, and Article 12, which deals with their right to express their wishes and feelings. That is to say, where systems other than 'stand alone' legal representation have been put in place, the child's representative is charged with both assessing their *best interests* and, often as a secondary duty, communicating their *views*. While these functions are inseparable in relation to very young children or children who, for some other reason, lack capacity, that is not necessarily the case with children who are able to form and communicate their own views on the facts at issue. It should also be noted that in most jurisdictions, social work authorities have a similar duty to act in the best interests of children and the presence of this extra layer of representation by guardians may be due to a lack of trust by courts or legislators in the independence of social workers, a point mentioned in the consultations on the future of the Irish guardian *ad litem* system (McQuillan *et al.*, 2004).

The conflation of the roles has meant that, even where apparently radical systems, such as the volunteer model in the US, have been put in place, they have paradoxically required that the child's representative become 'professionalized', to the extent that they must be trained in normal and pathological aspects of child development, family dynamics and so forth so that they may competently assess the child's best interests. If they were to be asked exclusively to represent their wishes and feelings, a shorter and more focused training in advocacy skills would be appropriate.

There is limited empirical work on the impact of models of children's representation but there has been some attempt to research children's satisfaction with the service (Berliner and Fitzgerald, 1998; Condelli, 1988; Poertner and Press, 1990; Ruegger, 2001). As we have noted above, systems using only lawyers generally seem to fare badly, with children feeling they were not listened to. In contrast, children seem to value guardian services, but state that this is primarily because they *did* feel listened to. They were generally less satisfied with the more welfare-based aspects of the service, such as the guardian talking to family members about what the child had told them. For example, in the UK, Ruegger (2001) interviewed 136 children. The children expressed positive views about the guardian service and felt listened to and supported by the

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guardian. However, a significant number of children appeared unclear that the guardian's role was not to represent their wishes but to take a fair view on their best interests. For example, a number expressed concern that matters they had felt were told confidentially to their guardian had subsequently been disclosed to a judge. One assumes that the children who took part in this study were those who were able to articulate their views.

Our review of guardianship systems in Northern Ireland and Ireland and this international survey has led us to the conclusion that, in court settings, the views of children are generally a secondary consideration to adult views of their best interests. This has led us to conclude that, for some groups of children in public or private law proceedings, an advocate (rather than a best interest oriented guardian and where necessary in addition to a legal representative) may enable better representation of the child in the courts and would be more in keeping with the intention of the UN Convention, which clearly states that children have to be viewed as individual subjects (for a fuller discussion of approaches see our recommendations to the Irish Government on guardian services; McQuillan *et al.*, 2004, pp. 95–97).

Advocacy could lead to an increased ability for children to be listened to and heard in proceedings (Dalrymple, 2005) in contrast to being subjects whose best interests are determined by powerful adults. This could lead to greater participation by children in legal proceedings, an increased role for children as citizens and a fuller implementation of their rights. As Stasiulis (2002) notes:

'A major innovation of the Convention . . . is that for the first time, it articulates the right of children to have a say in matters affecting them. . . . Indeed some analysts have argued that Article 12, which spells out some of these participation or empowerment rights is arguably the most significant and radical innovation of the Convention. . . . The importance of this article resides not only in the specific right to meaningful participation that it enunciates, but also in its departure from prevalent worldwide views of children and childhood. Rather than view children as 'pre-citizens', or as silent, invisible, passive objects of parental and/or state control . . . children are cast as full human beings, invested with agency, integrity and decision-making capacities' (pp. 508–509)

Clearly, the issue of children's vulnerability cannot be sidestepped. However, the importance of the court hearing children's views in addition to adult discourses about their best interests (which would still be represented by social worker involvement in cases) would provide greater balance to proceedings which are of central importance to the future

of the children concerned (Hardy, 1999). This echoes a point made by Schofield and Thoburn (1996), who argue for the adoption of a model of independent advocacy in child protection, where the advocate has no role or vested interest in the proceeding other than to ensure that the child's views and wishes are effectively represented.

The role of an advocate may depart substantially from that of current guardians. It may need to offer confidentiality, allowing the child to control what is disclosed (Dalrymple, 2001), and require a change in the nature of the relationship from one of independent professional to one of friend and ally (Dalrymple, 2003). It is difficult to predict what impact such a service might have on decision-making in courts and taking such a step would require something of a leap of faith by a judicial and welfare system that is deeply ambivalent about children's rights. As Smith (1997) notes:

'No wonder we bump into children's best interests at every turn—*adults* simply cannot manage without them' (p. 136)

In conclusion, then, our review of international practice suggests that there may well be scope for a more thorough-going engagement with the issues involved in facilitating the communication of children's wishes and feelings to the courts. This may be uncomfortable terrain for welfare professionals who are all too aware of the very real risks that exist for vulnerable children, but it is one with which any jurisdiction genuinely committed to treating its children as citizens must engage.

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