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**An Comhchoiste um Dhlí agus Ceart agus Comhionannas
Tuarascáil maidir le hAthchóiriú Chorás an Dlí Teaghlaigh**

Deireadh Fómhair 2019

Houses of the Oireachtas

**Joint Committee on Justice and Equality
Report on Reform of the Family Law System
October 2019**



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Contents

Chairman's Preface	3
Introduction	7
Table 1: List of public engagements with stakeholders	7
Previous reports/Background	7
Legal Context in Ireland.....	10
Table 2: Law Reform Commission Classified List of Family Law Acts in Force in Ireland as at September 2016	11
Recent legislative changes	13
Court structures in other jurisdictions	15
Current structure and conduct of family courts in Ireland	17
Table 3: court areas of jurisdiction	17
Key issues identified in hearings	21
Court structure and specialisation.....	21
Transparency and the <i>in camera</i> rule.....	25
Alternative dispute resolution	28
Resourcing and delays	30
Voice of the child.....	34
Imbalances within the family law and courts system.....	38
Conclusions and Recommendations	43
Appendix 1 – Committee Membership.....	51
Appendix 2 – Terms of Reference of the Committee	53
Appendix 3 – Witnesses and Official Report	57
Appendix 4 – Opening Statements	58
Appendix 5 – Submissions.....	123

Chairman's Preface

In 1996, the Law Reform Commission published a Report on Family Courts. Notwithstanding the progress made with regard to reforming the family law system since then, the current Oireachtas Joint Committee on Justice and Equality deemed it appropriate and necessary to address the issue in the 32nd Dáil, and we have made it a priority issue in our Work Programme.

The Committee held a series of public meetings in 2019 with stakeholder groups on the subject of reform of the family law system in order to better understand the issues that need to be addressed, and where the system can be improved.

Over the course of these engagements, it became abundantly clear that the family law system requires fundamental and ambitious reform. The current system, for a variety of reasons, fails to provide a user-friendly and efficient service to those engaged in it, at what can be an extremely difficult and emotive time in peoples' lives. The Committee has made a number of recommendations, with particular regard to the family court structure, specialisation, transparency, resources, the voice of the child and the imbalances within the court system. Many of these recommendations have been expressed elsewhere before, going back over many years. It is regrettable that they have to be repeated again here.

A copy of this report and recommendations has been sent to the Minister for Justice and Equality. The Committee looks forward to working proactively and productively with the Minister to address the issues identified within the family law system.

I would like to express my gratitude on behalf of the Committee to all the witnesses who attended our public hearings to give evidence and those who forwarded written submissions. Finally, I also wish to thank the staff of the Committee Secretariat who assisted in the preparation of this report. Go raibh maith agaibh.



A handwritten signature in black ink, which appears to read 'Caoimhghín Ó Caoláin'.

Caoimhghín Ó Caoláin T.D.
Chairman – October 2019



20th February 2019

Members of the Joint Committee with Dr Conor O'Mahony; representatives from the Law Society of Ireland; representatives from Children's Rights Alliance; and representatives from the Rape Crisis Network Ireland.



6th March 2019

Members of the Joint Committee with Dr Carol Coulter, Child Care Law Reporting Project; Dr Roisin O'Shea, ARC Mediation; representatives from the Council of the Bar of Ireland; and representatives from Treoir.



13th March 2019

Members of the Joint Committee with Dr Geoffrey Shannon, Special Rapporteur on Child Protection; Dr Kenneth Burns, UCC; representatives from FLAC; and representatives from Men's Voices Ireland.

Introduction

In Spring 2019, the Committee held a series of public engagements with relevant stakeholders, as laid out in the table below:

Table 1: List of public engagements with stakeholders

Organisation	Date of appearance
Children's Rights Alliance	20 February 2019
The Law Society of Ireland	
Rape Crisis Network Ireland	
Dr Conor O'Mahony, School of Law, UCC	
Child Care Law Reporting Project	6 March 2019
Arc Mediation	
Council of the Bar of Ireland	
Treoir	
Free Legal Advice Centres (FLAC)	13 March 2019
Men's Voices Ireland	
Dr Kenneth Burns, UCC	
Dr Geoffrey Shannon, Special Rapporteur on Child Protection	

The primary focus of the Committee hearings was to review the current structures within the family law system and to establish what areas could be improved and strengthened in order to create a more efficient, cost effective system with the lowest levels of trauma for families involved in proceedings. Although progress has been made in this area, the Joint Committee on Justice and Equality was of the view that much more remained to be done, and thus it made reform of the family law system a key priority issue in its 2019 Work Programme.

Previous reports/Background

Reform of the family law system and the structure of family law courts has been raised consistently by stakeholders and experts for over two decades. In 1996, the Law Reform Commission (LRC) published a substantive report on the Family Courts¹ in which it reviewed the broad features of the family law system based on

¹ https://www.lawreform.ie/_fileupload/Reports/rFamilyCourts.pdf

its Consultation Paper of 1994.² Highlighting a family law system in crisis, the LRC outlined that:

“The courts are buckling under the pressure of business. Long family law lists, delays, brief hearings, inadequate facilities, and over-hasty settlements are too often the order of the day. At the same time, too many cases are coming before the courts which are unripe for hearing, or in which earlier non-legal intervention might have led to agreement and avoidance of courtroom conflict. Judges dealing with family disputes do not always have the necessary experience or aptitude. There is no proper system of case management. Cases are heard behind closed doors, protecting the privacy of family members but offering little opportunity for external appreciation, criticism or even realisation, of what is happening within the system. The courts lack adequate support services, in particular the independent diagnostic services so important in resolving child-related issues. The burden placed on those who operate the system, especially judges and court officials, has become intolerable. Legal aid and advice services, despite substantial recent investment, continue to labour under an expanding case-load, and too many litigants go unrepresented. An unhealthy two-tier system of family justice is developing in which poorer often unrepresented litigants seek summary justice in the District Court while their wealthier neighbours apply for the more sophisticated Circuit Court remedies.”

At the time, the LRC emphasised that reforming the family law system would carry a cost and would require significant structural and legal reforms along with an increase in resources. However, the costly and radical development of an entirely separate and independent family court system was not recommended, with the LRC favouring instead the establishment of a regional family courts system that operates as a branch of the existing Circuit Court, with a wider family law jurisdiction that would include both private family law and public child protection law. This proposal would make use of existing resources while offering a more specialist service that would prioritise family law cases.³

The report offered 67 recommendations for structural and legal reform, and though there has been some progression in recent years, there is consensus amongst stakeholders that the majority of the recommendations therein continue to be relevant in 2019, with many recent reports calling for further implementation of the recommendations of the LRC.

In 1995, the Working Group on a Courts Commission was established to carry out a review of the courts in relation to operation, financing and other aspects. The working group published six reports and two working papers⁴, with its sixth and final report published in 1998 offering a summary of its work and

² <https://www.lawreform.ie/fileupload/consultation%20papers/cpFamilyCourts.htm>

³ <https://www.lawreform.ie/fileupload/Reports/rFamilyCourts.pdf> p. iii

⁴ Available [here](#).

recommendations on outstanding issues with the courts. The working group, in considering the operation of the Courts in relation to Family Law, set up a subcommittee on Family Courts and, in carrying out its review, found that submissions received from stakeholders echoed the criticisms of the LRC report. While some legislative progress had been made at this point, the working group found that many of the inadequacies inherent in the family law system that were identified in the LRC report still remained.⁵ The working group report makes 13 recommendations in relation to family law, most of which reiterated those of the LRC.

The provisions of the *Civil Liability and Courts Act 2004* allow for *bona fide* researchers and people appointed by the Courts Service to attend and report on family law proceedings and established the Family Law Reporting Project. In October 2007, Dr Carol Coulter's final report on the "Family Law Reporting Pilot Project"⁶ was published in two parts. Dr Coulter makes 18 recommendations in relation to the family law reporting pilot project and 27 recommendations in relation to the family law system, many of which again echo the observations of the 1996 LRC report. In consideration of the report, the Courts Service Board established the Family Law Reporting Project Committee to consider the report and make proposals in relation to the recommendations therein. The Committee completed its consideration of Dr Coulter's recommendations and published its report in 2009 with particular focus on the administrative aspects of the family law system.⁷

In 2014, the Law Society of Ireland published "*Family Law – The Future*"⁸ a submission to the Department of Justice, Equality and Defence. In their submission they outlined that almost two decades after the initial LRC Family Courts report, few of the recommendations had been implemented and many of the problems identified by the LRC remained. This was further reiterated by Dr Geoffrey Shannon in his 2018 *11th Report of the Special Rapporteur on Child Protection*⁹, and by Dr Carol Coulter again in her Child Care Law Reporting Project and by the UCC Child Care Proceedings research group.

⁵Working Group on a Courts Commission, *Sixth Report*, 29.

⁶[http://www.courts.ie/Courts.ie/library3.nsf/\(WebFiles\)/C4FA6C02C7B13A428025738400521CE9/\\$FILE/Report%20to%20the%20Board%20of%20the%20Courts%20Service.pdf](http://www.courts.ie/Courts.ie/library3.nsf/(WebFiles)/C4FA6C02C7B13A428025738400521CE9/$FILE/Report%20to%20the%20Board%20of%20the%20Courts%20Service.pdf)

⁷http://www.uspi.ie/attachments/File/Report_of_the_Family_Law_Reporting_Project_Committee_to_the_Board_of_the_Courts_Service.pdf

⁸ <https://www.lawsociety.ie/globalassets/documents/committees/family/familylawsubmission2014.pdf>

⁹ <https://assets.gov.ie/27444/92175b78d19a47abb4d500f8da2d90b7.pdf>

As outlined in *Shatter's Family Law*, the family law system in the Republic of Ireland has been radically transformed since the mid 1970s. A classified list of Acts related to family law, as provided by the Law Reform Commission in 2016, is presented in Table 2 below, followed by the most recent legislative changes in relation to the family law system.

Articles 41 and 42 of the Constitution recognise the family as the most important social unit within the State. Article 34(1) of the Constitution states that "Justice shall be administered in courts established by law... and save in such special and limited cases as may be prescribed by law, shall be administered in public". Due to the confidential details disclosed in family law proceedings, in order to protect parties' right to privacy, the majority of proceedings are held *in camera* under the 'special and limited' category of cases envisaged in the above article. Section 45(1) of the *Courts (Supplemental Provision) Act 1961*, listed that cases involving 'matrimonial causes and matters' be heard *in camera* and later Acts specifically dealing with family law matters also stipulated that proceedings be heard otherwise than in public including the *Judicial Separation and Family Law Reform Act 1989* and the *Family Law (Divorce) Act 1996*.

Family proceedings held *in camera* prohibit the publication of information that identifies the parties involved. Section 40 of the *Civil Liability and Courts Act, 2004* allows solicitors, barristers, and certain other categories of people approved by the Minister for Justice and Equality to attend family law cases and publish reports. Part 2 (sections 3 to 12) of the *Courts and Civil Law (Miscellaneous Provisions) Act, 2013* allows *bona fide* representatives of the press attend family law cases (subject to the right of the judge to exclude any such representatives) and to publish reports. The publication of reports of family law cases is allowed under these Acts on the strict condition that no names, addresses or any other details which might identify the parties can be used.¹⁰

The Law Reform Commission outlined in its consultation paper that the rise of family law litigation since the 1970s could be attributed to the introduction of a series of reforming Acts. Many new or improved remedies to family law issues were introduced in the *Family Law (Maintenance of Spouses and Children) Act, 1976*, the *Family Home Protection Act* of the same year, the *Family Law (Protection of Spouses and Children) Act, 1981*, the *Status of Children Act, 1987*, and the *Judicial Separation and Family Law Reform Act, 1989*.

Furthermore, the introduction of a civil legal aid scheme in 1980, which has since been employed mainly in family law cases, made the new remedies accessible to a wider public.¹¹ The *Judicial Separation & Family Law Reform Act 1989* enabled courts to grant a decree of judicial separation. Until 1996, Article 41 prohibited

¹⁰

<http://www.courts.ie/Courts.ie/Library3.nsf/pagecurrent/E8F7448AE6BF03C880257FB50039FEB2?opendocument>

¹¹ Law Reform Commission, [Consultation Paper on Family Courts](#) 1994 P16

the enactment of legislation providing for divorce, however, subject to a referendum held in November 1995, the original prohibition was replaced by a provision allowing for divorce as enacted by the *Family Law (Divorce) Act 1996*. Under the Act, the Courts are permitted to grant a divorce once the following conditions are established:

- the parties must have been married and living apart for a period amounting to four out of the previous five years before the application is made
- there must be no reasonable prospect of reconciliation and
- proper arrangements must have been made or will be made for the spouse and any dependent members of the family.

The central piece of legislation governing child protection proceedings is the *Child Care Act 1991* as amended. It should be noted that this remains subordinate to the Constitution and must also be compatible with the European Convention on Human Rights Act 2003.

Table 2: Law Reform Commission Classified List of Family Law Acts in Force in Ireland as at September 2016¹²

17.1 MARRIAGE		
Dept.	Name of Act	No/Year of Act
Justice	Family Law Act 1995	26/1995
Justice	Marriage Act 2015	35/2015
Justice	Deceased Wife's Sister's Marriage Act 1907	7 Edw. 7 c. 47
Justice	Deceased Brother's Widow's Marriage Act 1921	11 & 12 Geo.5, c. 24
Justice	Married Women's Status Act 1957	5/1957
Justice	Family Law Act 1981	22/1981
Justice	Family Law Act 1988	31/1988
17.2 CIVIL PARTNERSHIP AND COHABITANTS		
Justice	Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010	24/2010
17.3 CHILDREN AND PARENTAL DUTIES		
• 17.3.1 GENERAL		
Justice	Children and Family Relationships Act 2015	9/2015
Justice	Guardianship of Infants Act 1964	7/1964
Justice	Status of Children Act 1987	26/1987
Justice	Children Act 1997	40/1997
Justice	Legitimacy Act 1931	13/1931

¹² https://www.lawreform.ie/fileupload/Classified_List/Classified%20List%20of%20Acts%20v%2013.pdf

• 17.3.2 CHILD CARE AND PROTECTION		
Children ¹³	Child Care Act 1991	17/1991
Children ¹⁴	Child Care (Amendment) Act 2007	26/2007
Children ¹⁵	Child Care (Amendment) Act 2011	19/2011
Children	Child Care (Amendment) Act 2013	5/2013
Children	Child Care (Amendment) Act 2015	45/2015
Children	Children First Act 2015	36/2015
Children ¹⁶	Protections for Persons Reporting Child Abuse Act 1998	49/1998
Justice	Protection of Children (Hague Convention) Act 2000	37/2000
Justice	Children Act 1997	40/1997
17.3.3 CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS		
Justice	Child Abduction and Enforcement of Custody Orders Act 1991	6/1991
17.3.4 OMBUDSMAN FOR CHILDREN		
Children ¹⁷	Ombudsman for Children Act 2002	22/2002
17.4 ADOPTION		
Children ¹⁸	Adoption Act 2010	21/2010
Children	Adoption Act 2013	44/2013
17.5 CHILD AND FAMILY AGENCY		
Children	Child and Family Agency Act 2013 ¹⁹	40/2013
17.6 DIVORCE AND JUDICIAL SEPARATION		
• 17.6.1 DIVORCE		
Justice	Family Law (Divorce) Act 1996	33/1996
Justice	Family Law Act 1995	26/1995
Justice	Family Law (Miscellaneous Provisions) Act 1997 ²⁰	18/1997
Justice	Civil Law (Miscellaneous Provisions) Act 2008 ²¹	14/2008
• 17.6.2 JUDICIAL SEPARATION		
Justice	Judicial Separation and Family Law Reform Act 1989	6/1989
• 17.6.3 PRIVATE INTERNATIONAL LAW/CONFLICTS OF LAW		

¹³ See S.I. No. 488 of 2011.

¹⁴ See S.I. No. 488 of 2011.

¹⁵ See S.I. No. 488 of 2011.

¹⁶ See S.I. No. 218 of 2011.

¹⁷ See S.I. No. 218 of 2011.

¹⁸ See S.I. No. 218 of 2011.

¹⁹ Repealed Family Support Agency Act 2001 (54/2001); see S.I. No. 214 of 2011, S.I. No. 215 of 2011 and S.I. No. 216 of 2011 (only remaining statutory function of Department of Community, Equality and Gaeltacht Affairs that was, under the 2001 Act, transferred to Children and Youth Affairs).

²⁰ Note: 1997 Act also enacted changes to, for example, succession law: see Title 23, Land Law, below.

²¹ This Act is also classified at Titles 2.9: Publications, 9.1: General Jurisdiction of Courts and 23.4: Succession and Wills.

Justice	Domicile and Recognition of Foreign Divorces Act 1986	24/1986
17.7 MAINTENANCE²²		
Justice	Family Law (Maintenance of Spouses and Children) Act 1976	11/1976
Justice	Maintenance Act 1994	28/1994
17.8 DOMESTIC VIOLENCE		
Justice	Domestic Violence Act 1996	1/1996
Justice	Domestic Violence (Amendment) Act 2002	30/2002

Recent legislative changes

In 2012, a referendum was passed inserting Article 42A into the Constitution, entrenching the right for children to be heard in family law proceedings where that child is capable of forming views. In 2015, the signing of the Children and Family Relationships Act 2015 into law, under section 32, gave effect to the referendum and requires the Courts to hear the voice of the child with due regard to the age and maturity of that child. The legislation also provided legal clarity around various family types and addresses discrimination faced by children in non-marital families. Although a welcome progression overall, the Act does not provide clarity as to determining the child's capability of forming views.

Under the 2015 Act, the court may appoint an expert to determine and convey the views of the child by way of an expert report. The recent regulations as set out in the Guardianship of Infants Act 1964 (Child's Views Expert) Regulations 2018, specify the necessary qualifications and experience of child's views experts appointed under section 32(1)(b) of the Guardianship of Infants Act 1964 in private family law proceedings and the fees and expenses that may be charged by such experts when providing section 32 reports in family law cases.

The Courts and Civil Law (Miscellaneous Provisions) Act 2013 was introduced to amend the Civil Liability and Courts Act 2004 and the Child Care Act 1991 to modify the *in camera* rule in order to introduce greater transparency in the administration of family and child care law by allowing *bona fide* members of the press access to the courts in family and child care proceedings, subject to certain restrictions and prohibitions, including a strict prohibition on the publication of any material which would lead to the identification of the parties or children involved.

The 1991 Child Care Act first introduced the guardian *ad litem* (GAL), independent professionals appointed by the courts to represent the child's interests in specified legal proceedings. However, the original Act contained no provisions relating to appointments, function and status of a guardian *ad litem* in care proceedings or indeed their qualifications. The Department of Children and Youth Affairs is currently drafting the Child Care (Amendment) Bill 2018, which provides for the reform of the guardian *ad litem* service.

²² Maintenance Orders Act 1974 (16/1974) was repealed by European Communities (Maintenance) Regulations 2011 (S.I. No. 274 of 2011), reg. 25.

Under the Judicial Separation and Family Law Reform Act 1989, practitioners were directed to discuss and advise clients about mediation. The Mediation Act 2017 increased safeguards to this by imposing new requirements on the providers of legal services and solicitors are now obligated to make a Statutory Declaration confirming that they have advised separating clients (Section 5 and 6 of the 1989 Act) and divorcing clients (Section 6 and 7 of the Family Law (Divorce) Act 1996) that they have discussed and advised their clients about, inter alia, reconciliation, engaging in mediation, effecting a separation by means of deed or agreement and furnishing clients with appropriate contact details. ADR should be encouraged in suitable cases by legal practitioners and by the Courts in the context of case management.

The Domestic Violence Act 2018 introduced significant legislative changes to the law on domestic violence, including but not limited to, the courts' recognition of coercive control as an offence, the factors included when the courts consider applications, eligibility for safety/barring orders and the courts' consideration of the views of the child where a safety/barring order is sought in respect of that child.

On 24 May 2019, the people voted in a referendum to reduce the constitutional requirement for divorce applicants to live apart for a minimum of four years down to two years. The minimum period of four years of living apart set out in the Family Law (Divorce) Act 1996 will continue to apply, however, until the Oireachtas changes the law though this is expected in due course.

The Oireachtas already has the power to make laws recognising foreign divorces. This power is now made explicit in the Constitution. The explicit constitutional prohibition on a person remarrying in the State who has obtained a foreign divorce not recognised under Irish law will be removed. It will still be prohibited for a person to remarry in the State unless their foreign divorce is recognised under Irish law.

Court structures in other jurisdictions

Conversely to Ireland's current court system, specialised family court systems are commonplace in other jurisdictions in Europe, as well as in common law jurisdictions, though the form can vary from specialist divisions in existing court structures to completely separate specialist courts.²³ Most other common law jurisdictions share the approach that alternatives to the adversarial system should be explored when dealing with family law. There is broad consensus that family law systems would greatly benefit from specialisation in the family law area, with specialist or trained judges and staff, and a specialised family court structure such as those established in other jurisdictions.

It was originally anticipated that a referendum would be required for a constitutional amendment to Article 34 if the Government wished to create a separate family court. However, it was announced in 2014 that a referendum would not be necessary if a specialised family court was established as a division of existing court structures.²⁴ Yet while the intention to establish such a system was announced, it has yet to be implemented in practice.

Dr Geoffrey Shannon has stated that an analysis of the family law court systems in England and Wales and in Australia suggests a model which is not overly interwoven with the rest of the courts system. Managing the "type" of case which goes before each tier of the court also emerges as a key issue of importance. In England and Wales, they operate a very strictly run "gatekeeping system" of ensuring that cases are allocated to the most appropriate tier within the system, a case management mechanism that would be suited to the Irish context. Family law applications in the UK are made to the "Family Court", a specially designated family court system. The Family Court is a national court that sits in any location across England and Wales, generally in existent Magistrates and County Court buildings. Only judges with specialist experience and expertise hear family cases. The Family Court operates in tandem with the general court structure and the level of court and judge – Magistrate or County – at which a case is heard is dependent on the type of application before the Family Court.²⁵

There is a strong emphasis on mediation in England and Wales, and it is a legal requirement that couples must attend mediation information and assessment meetings (MIAM) prior to application for court proceedings. Some cases, such as those involving domestic violence, are exempt from this requirement.

Australia originally placed such importance on family cases being heard by Superior Courts that procedural or simplistic cases ended up being unnecessarily heard by judges of the Superior Courts. This resulted in a change to its system where the majority of family law proceedings are heard before the Federal Circuit

²³ Council of Europe Consultative Council of European Judges (2012) *Opinion No. 15 of the Consultative Council of European Judges on the Specialisation of Judges*, available at [https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE\(2012\)4&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864#P53_1776](https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2012)4&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864#P53_1776).

²⁴ <http://www.justice.ie/en/JELR/Pages/FamilyCourtsBill>

²⁵ *Ibid*, 77.

Court, with certain “categories” of cases being designated appropriate for the higher Family Court of Australia, where specialist judges and staff are employed. While family law comprises the majority of the Federal Circuit Court’s work, it functions across two divisions, the “General Federal Division” and the “Family Law Division”. Judges can sit across both divisions, though generally follow the original field of specialisation they practised as lawyers; thus, most family law proceedings are heard by specialist judges.²⁶

In 2007, the Australian government made family dispute resolution a requirement for divorcing couples before proceeding with a court process. Mediation units and in-house counselling services are an integral part of the Family Court in Australia and alternative dispute resolution (ADR) mechanisms are well-established, making litigation a less common, alternative route to resolving family disputes.

In some European states with specialised systems, such as France and Belgium, the judiciary and lawyers receive specialised training to equip them for the particular area of work.²⁷ This ensures a high level of knowledge, support and advice when managing family law proceedings. In France, child protection cases are heard by highly specialised judges trained in child welfare, who work with social workers to provide support and advice throughout the legal process and to secure the agreement of all parties. In Belgium, there is a high level of training and specialisation for lawyers in this area. Members of the Flemish Bar Association and its Youth Lawyer Commission must undertake a two-year course to train as a “youth lawyer”. The course has training on children’s rights, and trainee lawyers study child psychology as well as methods of communicating with children.

In England and Wales, the Bar Standards Board published in February 2017 a list of competencies which every barrister is expected to have from the outset in order to act in Youth Court Proceedings, and they must now be registered with the Board as part of the practicing application in order to act as a barrister in the Youth Court. The 2010 Family Justice Council Guidelines for Judges Meeting Children in family proceedings sets out guidance for judges when meeting children. This guidance encourages judges to assure children that their wishes have been understood, to explain the nature of the judge’s task and to receive advice from the children’s guardian (guardian *ad litem*) or lawyer about when a meeting is appropriate. Judges are advised that the age of the child is relevant, but that it should not alone determine whether a meeting is offered. The judge is required to provide a brief written explanation for the child where the meeting is refused. The guidelines emphasise that the meeting is for the benefit of the child, rather than for another purpose such as gathering evidence. These progressive guidelines assist in ensuring that the meeting is for the benefit of the child involved.

²⁶ Ibid, 79.

²⁷ Dr G. Shannon, [Eleventh Report of the Special Rapporteur on Child Protection](#), (DCYA 2018) 7.

Current structure and conduct of family courts in Ireland

Ireland does not have a separate, specialist family court system, and family law proceedings in Ireland are currently divided and conducted across the existing structures of the District Court, Circuit Court and High Court. There are no specific structures or guidelines on family law courts and practices, and procedures vary from court to court across the country. It is important to note, however, that the conduct of family law proceedings differs significantly to other civil proceedings due to the sensitive nature of the cases.

The Law Society of Ireland has summarised the jurisdictions of the various courts as follows in Table 3 below.²⁸

Table 3: court areas of jurisdiction

Court	Primary Areas of Jurisdiction
District Court	<ul style="list-style-type: none">• Applications under domestic violence legislation, specifically Barring Orders (interim and full), Safety and Protection Orders.• Applications for maintenance.• Custody, access and guardianship in respect of children (both marital and non-marital).• Applications for court orders re welfare of children under s.11 of 1964 Act e.g. re medical procedures/religious events or education, moving away applications dispensing with consent for signing of passports.• Application by civil partners and qualified co-habitants for certain reliefs under the 2010 Act.
Circuit court	<ul style="list-style-type: none">• Appeals from the District Court.• Concurrent jurisdiction with the High Court in respect of applications for judicial separation, divorce and nullity.• Concurrent jurisdiction with the High Court in respect of applications by civil partners and qualified co-habitants under the 2010 Act.• Concurrent jurisdiction with the District Court in relation to applications under domestic violence and maintenance legislation and issues affecting the welfare of children.

²⁸ <https://www.lawsociety.ie/globalassets/documents/committees/family/familylawssubmission2014.pdf>

	<ul style="list-style-type: none"> • Applications by civil partners and co-habitants under the 2010 Act. • Applications where there has been less than 3 months notification to the Registrar pre marriage.
High Court	<ul style="list-style-type: none"> • Appeals from the Circuit Court. • Special care cases. • Applications for judicial separation, divorce and nullity. • Applications by civil partners and qualified co-habitants under the 2010 Act. • Applications under the Adoption Acts. • Applications in respect of child abduction. • Cases stated from the lower Courts for interpretation on matters of law. • Judicial Review in respect of the lower Courts.
Supreme Court	<ul style="list-style-type: none"> • Appeals on matters of law from the High Court.

In Dublin, there are up to seven dedicated family law District courts and three Circuit Courts sitting five days a week hearing family law cases, with one to two High Courts sittings allocated to hearing such cases. Outside Dublin, the allocation of hearings is very much dependent on each individual District or Circuit Court, and family law competes with other areas of law for resources. There are no dedicated family law courts, and cases are heard on designated family law days.

Most family and child law cases in Ireland are heard by judges from the general courts system who are not required to have specialist qualifications or specific training or experience in family law matters and are not appointed as “family law” judges. Proceedings operate more informally than other civil proceedings and tend to foster an adversarial approach; however, the introduction of the Mediation Act 2017 obliges legal practitioners to advise clients about the advantages of resolving disputes through ADR methods, including mediation. It has often been emphasised that the common law adversarial system is highly unsuited for family law cases, as parents are focused on ‘winning’ and their disputes can be psychologically damaging for both them and their children.²⁹

Family law proceedings are held *in camera* due to the sensitive nature of the proceedings. While the administration of justice in public necessarily involves a loss of privacy, the public interest is not served in requiring family issues and issues involving a child to be heard in public.

The Courts (Supplemental Provisions) Act 1961 provides that matters of a matrimonial nature or involving a child should be heard otherwise than in public. Pursuant to section 40 of the Civil Liability and Courts Act 2004, the category of

²⁹ Joan Kelly, “Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice” 10 *Virginia Journal of Social Policy and the Law* 129 (2002), at 131.

persons entitled to attend family law proceedings and publish reports therefrom was extended. Part 2 of the Courts and Civil Liability (Miscellaneous Provisions) Act 2013 allows *bona fide* members of the press to attend family law proceedings and to publish reports, subject to certain conditions designed to ensure the anonymity of parties in family law proceedings.

Section 24 of the Child Care Act 1991 states that:

“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 welfare of the child as the first and paramount consideration, and
- (b) in so far as is practicable, give due consideration, having regard to his age and understanding, to the wishes of the child.”³⁰

The 2012 referendum on the constitutional amendment to Article 42 enshrined the right of children to have their views heard in family law proceedings, and the subsequent Child and Family Relationship Act 2015 introduced an obligation for the courts to ascertain and consider the views of any child who is capable of forming his or her own views when determining the best interests of the child, giving due regard to the age and maturity of the child.

Various methods are used to ascertain the views of the child across family courts in Ireland, though there is no consistent approach. Some courts routinely use guardians *ad litem*; rarely, but on occasion, children are heard directly in Court; sometimes they are heard in private chambers by the Judge; or the court may give directions for the purpose of procuring an expert report arising from questions affecting the welfare of a child and appoint an expert to determine and convey the views of the child.

There are two types of report utilised in family law - section 47 and section 32 reports. Section 32 reports exist under the Children and Family Relationships Act 2015, apply to private family law proceedings and are regulated by the Guardianship of Infants Act 1964 (Child’s View Expert) Regulations. These reports provide the courts with the specific views and wishes of the child, whereas section 47 reports report on the welfare of the child as per the opinion of the expert. Section 47 reports originated in the Family Law Act 1995 but were never commenced to operate in the District Courts.

The court has considerable discretion regarding the circumstances in which such a report or determination should be required, and the report must be financed by the parties involved, though those entitled to legal aid will receive support with

³⁰ <http://www.irishstatutebook.ie/eli/1991/act/17/section/24/enacted/en/html>

this cost. Where a GAL is appointed, they routinely report on the views of the child and provide an assessment of their best interests.

In 1980, a Civil Legal Aid and Advice scheme established the Legal Aid Board in Ireland. The scheme was given a statutory footing with the Civil Legal Aid Act 1995, which imposed a means-tested system for those applying for legal aid.³¹ The services of the scheme are administered by the Legal Aid Board, and over half of all legal aid applications relate to family law matters. Everyone is entitled to apply for legal aid, and anyone who satisfies the requirements of the Civil Legal Aid Act 1995 has a statutory right to receive civil legal aid.³² However, a client will only be eligible to access civil legal aid if they pass a principle test³³, a merits test³⁴ and a means test³⁵ - with the latter being the most significant. A person must have a disposable income of less than €18,000, as well as a disposable capital of less than €100,000, though the family home is not considered when assessing disposable capital. Those who qualify for legal aid will be required to pay a contribution for advice or representation based on this means test, though this contribution may be waived.

³¹ <https://www.flac.ie/campaigns/archive/flacs-campaign-for-civil-legal-aid-a-history/>

³² Section 27(1) Civil Legal Aid Act 1995

³³ In terms of the merits test, Section 28(2) Civil Legal Aid Act 1995 lays out the criteria to be considered by the Legal Aid Board in determining eligibility for the merits test for legal aid. They are that there must be: (a) reasonable grounds as a matter of law for instituting or defending proceedings; (b) reasonable grounds of success in the proceedings; (c) reasonableness in granting legal aid having regard to all the circumstances of the case such as probable cost to the Board; and (d) a lack of a more appropriate method than court proceed

³⁴ Law Society of Ireland, Legal Aid Taskforce, Civil Legal Aid in Ireland: Information for the Profession, 2008, pg. 18-26

³⁵ The law setting out the means test regulations are SI 273/1996 Civil Legal Aid Regulations 1996, SI 8/2002 Civil Legal Aid Regulations 2002, SI 460/2006 Civil Legal Aid Regulations 2006 and SI 346/2013 Civil Legal Aid Regulations 2013.

Key issues identified in hearings

Over the course of Committee hearings, and in the wider submissions, there was a general consensus amongst stakeholders that the current family law system in Ireland is beset by a number of difficulties. Many of these arise from the current structure of the family law courts. Delays, excessive case loads, inadequate facilities and lack of specialist training for judges are consistent issues across the various courts. Both private cases involving custody, maintenance and access disputes, and public law cases involving the State seeking orders to take a child into care, are held within the general courts system, and are primarily heard by judges without any particular specialisation in child or family law.

Court structure and specialisation

Although there is currently no specialist family court structure in Ireland, it is widely accepted that due to the sensitivity of the proceedings, a certain degree of specialisation across the courts and judges is necessary, and the establishment of a specialised family and children's court system is a recommendation of the Council of Europe guidelines.³⁶ The intention to establish such a system had been set out in the Programme for Government 2011-2016, and the Department of Justice and Equality has since stated that it is working on legislation to facilitate a dedicated family court structure. In response to ongoing parliamentary questions regarding the progression of structural reform, the Minister for Justice and Equality, Deputy Charles Flanagan, has stated that:

"The Government remains committed to significant reform of the courts, including the establishment of a family law court structure that is streamlined, more efficient and less costly. My Department is working on the general scheme of a family court Bill which will aim to streamline family law court processes, clarify jurisdictional issues and provide for a set of guiding principles to help ensure the family court will operate in a user-friendly and efficient manner. The intention is to establish a dedicated family court within the existing court structures."³⁷

It was originally anticipated that a referendum would be required for a constitutional amendment to Article 34 which would allow for the establishment of a separate family court. However, it was announced in 2014 that a referendum would not be necessary if a specialised family court was established as a division of existing court structures. Despite this, Dr Geoffrey Shannon recommended that should the Committee suggest ambitious, fundamental change to the family law system, it would be prudent to look at constitutional difficulties that may arise.

³⁶ Council of Europe, *Guidelines on Child-Friendly Justice* (2010), at 10.

³⁷ Dáil Éireann, Written Answers, 15 January 2019 – 'Family Law Cases'. Available here: <https://www.oireachtas.ie/en/debates/question/2018-02-06/56/>

As family law proceedings are often listed alongside criminal and other civil matters in the general court system, the procedures and practices involved vary from court to court, particularly outside Dublin, where there are no dedicated family courts. The Council of the Bar of Ireland (hereafter the "Bar Council") highlighted that a unified common system approach in child and family cases, both private and public, would make a significant difference as common rules would apply in those courts. At present, the District Court comprises 24 separate districts with their own set of rules, meaning that good practice that may exist in one District Court is not necessarily replicated in another. Operating with a common set of rules would ensure that the same issues are not re-litigated and would bring greater coherence to the system.

Judges are not required to have specialist qualifications or specific formal training for child and family law proceedings, and concerns were raised by stakeholders as to whether judges with no particular expertise in this area are qualified to provide judgement on cases of such a sensitive nature. Given that specialisation is not required, there is no common judicial approach to family law cases, which has created a lack of consistency in both the approach and decision-making process of such proceedings, as well as conflicting public information about how the system works. Stakeholders have argued that family law proceedings should be staffed by judges who have been trained or have specialist family law knowledge, and they should be supported by other specialist services.³⁸

In terms of specialisation of the judiciary, the majority of witnesses agreed that it would not be advisable for judges to be exclusively appointed as specialist family law judges. Rather, it would be more prudent if they were appointed in a generalist role while having the training and specialist skills required for the family law discipline. Dr Roisin O'Shea referred to the 80:20 approach utilised in jurisdictions such as Canada, where judges spend the majority of their time working and gaining experience of child and family law proceedings while still working on other areas. In the view of the Bar Council, having the same judges dealing with the family law list on an ongoing basis would lead not only to greater efficiencies, but also to greater consistency. The Committee noted that in order to gain consistency in judicial training, the issue will need to be tackled on a legislative basis to ensure that judges are trained appropriately for a family court.

It is generally accepted that child and family law proceedings require a different approach than other civil and criminal law proceedings and are heard, as a result, with a degree of informality. Under Section 29 of the Child Care Act 1991, child and family law proceedings are to be held *in camera* in a more informal setting, and should be heard "at a different place or at different times or on different days from those at or on which the ordinary sittings of the Court are held".³⁹ In practice, however, proceedings are heard in general court venues where judges and facilities are not tailored to child and family law cases. Dr Carol Coulter informed the Committee that a greater degree of informality exists in the Children's Court, involving round-table discussions - a format which could be applied in family law

³⁸ [Family Law Reporting Pilot Project](#), Dr Carol Coulter, P 43.

³⁹ <http://www.irishstatutebook.ie/eli/1991/act/17/section/29/enacted/en/html>

courts to create a more family-friendly environment. The view was widely expressed that improving court premises so as to provide child- and family-friendly spaces would help to make proceedings less intimidating, and thus reduce the negative impact on parties involved.

The inadequacy of the physical conditions of the courts in which family law proceedings are held is an issue that has been consistently highlighted since the Law Reform Commission's 1996 publication. In the absence of purpose-built venues, the premises in which family law proceedings are heard and determined are not fit for intended use, with private family law and child care proceedings being held along with criminal and other civil cases. Furthermore, family law proceedings involving children are often heard in premises with a lack of child-friendly spaces or meeting facilities, and there are major issues with overcrowding. Many of the current buildings are very dated, Victorian-era structures, in some cases surrounded externally by razor wire. This creates an environment that is not conducive to hearing from children. Seán Ó hUallacháin SC of the Bar Council outlined that in Dublin, child care cases are often heard in the District Court at the Bridewell, a court for criminal proceedings which, despite recent renovation, remains unsuitable for the contentious issues dealt with in public childcare cases. Despite the best efforts of individuals in the Courts Service, Dolphin House District Court, where most private family law cases are heard, and Phoenix House Circuit Family Court, have both struggled to cope with the growth in volume of cases.

Dr Carol Coulter described the findings of a report on childcare hearings in the District Court, conducted by the Child Care Law Reporting Project, which examined 35 District Courts throughout the country:

"We found overcrowding, a lack of privacy, lengthy lists and overworked judges in most of the courts attended. In some of these courts childcare cases were on a mixed list with criminal, civil, private family law and childcare cases. In most, the childcare cases featured in a general family law list which could be very long, up to 100 cases on a single day, and people can be waiting all day for their case to be heard."

In 2014, the Government announced plans for the construction of a purpose-built Family Law Centre and Children's Court complex located on Hammond Lane, next to the Four Courts, a site bought by the OPW in 2000. The complex, which would also be the premises of a new Supreme Court, would help to free up the Four Courts and provide an appropriate, modern space to manage the complexities of family law proceedings. However, progress on the project has been delayed due to funding issues, with the Department of Justice and Equality currently committed to allocating a maximum of €80 million towards the project. The Courts Service has estimated the cost of constructing such a complex at €140 million and has warned of the ever-increasing costs due to inflation, which could lead to further delays in construction and higher costs down the line. Committee Members agreed that it was necessary to allocate the funding to commence construction of the

Family Law Centre on Hammond Lane, which is urgently required to help address some of the structural issues undermining the family law system.⁴⁰

While some witnesses contended that waiting for new premises to be built was not an option when accommodating a specialist division of the family court, others emphasised that necessity for new buildings and a variety of accommodation options throughout the country. While some buildings could provide appropriate accommodation with some minor modifications, others are completely unsuitable for hearing family law proceedings, particularly those involving children. The RCNI stressed the need for creativity and to provide friendly, safe and unintimidating courtrooms.

Dr Conor O'Mahony submitted that a family courts system similar to that of the Children's Court for criminal matters involving children would be a simple approach to establishing a specialised family court, and the Committee noted that the approach of judges and professionals working within that system could provide guidance and a basis for the family courts:

"For those family cases one would designate the courts when they are hearing those issues as the family District, the family Circuit Court or the Family High Court. The legislation would then set out what are the characteristics of the family District Court to differentiate it from the regular District Court, be that procedural, in terms of facilities or specialist training for judges or other staff members. In that way, one would slot it into what we already have but one would separate it out in terms of that level of specialisation around the staffing and facilities that make it a specialist court."

Dr O'Shea submitted that what is required are regional hubs, with as many days as are necessary so that we can move to a case-managed system where specific appointment times are allocated for a case to be heard and there is no gathering of multiple cases at a courthouse at the start of a day for call-over.

Dr Coulter also contended that what was required was the establishment of a family court division of the existing courts, with specialist judges trained in family law and allocated to these courts for a period of two to four years, and with appropriate support facilities to allow for proper management of cases:

"I would suggest between 12 and 15 dedicated regional centres, where there could be easy access for wheelchairs and buggies, adequate consultation rooms, a comfortable waiting area with a separate room for vulnerable witnesses and children, and basic facilities like drinking water and a vending machine. It is not beyond our capacity to produce that for the courts, and no constitutional amendment is necessary to do this. Some improvements could be carried out to the existing system ... I believe, however, that they would essentially be a sticking plaster. It is

⁴⁰<https://www.irishexaminer.com/breakingnews/ireland/chief-justice-frank-clarke-family-courts-in-need-of-urgent-attention-922243.html>

essential to have a new structure of the courts to ensure they can deal adequately with family law.”

Transparency and the *in camera* rule

It has been largely accepted that there is a need for greater transparency in the family courts system, particularly with regard to the dissemination of information to the public, the ability to perform research and report on proceedings and the gathering and collating of data in relation to cases. Concerns have been expressed regarding the constraints of the *in camera* rule, which contribute to the inconsistency in approaches taken to family law proceedings.

While resourcing and support services are essential, stakeholders encouraged the better provision and distribution of information through a national public information campaign (as exemplified by such an initiative in Australia). Many people are not aware of what is available in terms of supports, and there is confusion about guardianship and the limits of people’s rights concerning access, custody and maintenance. Treoir also identified a significant gap in knowledge of family law amongst members of An Garda Síochána, the legal profession, social workers and the Judiciary, compounded by a pronounced geographical variation in how the family law system operates.

Under the *in camera* rule, family law proceedings are held privately so as to protect the identities of the parties involved, and it is an offence to broadcast or publish material that may lead to public identification of those involved. However, despite recent clarifying amendments in 2007 (Child Care (Amendment) Act) and 2013 (Courts and Civil Law (Miscellaneous Provisions) Act), the *in camera* rule remains poorly defined in Irish law, with precise prohibitions not set out.

Stakeholders stressed the importance of carrying out both quantitative and qualitative research in order to understand the experience of service users and for oversight of the court proceedings and judicial decision making. Reporting offers a full picture of how issues are addressed in the legal system and offers judges clarity, ensuring consistency of practice across the courts.

In her opening statement to the Committee, Dr Coulter outlined that Ireland has two parallel regimes for reporting on family law proceedings arising from the two amendments to the *in camera* rule listed above. The first change, introduced in 2004 by the then Minister for Justice, Michael McDowell, was designed to permit reporting of private family law proceedings without allowing the media attend. This was extended in 2007 to cover public family law, with the Child Care (Amendment) Act. This legislation names the Courts Service, the ESRI, the Law Reform Commission and all the major academic institutions as bodies that can nominate people to attend proceedings and write reports, subject to protecting the anonymity of the parties. Provided that the anonymity of the parties is protected, it is not restrictive as to what reporting can take place. Under the 2004 and 2007 legislation, Dr Coulter operated the Family Law Reporting Project and the Child Care Law Reporting Project respectively.

The second major change came in 2013, and was introduced by the then Minister for Justice, Alan Shatter. It allows *bona fide* members of the press to attend and report but subjects the media to a large number of restrictions on what may be reported. This legislation gives the court extensive powers to limit reporting, and provides for severe penalties for breaching the terms of the legislation – up to €50,000 in a fine or three years’ imprisonment, for both journalists and media executives who publish prohibited material.

Thus, the earlier regime for reporting family law is restrictive in who can attend proceedings and report on them, while not being prescriptive about what can and cannot be reported, subject to protecting a family’s anonymity; the later law allows the media free access to the family courts, but is highly restrictive as to what can be reported, with heavy sanctions. Since its enactment five years ago, there has been little media attendance at family law proceedings, and virtually no media organisation has the resources to provide comprehensive coverage.

Another possibility for obtaining further information about family law is through published judgements from the Judiciary. Members of the Committee were informed, however, that given the heavy workload of the Judiciary, it would not be feasible to provide written judgements in most family law cases, and the necessary resources are not available to provide for the redaction of judgements in order to remove all identifying information. A limited number of written judgements on child care from the District Court is published on the Courts Service website, with a larger number available but unpublished as the resources are not there for redaction.

Dr Coulter emphasised that a dedicated reporting body - like that of the Child Care Law Reporting Project, but not time-limited - that can attend a representative sample of cases, staying with complex cases through repeated adjournments and publishing the exchanges between parties’ lawyers, judges and witnesses as well as the court’s conclusions, would provide a balanced and systematic approach to reporting on family law proceedings. Members of the Committee noted the benefits of a reporting project that would extend to private family law cases, and agreed that such a body, as per the Child Care Law Reporting Project, would have to apply the same type of protocols to protect the anonymity of the parties, and filter out geographical details or any identifying information before it reaches the public domain. Providing such a service, and hearing directly from those involved in proceedings, could inform wider decisions and develop greater consistency throughout the courts, improving proceedings both for the decision makers and the participants involved.

Dr Kenneth Burns highlighted that the 2007 and 2013 amendments focus largely on permissions for attendance in, and the reporting of, these proceedings, and do not appear to cover research with participants outside of the proceedings. Stating that the *in camera* rule remained poorly defined despite the recent amendments, Dr Burns outlined that the precise parameters of what is prohibited are not set out, and whether any particular conversation about a set of *in camera* proceedings would breach the rule largely comes down to the subjective opinion of individual

judges. In essence, any person involved in *in camera* proceedings in the field of child protection, private family law or elsewhere risks being held in contempt of court every time he or she discusses the proceedings with anyone other than his or her legal representative or the other parties to the proceedings. The law neither clearly allows nor prohibits interviews with children, young people and their parents. In the absence of clarity, researchers, children, young people and parents are at risk of being held in contempt of court. The *in camera* rule has therefore had a chilling effect on research, thereby silencing the voices of children, young people and parents who are most impacted by proceedings.

While the sensitive nature of family law proceedings means that identities of parties should not be disclosed, the general consensus amongst witnesses was that the current application of the *in camera* rule has contributed to a significant lack of transparency in the system and that legislation clarifying the precise extent of the *in camera* rule is desirable.

The RCNI outlined that cases of sexual and domestic violence often become the subject of the family courts, both publicly and privately. The Family Court Services process on average 11,600 cases involving guardianship, custody and access matters. Many of these cases will carry allegations of sexual and domestic violence; however, currently there is no gathering of data and no statistics regarding the number of cases that include such allegations, due to the *in camera* rule. Aside from the Law Reporting Projects and Special Rapporteur, there is little data available to discern patterns and outcomes. The Committee agreed there is a need to make it possible for the Courts Service to gather and release statistics in the public interest so as to give an indication of the percentage of cases involving allegations of sexual and domestic violence in the family courts. This data could then be used in coordination with other agencies such as Tusla and An Garda Síochána to improve supports and policies in relation to family law matters.

In addition to the restrictions of the *in camera* rule, confidentiality and non-disclosure clauses imposed on parties in the family courts sometimes occur, whereby the court rules that a child's disclosures of rape and sexual violence must not be reported to the State's investigative authorities, An Garda Síochána, directly but must instead be mediated through appointed individuals or Tusla, who will act as a filter, deciding when a child's voice can be heard by our mandated criminal justice investigative authorities and when it will be contained. The RCNI emphasised that this data is merely anecdotal as documentation is not public; however, Committee Members expressed concern that there is no data or analysis generated by the Courts Services or Tusla to make publicly transparent regarding how many children and their guardians are bound by civil court-ordered, non-disclosure clauses with respect to criminal matters in family law proceedings. The Committee agreed that this data could again be gathered and collated in the interest of oversight in cases of intersecting civil and criminal areas of the independent legal system.

Alternative dispute resolution

Although the Irish Supreme Court has stated that courts should apply a more inquisitorial approach to proceedings involving children, it is acknowledged by legal practitioners and stakeholders that family law proceedings tend to foster an adversarial approach, particularly around cases involving guardianship and access disputes. The focus on litigation often results in greater, unresolved conflict which can lengthen or delay settlement of proceedings.

Moreover, adversarial proceedings can often result in unsatisfactory resolutions which can lead to further disputes and further expense for parties involved when court orders are not fulfilled. The Law Reform Commission, in its 1996 report, stated that parties should be “encouraged to resolve their disputes and agree on solutions without having recourse to the adversarial courts system”. It has often been emphasised that the common law adversarial system is highly unsuitable for family law cases, as parents are focused on ‘winning’, and their disputes can be psychologically damaging for both them and their children.⁴¹ The LRC stated:

“It needs to be recognised that judicial proceedings, even though conducted with informality and sensitivity, are not therapeutic exercises and that it is not possible to exclude from them some element of confrontation. This is one of the reasons why it is so important to avoid judicial proceedings where it is possible to do so without risk of injustice to the persons concerned”.⁴²

Dr Kenneth Burns, in highlighting to the Committee the negative impact of adversarial proceedings such as these, also suggested that the use of an inquisitorial approach as an alternative method be examined for child care proceedings. In highly adversarial cases, the relationships that have been built between Tusla, social workers and families can become fraught and damaged. If a case involves the removal of a child into care, the process becomes a matter of winning, and the system fails to keep the child’s interests at the centre.

Alternative dispute resolution processes such as this provide the option of an alternative pathway for family law disputes, with the most common process used being mediation. ADR has been defined by the LRC as “a broad spectrum of structured processes, including mediation and conciliation, which does not include litigation though it may be linked to or integrated with litigation, and which involves the assistance of a neutral third party, and which empowers parties to resolve their own disputes”.

The Judicial Separation and Family Law Reform Act 1989 introduced provisions directing legal practitioners to ensure that parties were aware of alternatives to legal proceedings, such as engaging in mediation. Amendments to the Act commenced in the Mediation Act 2017 added safeguards which now oblige legal practitioners to advise parties of the advantages of resolving disputes through ADR or mediation in cases where it is appropriate. While this is effective, not in all

⁴¹ Joan Kelly, “Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice” 10 *Virginia Journal of Social Policy and the Law* 129 (2002), at 131.

⁴² <https://www.lawreform.ie/fileupload/Reports/rFamilyCourts.pdf> p. 54-5

cases will parties choose to resolve their dispute through an ADR mechanism, and stakeholders outlined that front-loading the system with early and active case management from the judiciary would increase the numbers of parties opting for mediation. While it would require a commitment of resources from the judiciary, the Law Society is of the view that this method would allow judges to outline the court process and encourage the use of mediation as a faster and less adversarial alternative.

Despite the legislative reform brought about through the Mediation Act 2017, the Committee heard from Treoir that structures for mediation and resolution of family conflict remain significantly under-resourced, and often people must wait 12-26 weeks for an appointment. The failure to properly resource ADR also means that Ireland lags far behind other countries in establishing and sustaining shared parenting, an approach that is child-focused and supports the child having meaningful relationships with both parents, who share and are flexible regarding their responsibilities to their child. Mr Damien Peelo of Treoir highlighted that parents who take the route of shared parenting tend to work collectively in the interests of the child and are more willing to negotiate more flexible arrangements for access. However, Mr Peelo stated that the greatest barrier to shared parenting was court orders, and the presumption that they cannot be renegotiated.

While judges and practitioners are highly supportive of mediation, greater clarity regarding the utilisation of ADR is needed, and substantial resourcing is required in order to ensure that parties involved have access to and information on ADR services. Some stakeholders expressed the view that mediation should be a mandatory requirement before going to court, with possible penalties such as denial of legal aid should any party refuse mediation. However, Committee Members expressed the concern that there would be constitutional difficulties with mandatory mediation such as this. Furthermore, FLAC outlined that since the essence of mediation is people coming together in agreement to resolve issues, it is considered best when it is voluntary while some cases are simply inappropriate for mediation, such as those where an imbalance of power may exist. By way of an alternative, FLAC suggested examining ways of making mediation more accessible and encouraging more parties seeking litigation to opt for mediation.

Dr Geoffrey Shannon also suggested an alternative approach to mandatory mediation through the provision of mandatory information sessions which would help people understand the reality of the court process and the advantages of avoiding litigation with respect to the parties and children involved. This approach has been shown to be hugely successful for families and children in Los Angeles Superior Courts, where most parties elect to continue in mediation to resolve their issues. Dr O'Shea stated that according to research findings in California, once people have attended the first mediation session, 80% tend to go on.

Although Members of the Committee support the use of mediation as an alternative to family law proceedings in court, concerns were raised with regard to mediators not being appropriately regulated. In order to address the issue, Dr O'Shea emphasised the immediate need for a mediation council to be established

that will provide users with essential information regarding the competency of the mediator, the training standards of the mediator and complaints procedures in place should issues arise with the mediator. The Committee observed that the Mediation Act 2017 has provided a basis for resolving this issue, although it was noted that the establishment of a mediation council, which will produce codes of conduct for mediators, has yet to be implemented.

While an ADR mechanism is a suitable and desirable alternative to a court dispute, stakeholders remain divided as to whether or not ADR is appropriate in public family law cases or cases involving sexual or domestic violence or allegations such as these. The argument against the use of ADR is that since public family law cases involve the State on one side and the family – which is very often vulnerable – on the other, the situation is not evenly balanced, and therefore not appropriate for ADR.

With regard to private cases involving sexual or domestic violence, the Domestic Violence Act 2018 specifically precludes mediation as a proposed solution. The potential for subversion of the mediation process, leading to further victimisation of the victim and/or dependent children, is always present where there is evidence that one partner has already subjected the other to abuse, and any victim of such abuse would need the protection of a court order which may be enforced against the perpetrator.

In contrast to the view that mediation should never be used in cases of domestic violence, some stakeholders presented the position that mediation can be appropriate where a child safety issue is not at stake, and with the specific training and expertise of the mediator as being fundamental to the process. Dr Coulter suggested the following as areas of dispute in child protection where alternative dispute resolution can be appropriate: “access when children are in care: decisions about education of the children or around going on holidays; for psychological and medical assessments of the child; and so on. People should not have to go back to court to get those kinds of issues dealt with. It would be much more appropriate and suitable for them to take place in a less stressed environment.”

Dr Róisín O’Shea outlined the concept of parallel mediation, whereby the parties involved are dealt with separately, with the mediator managing safety, space and power imbalances. She stated that this approach is used very successfully in both Canada and New Zealand.

Resourcing and delays

Many of the difficulties confronting the family law system are a result of general under-resourcing, in spite of an ever-increasing number of family law applications.⁴³ While Members of the Committee are cognisant of the fact that

⁴³ <https://www.lawreform.ie/fileupload/Reports/rFamilyCourts.pdf> p. 10

improving and increasing resources will be at a cost to the State, in the longer term it may save money if done properly.

The consistent under-resourcing of the family law system has resulted in long delays in many parts of the country - an issue that was first raised in the LRC's 1994 Consultation Paper⁴⁴ and that has not abated since its publication with the volume of family law applications continuing to place a burden on the existing court system. Furthermore, the Constitutional amendment obliging the courts to hear the views of the child, which was given effect by the Children and Family Relationships Act 2015, has further added to the ongoing delays, with applications involving children now requiring more than one sitting.⁴⁵

It should be noted that delays in proceedings have a significant negative impact on children and families. The delays currently experienced in family law cases increase the difficulties and complications which arise in the context of relationship breakdown.

In Dublin, there are dedicated family law courts, and while delays remain in the system, there are not the chronic delays that can be experienced in other parts of the country. Outside Dublin, the number of days allocated to family law sittings is limited, resulting in the system clogging and long gaps between the institution of proceedings and their determination, or broken hearings whereby cases are adjourned to another date several weeks or months later. These delays tend to give rise to lengthy court sittings, with lists of up to 100 cases being assigned to a given day. No extra resources are provided in order to address the ever-growing backlog of cases, and the quality of the proceedings and determinations of cases heard later in the evening is questionable. Dr O'Shea cited her own research which found that family law litigants in the District Court "experience two different worlds. There are still impossibly long lists in the provincial courts. However, litigants in Dolphin House (in Dublin), by contrast, benefit from a brilliantly innovative system ... where almost 95% of the litigants are now self-representing."

The insufficient availability of facilities such as waiting rooms and consultation rooms often results in private meetings being held in corridors. Stakeholders outlined that child and family law proceedings which take place in the same buildings as criminal law and other civil law proceedings fail to ensure that the right to privacy is upheld, and that the inconsistency of resources in court venues negatively impacts on the conduct of family law proceedings. The failure to provide private consultation areas has resulted in legal practitioners and clients discussing sensitive and important private family matters prior to entering the courtroom, often in public areas such as corridors, which is contrary to the legislative and public policy purpose of family law proceedings and undermines the purpose of the *in camera* rule. All of these factors can increase the stress and tension of proceedings, which can raise volatility in the conduct of litigation.

⁴⁴ <https://www.lawreform.ie/fileupload/consultation%20papers/cpFamilyCourts.pdf>

⁴⁵ Dr G. Shannon, *Eleventh Report of the Special Rapporteur on Child Protection*, (DCYA 2018) 5.

Time constraints and the lack of judges to feasibly manage the number of cases also impact on hearing the voice of the child in many of these cases, and despite these long sitting days, many cases are often left unheard and parties are required to return on the next available sitting. Practically, this proves only to create further gaps and lengthen delays, as well as increasing legal costs for all parties, who have no certainty as to whether the case will proceed on the next available date.⁴⁶ Moreover, since judges are allocated on a term basis, there is no guarantee that an adjourned case will have the same judge hearing the next resumed sitting.

As outlined in FLAC's submission, access to justice must be efficient to ensure that issues can be resolved quickly and matters do not escalate. Addressing the Committee, Ms Eilis Barry outlined that problems with the provision of legal aid include problems with delays, the means test, the contributions, the waiver, the issuing of certificates and the areas of law excluded. In addition, there is a lack of transparency regarding the reasons for refusal and the amount of financial contributions collected.

Over half of all legal aid applications relate to family law matters. Ms Barry emphasised that the Legal Aid Board faces huge demands for its services and that the problems arise from the structures and lack of resources. Prolonged delays are encountered when one or both parties involved apply for civil legal aid. Examples of current delays, as stated by FLAC are: ten months (approximately 42 weeks) for first consultation in Blanchardstown and Finglas law centres; 33 weeks in Cork law centre; and 33 weeks in Tralee. However, even in cases where legal aid has been awarded or parties are sufficiently represented, there are delays due to an insufficient number of judges to deal with the heavy caseloads. There are currently 64 judges in the District Court, when a conservative estimate of what is required to manage the current workload would be at least 80. FLAC emphasised the need to allocate appropriate funding and properly resource the courts to cater for the volume of people using them in order to decrease wait times and ensure cases are addressed in an acceptable timeframe.

The Civil Legal Aid Act 1995, in practice, does not cover many areas of law, and the current under-funding of the Legal Aid Board has created lengthy waiting lists for initial consultations, which adds to delays in the courts system as well as a backlog of work, and delays in granting applications due to under-resourcing. In addition, many applicants will be excluded from eligibility, despite having low disposable income, due to issues with allowances in the means assessment. Given the disparity in rent and childcare costs across Ireland, there is geographic inequality whereby some people are unfairly penalised by living in an area where they pay higher rent.

Contrary to criminal legal aid, civil legal aid is not free, and clients are expected to pay a contribution based on income and assets assessed in the means test. The contribution for receiving advice through legal aid ranges from €30 to €150, depending on income. If representation is provided, a minimum contribution of €130 is required, though if a person has disposable income and capital after the

⁴⁶ [Family Law Reporting Pilot Project](#), Dr Carol Coulter, P 42

various allowances are deducted, then their contribution for legal aid will be calculated on both means and capital and may come to several thousand euro. These costs can be prohibitive and deter people from accessing the scheme, and can also create further monetary difficulties for those applicants living on basic incomes and/or social welfare, where the minimum contribution for representation would be significant. This issue has been exacerbated by an amendment to the Civil Legal Aid Act in 2008, whereby the Legal Aid Board can only waive contribution if it would cause “undue hardship” to the applicant. FLAC expressed concern that little is done by way of making the public aware of this waiver, and that there is ambiguity as to what is categorised as ‘undue hardship’ when granting the waiver. The Committee agreed that a review of the legal aid scheme was needed, particularly with regard to means testing and eligibility.

Legal practitioners working at the Legal Aid Board Law Centres are under significant pressures both in relation to time and resources while managing excessive client lists. While the operation of private practitioner schemes in District Courts should alleviate some of these pressures faced by the Legal Aid Board, the schemes have suffered from the chronic under funding of the Board, and solicitors participating in the scheme cannot economically make a living from it. Were the schemes to be adequately funded, more private practitioners could be employed, freeing up the Legal Aid Board and reducing delays for those accessing legal aid.

The Bar Council outlined that significant numbers of people in District Court cases are in receipt of legal aid. Poor resourcing hinders the work of the Board and results in delays to the court process where parties are waiting to get their legal aid certificate or waiting on their solicitor consultation. This can have a significant negative impact on parties concerned, particularly children or victims of domestic violence. Parties must often wait three to six months for their first consultation with a solicitor, which can significantly raise litigation costs where one party is privately represented. For those cases concerning marital/relationship breakdown where access or financial support is in dispute, this level of delay can have a significant impact on the family.

Significant additional resources are required in order for the Legal Aid Board to provide access to a proper functioning legal aid system for civil matters. Currently, the Legal Aid Board receives approximately €40 million per annum. Though there have been increases in recent years, they have not matched the requirements, given the number of people engaging the Board’s services. Although FLAC stated the need for further investment and resources for the Legal Aid Board, they were reluctant to provide a specific figure that would address the deficiencies in the service to the Committee, stating that a needs analysis is required.

As a result of the current housing crisis, further challenges exist where non-resident parents struggle to find suitable, child-friendly accommodation that is affordable within a low to middle range of income. This issue is particularly prominent in Dublin, where a significant salary is essential to manage the cost of housing. Child Contact Centre services were run on a pilot basis in two locations in north and south Dublin between 2011 and 2013 by One Family in partnership

with Barnardos. The service was to provide children whose parents are separate and unable to agree to appropriate contact arrangements with a neutral environment for access; and to provide children in the care of the HSE who need support to have contact with their parents. The services cost approximately €209k per year, and an independent evaluation confirmed support for an expanded national service. However, while the centres operated very effectively, they were not reallocated funding after 2013 and were closed.

Barnardos describes the centres as 'a safe, friendly and neutral place where children can spend time with the parent/s they do not live with. It is a child centred environment which allows the child to form or develop a relationship with the parent at their own pace and in their own way.' Although stakeholders expressed that centres such as these were a cost-effective, essential support for families for access visits, adequate resources would be crucial to providing a professional, safe space for families. Dr O'Shea highlighted that existing State resources, such as Family Resource Centres (FRCs), could be used to manage the growing and consistent need for mediation and points of contact. She noted that there are 120 FRCs nationwide which have the facilities to operate as contact centres, if resourced appropriately.

Members of the Committee noted the view that, should they be adequately funded and resourced, contact centres could also provide State-led mediation services and other supports that would have the potential to provide a significantly positive impact on the family law system.

Voice of the child

There was a general view amongst stakeholders that a family law system must be equipped not only to have children present, but also to facilitate them in having meaningful involvement in proceedings. Currently, however, despite its 2012 insertion into the Constitution, the right of the child to be heard is not being adequately fulfilled - with inadequate facilities, legislative gaps, adversarial proceedings and a lack of appropriately trained staff all proving to be major barriers to upholding the constitutional obligation.

Dr Conor O'Mahony, contended that current legislation fails to provide sufficient clarity in terms of ascertaining the views of the child:

"First, the Act makes it clear that the appointment of an expert to determine and convey the views of the child is entirely at the discretion of the court. This is not necessarily a problem; Article 42A does not require the appointment of a person to ascertain and convey the views of the child, as long as the child is given the opportunity to express those views in some form. However, the Act is silent as to what exactly should happen in cases where the court decides not to appoint an expert. This lack of clarity has potential to pose difficulties. The obligation to facilitate the free expression of the child's views remains, but the absence of clear provisions stipulating how this should happen leaves the door open to

nothing happening at all. This is particularly so since the current default in private family law proceedings is that the views of the child are not ascertained. Many judges may not feel qualified to speak to children in chambers, and direct testimony from the witness box will often be inappropriate, given the nature of the proceedings. Rather than granting the court the discretion to appoint an expert and leaving silence on the fall-back position, the better approach would have been for the Act to make the appointment of an expert the default position, with clear stipulations as to the exceptions where this need not occur, and what should happen instead.”

Dr Geoffrey Shannon stated that while Ireland has been very progressive in this area in terms of legislation, our current infrastructures are built around adults, and he urged the Committee to focus on adopting structural reform similar to that seen in jurisdictions such as Scandinavia, where the infrastructure and proceedings are tailored to the needs of the child.

Although there has been a lot of recent legislative reform in this area, Dr Shannon highlighted that infrastructural issues were leading to a lack of implementation of the reforms, and that ambiguity around the means of ascertaining the views of the child leaves a significant gap in enforcing the constitutional obligation. The Children and Family Relationships Act 2015 is not prescriptive with regard to the various methods by which the Courts should ascertain the views of the child, and various other provisions, such as the guardian *ad litem* provision and the procurement of expert reports, are inconsistently implemented. The Committee heard that a clear, structured framework is required since the absence of legislative guidance and policy has resulted in a lack of consistency in the Courts, where the voice of the child is often left unheard as a result.

Given that hearing directly from children is very challenging, particularly when judges and lawyers are not obliged to have specialist training, Dr Shannon emphasised the need for a number of agencies to be involved in proceedings to support judges in applying multiple methods to ensure that the voice, welfare and best interests of the child are central to proceedings. In spite of this challenge, however, the Committee was informed that when children are capable of articulating views, they want to be heard by the decision maker and feel empowered when this occurs. Dr Shannon emphasised that in order to allow for this, the necessary funding must be provided to ensure that the required supports are available in both child care and private cases. If there is commitment to hearing the voice of the child, it could be done by way of a national system for ensuring that children are heard in all proceedings affecting them, such as the guardian *ad litem* system in Northern Ireland.

Due to the complexities of family law, protocols and legislation would have to be drafted with due regard to the various possible scenarios, for example, private family law contexts where divorce can cause emotional crises in children, as well as child abuse contexts where a power imbalance exists. Dr Shannon suggested the need for overarching legislation to involve a range of disciplines to ensure that

the voice, welfare and best interests of the child are front and centre of decision-making, whilst also ensuring that decision-makers/the judiciary are trained and equipped to select the best methods appropriate to each case.

The Law Society of Ireland outlined that the 2015 Act put increased pressure on the court system and that judicial discretion only proves to add to the inconsistency of hearing the voice of the child in family law cases since, in many situations, each individual judge will have a different opinion on how to ascertain the views of the child.

In some cases judges will hear the voice of the child in their chambers. Although it is not a common practise, some witnesses warned against this method where judges are not appropriately trained for the complexities that may be involved. While there is some judicial training in Ireland, it is ad hoc and inconsistent, and the Committee agreed that should the judiciary be managing family law cases, appropriate training should be a mandatory requirement. Dr O'Shea highlighted that in Canada, judges are obliged to have continuous professional training on an annual basis with regard to hearing the voice of the child and how to determine if there is a situation of estrangement, parental alienation or parental coaching.

In the context of private family law proceedings, procuring an expert report is the most commonly utilised mechanism for hearing the voice of the child, yet an absence of resources makes this problematic. The Law Society highlighted that the introduction of the recent Guardianship of Infants Act 1964 (Child's Views Expert) Regulations⁴⁷ "fixed the cost of an expert report on hearing the voice and welfare of the child under section 32 of the Child and Family Relationships Act 2015 at €250 or €300. That will mean that experts will not produce these reports. Procuring a report typically involves at least four visits to the family and the parents to determine what will happen. As the person who produces a report will be cross-examined in court, there may also be attendance at court and, in addition, the expert will have to produce the report, into which at least 20 hours will have to go. People will not do that."

The Law Society emphasised that in reality, the cost of procuring an expert report is in the region of €3,000-4,000. Fees must be paid by parties to the proceedings, and should they be unable to pay this cost, an expert cannot be appointed, which leaves open the possibility that the views of the child are simply not heard. This has also led to judges, many of whom are not specifically trained, attempting to hear the voice of the child without the assistance of any expert and without any great funding from the Courts Service. Members of the Committee agreed that it is necessary to ensure that the cost of expert reports does not exclude a large cohort of the population from accessing justice. Currently, the parties involved in the proceedings, regardless of financial means, must pay for the reports should they be procured, though those entitled to legal aid get 50% of the cost covered by the Legal Aid Board. For lower income families and those

⁴⁷ <http://www.irishstatutebook.ie/eli/2018/si/587/made/en/pdf>

struggling already, the costs can be onerous, raising the risk that reports are not obtained and the constitutional right of the child to be heard is compromised.

In highlighting this issue, FLAC emphasised the need for proper, comprehensively funded civil legal aid, though accepted that in the interim, additional mechanisms such as unbundling the legal service would be necessary. The Committee noted the Children's Rights Alliance recommendation for the implementation of a State scheme akin to the legal aid scheme to ensure the appointment of an expert in cases involving children.

Dr O'Mahony emphasised the importance of flexibility when prescribing methods for ascertaining the views of the child since every individual child and every case is different. For instance, communicating directly with a 16-year-old child may be a better method than the use of an expert; whereas the use of an expert may be better suited to cases involving younger children, where communication barriers are more likely. However, because the 2015 Act refers to the use of the expert but not to the other options, it raises the question as to what those options are and how they would work in cases in which experts are not appointed. As well as exploring the various possible options, it is also necessary to clarify the criteria for appointing an expert, including the area of specialisation, where the person would fit in terms of accountability, the professional body and the qualifications he or she would have to have and how this expert would be resourced. The Committee agreed that better clarification was needed in this area of legislation to ensure that the right of the child to be heard is upheld.

In the context of public proceedings, Dr O'Mahony outlined that the Child Care Act 1991 provides two specific mechanisms for ascertaining the views of the child in child care proceedings: the appointment of either a guardian *ad litem* or the appointment of a solicitor to represent the child who would be a party to proceedings. The mechanism in the Child Care Act whereby a solicitor can be appointed for a child is used very infrequently, and invariably the guardian *ad litem* is the primary, and most effective, vehicle in a set of proceedings through which the views of the child would be communicated to the court. While it is currently unlikely that lawyers in family law cases in Ireland have the skills and expertise required to hear and represent the voice of the child, stakeholders expressed the view that should appropriate training be provided, lawyers could be part of the suite of measures in place to ensure the child's voice is heard, instead of relying on a guardian *ad litem* in all scenarios.

The role of the guardian *ad litem* is twofold: to represent the views of the child and to represent the welfare of the child. Dr Carol Coulter outlined that while children may not be the best judges of their own welfare, their views need to be represented before the courts in an unfiltered manner; and she expressed concern that the current system leaves room for the views of the child to be silenced while prioritising the guardian *ad litem*'s opinion regarding the welfare of the child. There is always a social worker and a solicitor representing the Tusla side in public cases, and it is important to note that the social worker is not impartial in proceedings and that they are in court seeking a particular outcome. The guardian *ad litem* is

therefore a fundamental element of such proceedings because he or she provides independence in terms of analysing the child's best interests and communicating the views of the child.

As set out above, section 32 reports are procured for determining and conveying the voice of the child in private law cases, and are regulated under the recent Child's Views Expert regulations. Likewise, section 47 reports are procured when there is a question affecting the welfare of the child. However, some Members of the Committee expressed concern regarding section 47 reports and the lack of regulations applicable to those considered 'experts'. The Committee noted that some unregulated professions could be authorised to compile reports where, should parties involved disagree with the report, there is currently no mechanism to allow for complaints regarding the conduct of that professional. Dr Shannon stressed that similar regulations to those issued around section 32 reports need to be issued for section 47 reports to ensure that those who prepare the reports are properly qualified and given specific terms of reference for engagement.

Imbalances within the family law and courts system

Members of the Committee raised concerns regarding imbalances within the family law and courts system in relation to fathers, lower income families or those on social welfare and those living in rural versus those living in urban areas. Stakeholders suggested that, anecdotally at least, there is a perception that fathers in family law proceedings are not treated equally and fairly in respect of access and maintenance. This could be attributable in part to a failure to recognise a change in society whereby fathers now have greater involvement with their children than in the past; and stakeholders strongly emphasised the need for proper research and data to be produced in private cases to ascertain the position of fathers in family law courts and whether the present-day role of a father is being adequately reflected in court orders.

Dr Coulter highlighted a specific inequality she observed towards certain fathers due to the operation of the civil legal aid scheme. It is strictly means tested, and a situation often arose where a working father earning a modest wage was above the means threshold for legal aid while his wife, if she was a mother, would typically not be working or working part time, and would fall under the means threshold. If the relationship broke down, therefore, she would be eligible for legal aid but he would not. That gives rise to an inequality of arms in legal proceedings and is clearly unfair. A solution to this, she submitted, would be to remove or significantly increase the means threshold, while asking for a means-related contribution from litigants, so a person on an average income could avail of the civil legal aid scheme and contribute according to his or her means.

Men's Voices Ireland echoed the view that men are less likely to qualify for legal aid and very many are unable to afford legal representation. They also believe that the threshold for legal aid is too low and disadvantages men. They argued that the family law system more broadly produces outcomes that are bad for men: "Too often it is a winner-takes-all situation in which the man is removed from the

home. He may still have to pay maintenance and a mortgage as well as provide for himself. Furthermore, he will often discover that access to his home is gravely diminished, in many cases because he can no longer provide suitable accommodation for himself and his children due to his removal from the family home under section 10 of the Family Law Act 1995”.

Dr Róisín O’Shea expressed the view that fathers are often seen to be secondary parents, and the current approach of the courts does not ensure parity of treatment for both parents as a result. She highlighted that in 97% of cases, fathers are the non-resident parents, and the current default access orders given by the District and Circuit Courts to fathers are for “every second weekend and one night during the week”. Research by ARC mediation found that the default access orders arose from expert reports where a welfare issue had been raised regarding a child and had originally been the minimum access to be given to a non-resident parent. Committee Members noted the negative impact that this approach has on both the fathers and children involved in family disputes, and some agreed that the adversarial approach of the family law system is creating an imbalance of parental rights. Dr O’Shea highlighted the efficacy of ARC Mediation’s project in Dublin that could be used to address such an imbalance through competent mediation linked to the courts, whereby any agreement is legally binding under section 11 of the Mediation Act. In the 50 cases involved in the project, she noted, the parenting time of non-resident parents improved in all cases, where 80% of the fathers involved did not have any access prior to participating in the project.

Members of the Committee raised concerns about the lack of sanctions regarding breaches of access and non-payment of maintenance. It was highlighted that whilst the provisions for sanctions are in place under the 2015 Act, in practise they are rarely imposed. An amendment to the Guardianship of Infants Act introduced by the 2015 Act provides for a number of innovative methods for sanctioning breaches of access orders, including the granting of compensatory time where the judge may compensate the parent who has been refused access with longer periods of time to offset the effects of the break in contact. When the person affected by a breach of access goes to court, he or she must fill in a form stating that they are coming to court to deal with a breach of access, and should they wish to have sanctions imposed, another form must be filled to state this. However, stakeholders stated that little information is readily available regarding such procedures, and thus sanctions are rarely imposed by judges.

Although Members supported the use of sanctions, they were of the view that sanctions should be imposed with caution and that a more comprehensive response is required in some cases, such as where children refuse to go on access visits. In order to prevent breaches of access, Members agreed that in addition to the use of sanctions, it is essential for the child to be at the centre of decisions and to be heard.

Mr Damien Peelo also highlighted that in high conflict cases, parents often do not realise that the court ruling can be renegotiated at later stages, and thus, access

remains highly inflexible. This is contrary to the idea of shared parenting, whereby parents work together and negotiate issues around access and maintenance in respect of the changing needs of the child in order to provide flexibility for all parties. However, the Bar Council emphasised that 50:50 shared parenting is not always a viable or practical outcome. Serious issues exist for the non-resident parent, primarily the father, in terms of access to housing. Accommodation issues are a particularly prominent issue in Dublin, where the housing crisis has created a significant challenge for non-resident parents to find child-friendly accommodation unless one is on a significant salary, leaving lower to middle income families at a considerable disadvantage. In addition, the non-resident parent in need of appropriate accommodation for contact time will also have difficulty getting onto the housing list because provision is only made for the primary carer. The Committee agreed that this issue could be addressed through the provision of family contact centres in existent Family Resource Centres, as set out above.

In Ireland, family law conflict is often exacerbated by unmarried fathers not having automatic guardianship rights in respect of their children, even if their name is registered on the birth certificate. Only mothers have automatic rights to guardianship in these cases and, by contrast, married parents are automatically joint guardians with equal rights in relation to the child. Not only does this ignore the realities of modern family life in Ireland, it also creates inequality in terms of parental rights and responsibilities; and this in turn often results in separating parents taking the adversarial route through court, leading to tension and conflict between parties, with the child caught in the maelstrom.

Treoir emphasised that under the UN Convention on the Rights of the child, every child has the right to know who their parents, both father and mother, are; and second, has the right also to enjoy the company of both parents. 30% of children a year are born to unmarried parents yet the rights of this group of people are still very vague.

As set out in the Children and Family Relationships Act 2015, the sole guardian of a child born outside of marriage is the mother. The unmarried father will only be granted guardianship rights if he has lived with the mother for 12 consecutive months prior to the birth, and 3 months following the birth. The other option is for both parents to sign a statutory declaration agreeing that the father be appointed as joint guardian. Further issues arise when the biological mother is married, but not to the biological father. In circumstances where the mother tries to register the birth of her child and the husband is not contactable, and in the absence of legal documentation to rebut the statutory presumption of paternity, the birth cannot be registered unless the husband is recorded as the father of the child.

Dr Ruth Barrington indicated that a statutory declaration can prove to be problematic since the guardianship is not registered anywhere. With a third of children born to unmarried parents, the imbalance of guardianship rights of those fathers who are married or unmarried has become a significant social problem that is not being recognised or addressed appropriately in the 2015 Act. Members

of the Committee were supportive of the recommendation on having a register of guardians as a starting point for scoping out options for enhanced guardianship rights. The issue of the register of guardians was debated at the time of the 2015 Act, though Dr Shannon emphasised that a system built around children would be less concerned about guardianship issues and more concerned about ensuring that the parents looking after the child have the legal rights to do so.

Members of the Committee agreed with the view that unmarried fathers should be given automatic guardianship rights, though it was recognised that practical issues could arise, for instance, where a father is not involved, or does not wish to be involved, with the child. Automatic guardianship exists for unmarried fathers in Northern Ireland, and the Committee noted that other jurisdictions do not use terms like 'guardianship', 'custody' and 'access' as they are considered to be parent-centred, opting, instead, for more child-centred terms such as 'parental responsibility' and 'contact'. The deviation from these historic terms was also suggested by Dr Shannon during the debate on the Children and Family Relationships Bill 2015, with the reason proffered for not progressing along those lines being that it might require more ambitious constitutional change. Dr Shannon argued for putting a constitutional proposal to the people that would allow for an ambitious reform of the family court system and structures, rather than being tied by constitutional constraints.

Treoir emphasised that the socio-economic position of parents has a huge impact in determining their ability to fully access the family law system, and those on lower incomes remain at a disadvantage. Family law issues are often accompanied - and aggravated - by debt, unemployment and housing problems. FLAC highlighted the importance of social inclusion and promoting access to justice, including access to legal aid. Those who qualify for legal aid must pay a minimum contribution of €130, a substantial amount for a low income worker or a person dependent on welfare. This often leads to lay litigants in family law hearings, further delaying the process and increasing tension between parties in court.

Dr Kenneth Burns highlighted that if a case must go to litigation, then it should be fair regardless of financial disposition. Lay litigants going up against an expensive barrister does not amount to a fair hearing when one party has no experience and no information or knowledge of procedures. Dr Coulter outlined that the restrictive means threshold of the civil legal aid scheme creates such inequality in legal proceedings. In a scenario where there is a sole earner and the relationship breaks down, the situation often arises where the sole earner cannot afford a private solicitor, but is above the means threshold to qualify for legal aid; yet the other person, who may be working part-time or is the primary care-giver to children, would qualify, resulting in one unrepresented party in court. This issue tends to impact heavily on separating families on low to modest incomes. Furthermore, the delays involved with legal aid often results in the non-resident parent – almost invariably the father – not seeing their child for several months, frequently resulting in estrangement. While an ideal solution would be for parties to resolve disputes amicably, it is not always possible, and Members of the Committee agreed that improving resources with regard to information, mediation and the

judiciary itself would significantly reduce the numbers going to litigation and allow for more equal negotiating within disputes.

The VAT rate charged on family law services was identified as an issue by a number of witnesses. In the context of mediation, Dr O'Shea noted that the bulk of her private family mediation work is charged at €123 per hour, of which €23 is VAT: "One immediate step the Government could take to support families in distress is to reduce the tax on those fees. Those who need the services of a family mediator or a family law solicitor are individuals rather than businesses and, therefore, cannot reclaim VAT, which at the current rate of 23% is almost a quarter on top of fees charged."

Conclusions and Recommendations

Based upon the hearings, submissions and broader consideration of the issues, the Committee arrived at the following conclusions and recommendations:

Courts structures and facilities

1. The Committee, with due regard to the express Government commitment to bring forward legislation to provide for a more efficient family law courts structure, strongly recommends the establishment of a dedicated and integrated family court within existing court structures. Specialised family courts are commonplace in other jurisdictions. The Committee calls upon the Minister for Justice and Equality and the Government to make this a matter of urgent legislative priority. Legislation must, in turn, be backed up with the necessary resources and implementation.
2. Stakeholders highlighted the inadequacy of many premises in which family law proceedings are currently heard, stating that current venues are not fit for purpose, with major issues of overcrowding and environments that are unsuitable for children and the sensitivity of family law proceedings. The Committee recommends a thorough review of the physical infrastructure of family law courts, with a view to producing a blueprint for a modern, efficient and family-friendly courts infrastructure.
3. Key ancillary services and agencies, such as legal aid and mediation services, as well as the courts and courts offices, should all be housed under one roof. Accommodation should incorporate appropriate areas for private consultation, child and welfare assessment services, ADR facilities, child-friendly spaces, crèche facilities, disability access and supports and guides for navigation through the process for lay-litigants. Translators should be readily available to courts to avoid lengthy delays when there are language problems.
4. It is beyond the scope of this report to be prescriptive about how precisely a new courts infrastructure should be designed. However, the Committee is of the view that the most appropriate model would be based upon a network of regional hubs, with sittings set aside exclusively for family law cases, and with as many sitting days as are necessary so that we can move to a case-managed system where specific appointment times are allocated for a case to be heard and there is no gathering of multiple cases at a courthouse at the start of a day for call-over. Case management must be child focused and made with explicit reference to the child's needs and timescales.
5. As outlined to the Committee, progress on a site on Hammond Lane, purchased by the OPW in 2000 close to the existing Four Courts, has halted due to the insufficient allocation of necessary funding. Taking into

consideration the possibility that costs could increase further due to inflation in the construction industry, the Committee is strongly of the view that the necessary funding should be allocated as a matter of priority, and that construction of a purpose-built family law complex on the site should commence as soon as possible.

6. Restructuring of the family law courts must include the promotion of a system of interdisciplinary communication and information sharing.

In private family law matters, key services should be available to permit family law judges to refer couples or parties to skilled personnel to:

- draw up parenting plans;
- carry out parenting capacity assessments;
- deal with anger management programmes in domestic violence cases;
- monitor custody and access orders when they break down and facilitate their restoration;
- engage in family therapy; or
- implement supervised access orders.

The interdisciplinary approach involves an acceptance that simply making a court order is not sufficient, that further work needs to be undertaken by specialists with a range of non-legal skills to ensure that the needs of clients are met. It would require a problem-solving court where, for example, judges would be in a position to order a mental health assessment.

7. Current legislation provides that family law proceedings should be heard as informally as is practicable. However, in practice, proceedings are held in general court venues, often applying an adversarial approach. In considering the greater degree of informality that already exists in the Children's Court, Members of the Committee are of the view that a similar format should be applied to family law courts to create a more family-friendly environment where facilities are tailored specifically to children and family law cases.
8. The Committee heard that procedures and practices vary from court to court, with a lack of consistency being a major issue under the current structure. The Committee recommends that legislation for a new family law court structure should also provide for the development of a comprehensive set of overarching rules and practice guidelines to be applied uniformly across divisional courts to ensure a more unified and coherent approach to family law proceedings.
9. Given the particular sensitivities and complexities of family law proceedings, the Committee is of the view that a certain level of specialisation is required to ensure greater consistency in practice and procedure throughout the family courts process. It is recommended therefore that members of the judiciary, lawyers and court staff receive

comprehensive specialist training in regard to the particular issues relevant to family law to ensure those involved in family court proceedings have the specialist supports required. Training should be ongoing in order to keep up with the changes and expectations of a modern society.

10. The Committee recommends the employment of specialist child court liaison officers to provide procedural information and support to children and families during the course of family law proceedings.
11. The Committee is of the view that specialist judges with appropriate training should be assigned - though not exclusively confined - to family law courts for a minimum period of at least two years, in order to ensure greater efficiency and consistency with regard to decision-making and to the implementation of legislation, court rules and procedure.

Transparency and the in camera rule

12. The Committee believes that there is insufficient knowledge of and dissemination of general information about the family law system. There is a significant gap in knowledge and understanding of the system, not only amongst the general public, but even amongst members of the legal profession, An Garda Síochána, social workers and the Judiciary. In order to address this issue, the Committee recommends:

- a. The launch of a national public information campaign, similar to that introduced in Australia, in order to ensure better provision and dissemination of information to the public, as well as ensuring better access to information regarding the process, and rights and supports for those entering into proceedings;
- b. That the website of the Courts Service be significantly updated and modernised, with guides and visual aids to provide easy and efficient access to information for members of the public in respect of family law in particular; and
- c. That professionals employed by agencies involved in family law matters are provided with specialist training to ensure they have the knowledge and understanding of the system to provide parties to proceedings with the relevant and necessary supports and services.

13. Ambiguity surrounding the ambit of the *in camera* rule has contributed to an inconsistency and lack of transparency with regard to the conduct of family law proceedings. In relation to research, for example, the current law does not specifically allow or disallow research outside of court hearings. The Committee therefore recommends:

- a. The establishment on a permanent basis of a dedicated reporting body, to include both public and private family law proceedings. This body would apply similar protocols to the Child Care Law Reporting Project in order to ensure the protection of anonymity of parties before information reaches the public domain; and
 - b. That further examination be given to the operation of the *in camera* rule to provide greater certainty regarding its application, and to expand the scope of researchers and others to investigate and report on the family law process, whilst maintaining the anonymity of individuals.
14. A corollary of the *in camera* rule is that there is little by way of gathering and collating of data in private family law proceedings. In particular, the Committee noted the absence of data regarding the outcomes of private family law proceedings in relation to the rights of fathers, access rights and custody. It was agreed that in order for the Courts to provide consistency and balance in decision making, there must be better transparency within the process. The necessary resources should be made available to the Courts Service to gather and provide essential data regarding outcomes of private family law proceedings in order to assist future policy making.
15. Presently, it is not possible for the Courts Service to gather and release statistics regarding the precise number of cases heard that involve allegations of sexual abuse or domestic violence. The Committee believes it is desirable that the Courts Service, in conjunction with the Central Statistics Office, would gather and publish data regarding the number of cases that include allegations of sexual abuse or domestic violence in private law proceedings, and coordinate such information with An Garda Síochána and Tusla to ensure the necessary supports and services are provided.
16. The Committee believes that the number of cases where 'non-disclosure' or 'confidentiality' clauses are imposed on children (either directly or through their guardians) in the family courts should be made publicly transparent. It is therefore recommended that the Courts Service data collection system tracks the number of children bound by such clauses, in the interest of transparent oversight in cases of intersecting civil and criminal areas.

Alternative Dispute Resolution

17. The Committee acknowledges that family law proceedings are very stressful for the parties, particularly where there are children involved. The Committee believes that it would be beneficial if lawyers and family

law Courts could advise the parties at the commencement of proceedings that at the end of the process the best the parties can hope for is a Court imposed decision relating to their entitlements to assets and custody or access rights in respect of children. Although family law proceedings arouse very strong feelings amongst the parties, the Committee believes the parties should be advised at the outset that they would be exposed to less stress, cost, time and risk if they could reach a settlement amongst themselves rather than persisting with an adversarial process in which a Court will ultimately impose a decision that will seek to balance the respective rights and interests of all affected parties.

18. While acknowledging the effectiveness of the provisions of the Mediation Act 2017 in obliging legal practitioners to advise their clients of ADR options, the Committee is of the view that early and active case management by the judiciary would better highlight the advantages of ADR methods and actively encourage parties to choose a non-adversarial route from the outset.
19. The Committee is of the view that information regarding ADR methods needs to be made more publicly available, particularly for those entering into family law disputes. It does not believe that mediation, which by its very nature should be consensual, should ever be made mandatory. However, it does strongly recommend that mandatory information sessions be provided in relation to mediation and other ADR options prior to proceeding with litigation, in order to ensure that parties understand the reality of the court process and the advantages of avoiding litigation where appropriate. Such information sessions could draw upon the example of the Mediation Information and Assessment Meetings (MIAMs) offered in the UK.
20. The Committee heard significant evidence that ADR, particularly mediation, is an essential element of an efficient and cost effective family law system, whilst also achieving better outcomes for families. ADR and mediation facilities should be features of every court house where family law proceedings are heard. Such supports would help to alleviate the workload of the Legal Aid Board and the Judiciary should they be adequately provided for and integrated into the courts system. The Committee therefore recommends substantially increased funding and adequate resourcing of ADR services.
21. Concerns were raised regarding the regulation of mediators and others engaged in alternative dispute resolution, and ensuring that they are suitably qualified and properly trained in family law matters. The Committee therefore urges the Government to implement the provision within the Mediation Act 2017 to establish a Mediation Council in Ireland that will provide a code of conduct for mediators and provide users with information regarding the competency of mediators; set training

standards for mediators; and put complaints procedures in place should issues arise with a mediator.

22. The Committee agreed that while public child care cases are in general unsuitable for mediation, it may be appropriate for the judge to recommend the use of mediation in particular situations, rather than return to court, when children are already in care - such as negotiations around access; decisions about the education of the children or going on holidays; or psychological and medical assessments of the child.

Resourcing and delays

23. The Committee, in acknowledging the information gap that exists at present, recommends that the Legal Aid Board and Courts Service both work to promote increased public knowledge of the Legal Aid Scheme, providing greater visibility and accessibility to such information so that the public are fully aware of the supports available, and the extent and limits of those supports.
24. The Committee recommends that a full review of the legal aid scheme be conducted, with particular regard to means test rates, contribution requirements and eligibility, in order to ensure that the scheme is meeting the needs of those most vulnerable in society. It believes that the current threshold for legal aid needs to be raised significantly.
25. Given the delays and volume of cases facing the Legal Aid Board, and the barriers to access facing the public, the Committee strongly recommends that a thorough needs analysis and review be conducted of the funding requirements of the Legal Aid Board, with a view to reducing waiting times for consultations with a solicitor and ensuring that cases are progressed within acceptable timeframes that minimises stress on children in particular.
26. The Committee heard that outside of Dublin, the number of days allocated to family law sittings is limited, resulting in serious delays as well as lengthy court sittings. Cases are often adjourned to be determined by a different judge on a different day. The Committee recommends that, in addition to structural reforms, a substantial increase in the number of judges is essential – particularly at District Court level - to address the backlog of cases and relieve pressure on the judiciary.
27. The Committee agrees that the current housing crisis and lack of affordable accommodation, particularly in Dublin, for those affected by a separation/divorce has a significant negative impact on children and non-resident parents involved. It is therefore recommended that funding be allocated to allow for the re-establishment of Child Contact Centre services - as previously operated by One Family and Barnardos - to

provide a neutral space for parents to access their children in child care cases, and for those non-resident parents who cannot provide suitable accommodation for access in private family cases. Such centres could operate through existing Family Resource Centres throughout the country.

Voice of the child

28. The Committee heard that, despite the introduction of Article 42A of the Constitution in 2015, there is currently an uneven, patchwork approach to the question of whether children get to participate in family law proceedings. Legislation is silent as to what should happen in cases where a court exercises its discretion not to appoint an expert. A clear, structured framework is required, with legislative guidance for the courts. The Committee therefore recommends a review to consider amending and consolidating current legislation in this area and providing specific guidelines on how to ensure that the views of the child are adequately and fairly ascertained.

It believes that the appointment of an expert ought to be the default position, with clear stipulations as to the exceptions where this need not occur, and what should happen instead.

29. Greater clarity is also necessary in relation to the specific criteria for appointing an expert, including the area of specialisation, where the person would fit in terms of accountability, the professional body and the qualifications he or she would have to have, and how this expert would be resourced.
30. Although there is a Constitutional requirement to ascertain the views of the child, in reality this is undermined by the fact that the funding of the necessary expert reports to give effect to this can fall on the shoulders of parents, who will often not have such resources. If the constitutional aspiration that the voice of the child be heard is to be made reality, there is a need to establish a State panel of experts who would be available to the courts to produce a report within a reasonable timeframe.

An alternative solution would be to establish a national body such as the Guardian *ad litem* service in Northern Ireland, with a view to the service being utilised in both public and private family law proceedings.

31. In the interim, the Committee believes there is an urgent need to review recent regulations fixing the cost of an expert report on hearing the voice and welfare of the child under section 32 of the 2015 Act at €250 or €300. This is completely unrealistic given the amount of work involved, and means that many experts will not produce such reports.

32. The Committee recommends that consideration be given to providing regulations in respect of section 47 reports, similar to the recent Child's View Expert Regulations. Such regulations would ensure that those who prepare the reports are properly qualified and given specific terms of reference for engagement.

Imbalances in the court system

33. The Committee believes there is a real need for the Department of Justice and Equality, in conjunction with the Courts Service, to conduct greater research into outcomes in family law proceedings, in particular in relation to the position of fathers in family law proceedings, to ensure there is parity of treatment for both parties, adequately reflecting modern society and the changing role of fathers.
34. In consideration of the existing sanctions for breaches of access, the Committee is of the view that information regarding such possible procedures should be provided to all families involved in family law disputes. While supporting the imposing of sanctions for breaches of access, the Committee is also in favour of a more comprehensive, flexible response to breaches of access, perhaps involving negotiating access through mediation with the child at a family resource centre.
35. In recognition of the significant imbalance in terms of guardianship rights for fathers who are married or unmarried, the Committee recommends creating a central register of guardians to ensure that there is a record of legal guardians in the system. The Committee is also of the view that serious consideration ought to be given to granting automatic guardianship rights to unmarried fathers.
36. The Committee recommends that consideration be given as to whether laws should be amended to take into account situations where one parent is wrongfully influencing their child or children against the other parent, thereby creating unfair and unwarranted alienation that can be destructive and life lasting.
37. The Committee urges the Government to greatly reduce the rate of VAT of 23% that currently applies to family law fees. This places an undue burden on individuals and families, who are often already in a situation of financial distress.
38. The Committee is of the view that more child-centred terms such as "parental responsibility" and "contact" should be used in the context of family law, instead of historic terms like "guardianship" "custody" and "access". However, the Committee is cognisant that further consideration must be given to the constitutional issues that may arise from such change.

Appendix 1 – Committee Membership

Joint Committee on Justice and Equality

Deputies



Caoimhghín Ó Caoláin TD
(SF) [Chair]



Colm Brophy TD
(FG)



Jack Chambers TD
(FF)



Catherine Connolly TD
(I4C)



Peter Fitzpatrick TD
(IND)



Jim O'Callaghan TD
(FF)



Thomas Pringle TD
(I4C)

Senators



Frances Black
(CEG)



Lorraine Clifford-Lee
(FF)



Martin Conway
(FG)



Niall Ó Donnghaile
(SF)

Notes:

1. Deputies nominated by the Dáil Committee of Selection and appointed by Order of the Dáil on 16th June 2016.
2. Senators nominated by the Seanad Committee of Selection and appointed by Order of the Seanad on 20th July 2016.

JOINT COMMITTEE ON JUSTICE AND EQUALITY

TERMS OF REFERENCE

a. Functions of the Committee – derived from Standing Orders [DSO 84A; SSO 70A]

- (1) The Select Committee shall consider and report to the Dáil on—
 - (a) such aspects of the expenditure, administration and policy of a Government Department or Departments and associated public bodies as the Committee may select, and
 - (b) European Union matters within the remit of the relevant Department or Departments.
- (2) The Select Committee appointed pursuant to this Standing Order may be joined with a Select Committee appointed by Seanad Éireann for the purposes of the functions set out in this Standing Order, other than at paragraph (3), and to report thereon to both Houses of the Oireachtas.
- (3) Without prejudice to the generality of paragraph (1), the Select Committee appointed pursuant to this Standing Order shall consider, in respect of the relevant Department or Departments, such—
 - (a) Bills,
 - (b) proposals contained in any motion, including any motion within the meaning of Standing Order 187,
 - (c) Estimates for Public Services, and
 - (d) other matters

as shall be referred to the Select Committee by the Dáil, and

 - (e) Annual Output Statements including performance, efficiency and effectiveness in the use of public monies, and
 - (f) such Value for Money and Policy Reviews as the Select Committee may select.
- (4) The Joint Committee may consider the following matters in respect of the relevant Department or Departments and associated public bodies:

- (a) matters of policy and governance for which the Minister is officially responsible,
 - (b) public affairs administered by the Department,
 - (c) policy issues arising from Value for Money and Policy Reviews conducted or commissioned by the Department,
 - (d) Government policy and governance in respect of bodies under the aegis of the Department,
 - (e) policy and governance issues concerning bodies which are partly or wholly funded by the State or which are established or appointed by a member of the Government or the Oireachtas,
 - (f) the general scheme or draft heads of any Bill,
 - (g) any post-enactment report laid before either House or both Houses by a member of the Government or Minister of State on any Bill enacted by the Houses of the Oireachtas,
 - (h) statutory instruments, including those laid or laid in draft before either House or both Houses and those made under the European Communities Acts 1972 to 2009,
 - (i) strategy statements laid before either or both Houses of the Oireachtas pursuant to the Public Service Management Act 1997,
 - (j) annual reports or annual reports and accounts, required by law, and laid before either or both Houses of the Oireachtas, of the Department or bodies referred to in subparagraphs (d) and (e) and the overall performance and operational results, statements of strategy and corporate plans of such bodies, and
 - (k) such other matters as may be referred to it by the Dáil from time to time.
- (5) Without prejudice to the generality of paragraph (1), the Joint Committee appointed pursuant to this Standing Order shall consider, in respect of the relevant Department or Departments—
- (a) EU draft legislative acts standing referred to the Select Committee under Standing Order 114, including the compliance of such acts with the principle of subsidiarity,
 - (b) other proposals for EU legislation and related policy issues, including programmes and guidelines prepared by the European Commission as a basis of possible legislative action,
 - (c) non-legislative documents published by any EU institution in relation to EU policy matters, and

- (d) matters listed for consideration on the agenda for meetings of the relevant EU Council of Ministers and the outcome of such meetings.
- (6) Where a Select Committee appointed pursuant to this Standing Order has been joined with a Select Committee appointed by Seanad Éireann, the Chairman of the Dáil Select Committee shall also be the Chairman of the Joint Committee.
- (7) The following may attend meetings of the Select or Joint Committee appointed pursuant to this Standing Order, for the purposes of the functions set out in paragraph (5) and may take part in proceedings without having a right to vote or to move motions and amendments:
- (a) Members of the European Parliament elected from constituencies in Ireland, including Northern Ireland,
 - (b) Members of the Irish delegation to the Parliamentary Assembly of the Council of Europe, and
 - (c) at the invitation of the Committee, other Members of the European Parliament.

**b. Scope and Context of Activities of Committees (as derived from Standing Orders)
[DSO 84; SSO 70]**

- (1) The Joint Committee may only consider such matters, engage in such activities, exercise such powers and discharge such functions as are specifically authorised under its orders of reference and under Standing Orders; and
- (2) Such matters, activities, powers and functions shall be relevant to, and shall arise only in the context of, the preparation of a report to the Dáil and/or Seanad.
- (3) The Joint Committee shall not consider any matter which is being considered, or of which notice has been given of a proposal to consider, by the Committee of Public Accounts pursuant to Standing Order 186 and/or the Comptroller and Auditor General (Amendment) Act 1993; and
- (4) any matter which is being considered, or of which notice has been given of a proposal to consider, by the Joint Committee on Public Petitions in the exercise of its functions under Standing Orders [DSO 111A and SSO 104A].
- (5) The Joint Committee shall refrain from inquiring into in public session or publishing confidential information regarding any matter if so requested, for stated reasons given in writing, by—
 - (a) a member of the Government or a Minister of State, or
 - (b) the principal office-holder of a body under the aegis of a Department or which is partly or wholly funded by the State or established or appointed by a member of the Government or by the Oireachtas:

Provided that the Chairman may appeal any such request made to the Ceannt Comhairle / Cathaoirleach whose decision shall be final.

- (6) It shall be an instruction to all Select Committees to which Bills are referred that they shall ensure that not more than two Select Committees shall meet to consider a Bill on any given day, unless the Dáil, after due notice given by the Chairman of the Select Committee, waives this instruction on motion made by the Taoiseach pursuant to Dáil Standing Order 28. The Chairmen of Select Committees shall have responsibility for compliance with this instruction.

Appendix 3 – Witnesses and Official Report

Witnesses/Organisation	Date of appearance and link to debate
<p>Children’s Rights Alliance</p> <p>The Law Society of Ireland</p> <p>Rape Crisis Network Ireland</p> <p>Dr Conor O’Mahony, School of Law, UCC</p>	<p>20 February 2019</p>
<p>Child Care Law Reporting Project</p> <p>Arc Mediation</p> <p>Council of the Bar of Ireland</p> <p>Treoir</p>	<p>6 March 2019</p>
<p>Free Legal Advice Centres (FLAC)</p> <p>Men’s Voices Ireland</p> <p>Dr Kenneth Burns, UCC</p> <p>Dr Geoffrey Shannon, Special Rapporteur on Child Protection</p>	<p>13 March 2019</p>

**CHILDREN'S
RIGHTS
ALLIANCE**

Opening Statement to the Joint Oireachtas Committee on Justice and Equality on the Reform of the Family Law System

20 February 2019



Founded in 1995, the Children’s Rights Alliance unites over 100 members working together to make Ireland one of the best places in the world to be a child. We change the lives of all children in Ireland by making sure that their rights are respected and protected in our laws, policies and services.

Ag Eisteacht	Irish Primary Principals Network
Alcohol Action Ireland	Irish Refugee Council
Amnesty International Ireland	Irish Second Level Students’ Union (ISSU)
An Cosán	Irish Society for the Prevention of Cruelty to Children
ASH Ireland	Irish Traveller Movement
Assoc. for Criminal Justice Research and Development (ACJRD)	Irish Youth Foundation (IYF)
Association of Secondary Teachers Ireland (ASTI)	Jack & Jill Children’s Foundation
ATD Fourth World – Ireland Ltd	Jesuit Centre for Faith and Justice
Atheist Ireland	Jigsaw
Autism Network Ireland	Kids’ Own Publishing Partnership
Barnardos	Lifestart
Barretstown Camp	National Office Mecpaths
Bedford Row Family Project	Mental Health Reform
BeLong To Youth Services	Mercy Law Resource Centre
Care Leavers’ Network	Migrant Rights Centre Ireland
Catholic Guides of Ireland	Mothers’ Union
Child Care Law Reporting Project	Mounttown Neighbourhood Youth and Family Project
Childhood Development Initiative	Museum of Childhood Project
Children in Hospital Ireland	MyMind
COPE Galway	National Childhood Network
Cork Life Centre	National Organisation for the Treatment of Abusers (NOTA)
Crosscare	National Parents Council
Cybersafe	Post Primary
Dental Health Foundation of Ireland	National Parents Council Primary
Department of Occupational Science and Occupational Therapy, UCC	National Youth Council of Ireland
Disability Federation of Ireland	Novas
Down Syndrome Ireland	One Family One in Four
Dublin Rape Crisis Centre	Parentstop
Early Childhood Ireland	Pavee Point
Educate Together	Peter McVerry Trust
EPIC	Rape Crisis Network Ireland (RCNI)
Extern Ireland	Realt Beag
Focus Ireland	SAFE Ireland
Foróige	Saoirse Housing Association
Future Voices Ireland	SAOL
Gaelscoileanna	Beag Children’s Centre
Teo	Scouting Ireland
Good Shepherd Cork	School of Education UCD
Home-Start National Office	Sexual Violence Centre Cork
Immigrant Council of Ireland	Simon Communities of Ireland
Inclusion Ireland	Social Care Ireland
Independent Hospitals Association of Ireland	Society of St. Vincent de Paul
Institute of Guidance Counsellors	Sonass Domestic Violence Charity
Irish Aftercare Network	Special Needs Parents Association
Irish Association for Infant Mental Health	SPHE Network
Irish Association of Social Workers	SpunOut.ie
Irish Centre for Human Rights, NUI Galway	St. Nicholas Montessori College
Irish Congress of Trade Unions (ICTU)	
Irish Council for Civil Liberties (ICCL)	
Irish Foster Care Association	
Irish Girl Guides	
Irish Heart Foundation	
Irish National Teachers Organisation (INTO)	
Irish Penal Reform Trust	

St. Nicholas Montessori Teachers' Association St.
Patrick's Mental Health Services
Step by Step Child & Family Project Suas
Educational Development Teachers' Union of
Ireland Terenure Rugby Football Club
The Ark, A Cultural Centre for Children
The Prevention and Early Intervention Network
The UNESCO Child and Family Research Centre,
NUI Galway Traveller Visibility Group Ltd
Treoir
UNICEF Ireland
youngballymun
Youth Advocate Programme Ireland (YAP) Youth
Work Ireland

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Opening Statement

The Children's Rights Alliance welcomes today's opportunity to address the Joint Oireachtas Committee on Justice and Equality on the reform of the family law system. The Alliance unites over 100 members working together to make Ireland one of the best places in the world to be a child. We change the lives of all children by making sure their rights are respected and protected in our laws, policies and services. We also provide legal information and advice to children, young people and their families through our newly established legal information line and nationwide legal advice outreach clinics.

The Children's Rights Alliance welcomes this examination of Family Law Reform by the Committee across a wide range of areas.

There have been considerable changes in the area of family law over the past number of years including the passing of the Domestic Violence Act 2018 and the Children and Family Relationships Act in 2015. The Children and Family Relationships Act represented the most important reform of child and family law for a generation by placing children at the heart of all family law decisions. For the first time a comprehensive test was set out in legislation for Judges when deciding on what is in the best interests of children in guardianship, custody and access cases.⁴⁸ This includes a focus on hearing the views of the child. The legislation also provided legal clarity around various family types and addresses discrimination faced by children in non-marital families.

While these reforms are welcome, children and families still encounter many issues when going through the family law system. We hear from our members working with families that they find the experience of going to court intimidating and difficult.⁴⁹ Through our legal information line we hear from children and families who find the family law system confusing, daunting and hard to navigate.

In our presentation today, we will focus on the role of children in family law proceedings and the need to reform the family law courts structure to meet the needs of children and families.

(1) Courts Structure

The family law courts have not been designed with the presence of children and families in mind. Families are often at loggerheads and the physical environment does not provide them the necessary space and privacy to deal with very personal and sensitive matters. Judges are making decisions in courts around the country about intimate family issues often in the same room as they are dealing with other matters such as criminal law.⁵⁰

Despite the fact that most proceedings involving children are subject to the *in camera* rule, a large number of Court facilities still lack basic privacy. From consultations with lawyers, we know that legal advice is sometimes provided in hallways and stairwells, rather than child-friendly consultation rooms. Children who are present in the Court environs may witness or experience violence or other upsetting behaviour

⁴⁸ Part V of the Guardianship of Infants Act 1964, as amended by the Children and Family Relationships Act 2015, s63.

⁴⁹ Information received by the Children's Rights Alliance from Barnardos, 14 February 2019

⁵⁰ Prof. G Shannon, *Eleventh Report of the Special Rapporteur on Child Protection*, (DCYA 2018) 72

due to insufficient staffing of Gardaí in Courthouses. In addition, not all Courts in the country have the facilities to provide the use of a television link for child victims and witnesses when giving evidence. We hear from our members that families themselves have highlighted the need for a separate family court structure to be established.⁵¹

The Council of Europe's *Guidelines on Child-Friendly Justice* provide that States should ensure that proceedings involving children are dealt with in 'non-intimidating and child-sensitive settings'.⁵² The Guidelines recommend that interviewing and waiting rooms for children 'in a child-friendly environment' be provided in court settings.⁵³ They also suggest that children should be familiarised with the Court setting, the layout and the roles and identities of officials ahead of attending proceedings and that Court sessions involving children should be adapted to the child's pace and attention span with planned regular breaks and hearings that are limited in duration.⁵⁴

We recommend that in reforming the family law system a priority should be making available suitable accommodation for children and young people in the Courts. A key aspect of this will be the development of the dedicated children and family courts in Hammond Lane in Dublin. In developing and designing the new family courts, all stakeholders should be consulted including legal professionals, families and those who work to support them. Children and young people should also be consulted for their views as was done with the development of the children's court in Smithfield.

In Ireland, most child and family law cases are heard by generalist judges in the general courts system. However, specialised family or children's court systems are commonplace across Europe and in other common law jurisdictions where there are specially designed court facilities and the judiciary and lawyers have specialised training.⁵⁵ We have also seen Judges in other jurisdictions adopt child-friendly methods to communicate more effectively with children and young people. For example in the UK we have seen Justice Peter Jackson write a letter directly to a 14 year old by explaining his decision in a custody case⁵⁶ and also in a separate case write a judgment using emojis to explain his decision to the children concerned in a custody case.⁵⁷

We recommend that in introducing any family law reform, specialised training is provided for all professionals working in the family law courts reflecting child friendly justice principles and how to communicate with children and young people.

(2) Role of Children

The right of all children to be heard and taken seriously constitutes one of the fundamental values of the UN Convention on the Rights of the Child. The Council of Europe's *Guidelines on Child-Friendly Justice*

⁵¹Information received by the Children's Rights Alliance from Barnardos, 14 February 2019

⁵²Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, 29

⁵³*ibid.*

⁵⁴*ibid.*

⁵⁵Prof. G Shannon, *Eleventh Report of the Special Rapporteur on Child Protection*, (DCYA 2018) 7

⁵⁶M. Fouzder, 'Dear Sam': Judge writes to 14-year-old to explain custody ruling', Law Society Gazette <<https://www.lawgazette.co.uk/law/dear-sam-judge-writes-to-14-year-old-to-explain-custody-ruling/5062255.article>> accessed 17 February 2019

⁵⁷J Bingham, 'Smile: High Court judge uses emoji in official ruling' Telegraph <<https://www.telegraph.co.uk/news/2016/09/14/smile-high-court-judge-uses-emoji-in-official-ruling/>> accessed 17 February 2019

provide that Judges should respect the right of children to be heard in matters that affect them and that children should be consulted about the manner in which they would like to be heard.⁵⁸ The *Guidelines* also provide that children should not be precluded from being heard on the basis of age.⁵⁹ As we know different children have different levels of maturity and understanding of what is happening and the issues being discussed in the courts.

Article 42A.4.2 of the Constitution enshrined the right of children to have their views heard in adoption, guardianship, custody and access proceedings. The Children and Family Relationships Act 2015 introduced an obligation for Judges to consider the views of children as one of the factors when determining the best interests of the child.⁶⁰ The Act is not prescriptive about the way in which the voice of the child is to be heard in proceedings.⁶¹ Different methods vary from the child being heard directly in the Court, being heard in chambers by the Judge or the use of an expert to hear the views of the child and report back to the court. We note that Professor Geoffrey Shannon, the Special Rapporteur on Child Protection, in his latest report recommends that guidelines should be developed in Ireland for meetings between judges and children.⁶²

We hear directly from children and families on our legal information line and through our legal advice clinics that they feel that the views of children are not being adequately heard in family law proceedings, in particular in access disputes. The Children's Rights Alliance is concerned that the newly introduced Regulations on the Child's Views Experts may make it more difficult for the views of children to be heard in the family law courts. The Regulations place the burden on families to pay for the views expert, meaning only those children whose families can afford it will have their right to be heard realised.⁶³ Further, in analysing and considering the amount of work that is required to deliver on the objectives of the legislation, and to give meaningful effect to its provisions, it would appear that this maximum fee set out in the Regulations may be too low in certain circumstances, depending on the level of complexity in the case. This may in turn lead to difficulties in finding qualified experts to carry out the work needed.

The Children's Rights Alliance hears from children and families on an ongoing basis who find the family law system hard to navigate and they call us seeking information on their rights and the process. According to the Council of Europe's *Guidelines on Child-Friendly Justice*, information should be promptly provided to children and include information on their rights, the system and procedures involved and the role of the child, existing support mechanisms, the appropriateness and possible consequences of using in-Court or out-of-Court proceedings such as mediation for proceedings involving children. Consideration could be given to providing information to the child and parents or legal representatives and child-friendly materials containing relevant information could be made widely available and widely distributed.⁶⁴ We recommend that any information provided to children be adapted to their age and maturity, be in a language they can understand, which is sensitive to gender and culture. Digital technology could help to make information accessible to children, families and organisations who support and work with them.

⁵⁸ Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, 29

⁵⁹ *ibid.*

⁶⁰ Part V of the Guardianship of Infants Act 1964, as amended by the Children and Family Relationships Act 2015, s 63.

⁶¹ *ibid.*

⁶² Prof. G Shannon, *Eleventh Report of the Special Rapporteur on Child Protection*, (DCYA 2018) 21

⁶³ Guardianship of Infants Act 1964 (Child's Views Expert) Regulations 2018, SI 587/2018

⁶⁴ Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, 20

Another method of providing information and support to children and young people who come into contact with the family law system could be to employ a specialist child court liaison officer in all regions. The Children's Rights Alliance recommends the prioritisation of access to appropriate child- friendly information in any reform of the family law system.

Thank you for your attention and we would be happy to take any questions.

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Law Society of Ireland, 20 February 2019

The Society welcomes the opportunity to contribute to the consideration by the Joint Oireachtas Committee on Justice and Equality, on what is a vital part of the justice system and one that impacts on the lives of so many people, particularly children.

We have set out headline commentary to the questions forwarded by the Committee. Our 2014 *Family Law – The Future* proposal continues to inform the Society's position on many of the issues raised, notwithstanding that some legislative measures since 2014 have to be accommodated.

1. Court Structure

1.1. Difficulties arising out of the current courts system, including heavy case loads, delays, inadequate facilities, and judges lacking specialist expertise in family law.

Current difficulties: Family Law is in crisis

- 1.1.1. Inadequate security, unsafe environment for litigants and unsafe working conditions for courts staff, lawyers and judges, unsafe premises for family law in Dublin and nationwide as evidenced by the recent security issue on the 20 December 2018 when a Circuit Court Judge in Phoenix House Dublin was taken hostage along with a lawyer and client. The situation is particularly bad in Dublin as regards premises as the childcare courts are currently housed in Victorian criminal law courts which are not fit for purpose, the private District Family Law Courts are held in Dolphin House which are not fit for purpose due to the numbers attending and the unsuitability of the premises. The security issues in the Circuit Family Court in Phoenix House have recently been exposed by the security issue. The promised new family law facilities at Hammond Lane appear to have stalled.
- 1.1.2. The introduction of the Child and Family Relationships Act 2015 has put an increased burden on an already over worked District Family Court system by making it necessary to hear the voice of the child in all proceedings involving access, custody and access. No resources have been provided to pay for the experts required to complete the voice of the child reports pursuant to section 32 of the Guardianship of Infants Act, 1964 as inserted by the 2015 Act.
- 1.1.3. Prior to the 2015 Act custody, guardianship and access disputes could be resolved on the first listing of a case, now the first listing may only deal with the name of the expert to be appointed or whether or not there should be one appointed. If no expert is appointed then further court time may be expended by the Judge fixing a date in the future when he can take time to meet the child or children. Generally cases now require a number of listings before they can be resolved further increasing the workload of the District Court Judges.
- 1.1.4. A specialist division of family law courts and judges would assist greatly in dealing with family law cases more efficiently as it would be likely that the same judges would be available to deal with cases which appear regularly before the courts and a greater degree of consistency could be established. It has been noted elsewhere that judges should not be confined to this specialty but should be appointed as 'general' judges who could be assigned to family law but who would not necessarily spend all their judicial career in family law.
- 1.1.5. More focus should be placed on settling cases earlier on in the process. Very active intervention in family law cases by Judges, not County Registrars, or other officials, with an emphasis on resolution and ADR could result in significant savings of time, resources for all concerned.
- 1.1.6. The unintended consequences which will flow from the introduction of regulations 6-10 as contained in the Guardianship of Infants Act 1964 (Child's Views Expert) Regulations 2018 which set a maximum fee for experts who provide section 32 reports to the family law courts. The remainder of the regulations are welcomed and can be implemented provided regulations 7-10, (which are in any event, stand alone), are removed. There is already a shortage of experts to complete these reports resulting in delays preventing the timely resolution of family law disputes for children and parents causing further unnecessary upset to the parties. The result of the implementation of regulations 7-10 will result in a flight of experts from this area of work and has made a bad situation much worse.

1.1.7. The legal aid board appears chronically underfunded and it is not economically possible for solicitors to make a living from the private practitioner scheme which has led to a flight of solicitors from the District Family Court where it operates.

1.2. Whether these issues could be remedied through the establishment of a dedicated family law courts structure throughout the country. How exactly should this system be structured? Would it require a change to the Constitution?

1.2.1. See our 2014 submission for a more detailed exposition of the pros and cons of various systems. However, the short answer is that a dedicated family law courts structure throughout the country could remedy many of the problems currently faced, but only if:

- a. The family law court system was properly resourced and
- b. The family law court system was integrated with ADR and the legal aid board in the court houses, providing facilities not only for the courts but also for ADR and the legal aid board.
- c. Proper premises were provided for the family law courts.
- d. The geographic court jurisdictions were merged to create perhaps 10-14 dedicated and specialist family law courts comprising District, Circuit and High Courts eg cases currently dealt with in Carrickmacross would now be dealt with in a District Court in Dundalk which would deal with a number of District Court areas and Circuit Court areas such as those in Cavan, Monaghan, Meath. This would mean more travelling for litigants and lawyers and the location of these centralised courts would have to be considered.
- e. It is not proposed to change the work undertaken by each court, the important issue is that only family law cases would be heard in these courts and they would take the family law cases out of the more general courts before which they are currently being heard.
- f. If it were simply a case of creating a family law division within existing structures then a referendum would not be required. Equally the changes to District and Circuit Court would require some consideration. See also our 2014 submission for alternatives to this model, which might require a constitutional referendum.
- g. There is a benefit to making the change as simple as possible to ensure that it takes effect rather than seek to change everything while it remains the same.

1.3. Is there a need to define more clearly the jurisdiction of the various courts in making and enforcing family and child Orders?

1.3.1. An examination of the jurisdiction is contained in our 2014 submission.

1.4. Whether lessons can be learned from other jurisdictions.

1.4.1. See our *2014 Family Law – The Future* submission for a comparative analysis of other common law jurisdictions.

2. The costs of family law cases

2.1. Does the general practice of not awarding costs against parties in family law proceedings encourage delaying tactics and frivolous applications? Is there a need for costs penalties for parties who abuse the system? Should costs be awarded against parties who lose an appeal?

- 2.1.1. It is more complex than that as costs are seem to be paid from the one pot. However there is a need to revisit this costs rule in cases where malicious delay can be proven or in the case of applications to court which should never have been taken. Yes there is a need for costs penalties for those who abuse the system.
- 2.1.2. In relation to the appeal, again it would be wrong to have a mandatory position as appeals will turn on the facts of the case.
- 2.1.3. Perhaps a better way to look at the issue of costs is to encourage settlement at every possible opportunity, to increase case management and to have a costs order as a punishment for those who insist on proceeding with their cases where they have been made an offer by the other side that they are unlikely to better in court. The use of Calderbank letters could be considered however again, this should be introduced on a case by case basis.
- 2.1.4. If there is to be any realistic prospect of a coherent policy approach to costs in family law cases then either legislation is required or a specialist division of family law judges who will apply the law in a similar manner.

2.2. Can the family law courts be restructured in such a way as to reduce legal costs?

- 2.2.1. Early settlement discussions should be facilitated in separation and divorce cases by a rigorous case management system
- 2.2.2. Meaningful court appearances which have as their object not only preparing the case for hearing but in addition moving the parties towards ADR
- 2.2.3. Consistent judicial supervision of cases to ensure that ADR is considered prior to issue of proceedings, immediately post issue of proceedings and at all times during the currency of proceedings

2.3. Can more be done to encourage the early settlement of disputes, including greater costs penalties for failure to engage in alternative dispute resolution?

- 2.3.1. Our comments above apply in this respect. The allocation of a specific judge to case manage a case from early on in judicial separation or divorce, who is also a trained mediator/collaborative lawyer/arbitrator would be likely to facilitate the early settlement of disputes.

2.4. Is the system of free legal aid adequate in ensuring access to justice in the family law context?

- 2.4.1. One of the great difficulties in the family law system is the lack of resources given to the legal aid board. In order to properly deal with the huge backlog of work and delays in granting legal assistance to clients they require an increase in resources.

3. Alternative dispute resolution

3.1. How Ireland compares with other jurisdictions in terms of the application of alternative dispute resolution processes to family law proceedings. Could more be done to embed ADR in the Irish family law courts system?

- 3.1.1. It should be stressed that ADR is not restricted to mediation but includes collaborative law, mediation, potentially arbitration as well as lawyer assisted settlements.

- 3.1.2. The current Court structures must be re-examined to consider the following dynamics:

- Early settlement discussions should be facilitated in separation and divorce cases by a rigorous case management system.
- Meaningful court appearances which have as their object not only preparing the case ready for hearing but in addition moving the parties towards ADR
- Consistent judicial supervision of cases to ensure that ADR is considered prior to issue of proceedings, immediately post issue of proceedings and at all times during the currency of proceedings,
- Information sessions on ADR should not be mandatory but should instead be voluntary but encouraged and should be available on a regular and visible basis *in situ* in the District Court, Circuit Court and High Court nationwide.
- ADR specialists such as accredited mediators, conciliators and collaborative lawyers only should provide the information sessions, adhere to a code of conduct and should not furnish legal advice, but merely information on ADR. Such specialists should also not seek to screen clients for the suitability for ADR nor should they seek to gain referrals from the information session. Only lawyers who have either trained as a mediator or a collaborative lawyer should be qualified to provide the information sessions.
- Family law clients should also be recommended to attend either a course or an information session on shared parenting.
- Judges should also have, at their discretion, the authority to either determine or mediate a case. All judges and county registrars should therefore be trained as mediators.
- Judges and county registrars should also have the power to direct parties to attend an ADR information meeting.

- 3.1.3. One of the principles of mediation is that it must be voluntary so there is some reluctance, even in the Mediation Act, 2017 to compel mediation or even to compel mandatory

attendance at information on mediation sessions. Information sessions on ADR should not be mandatory but should instead be voluntary but encouraged and should be available on a regular and visible basis in situ in the District Court, Circuit Court and High Court nationwide.

- 3.1.4. The Judicial Separation and Family Law Reform Act, 1989 introduced ground breaking provisions directing practitioners to discuss and advise their clients about inter alia mediation. Before the amendments made to these acts in the Mediation Act 2017 Solicitors were only obliged to certify that they had discussed and advised their clients about inter alia reconciliation, engaging in mediation, effecting a separation by means of deed or agreement and furnishing clients with appropriate contact details.
- 3.1.5. Following the commencement of the Mediation Act 2017 the safeguards have been substantially increased - Solicitors are now obligated to make a Statutory Declaration confirming that they have advised separating clients (Section 5 and 6 of the 1989 Act) and divorcing clients (Section 6 and 7 of the Family Law (Divorce) Act, 1996) as above. The penalty for making a statutory declaration which is to the knowledge of the declarant is false or misleading is set out in section 6 of the Statutory Declarations Act, 1938 and includes both a fine and a term of imprisonment.

4. Conduct of family law proceedings/role of children/rights of fathers

- 4.1. **It has been argued that, currently, there does not appear to be a coherent view, either amongst the judiciary or legal practitioners, as to how family law proceedings should be conducted. The degree of formality can vary greatly. Should family law proceedings be conducted in a less robust manner out of sympathy for the parties and a desire to lessen the trauma of litigation? Or is the current approach too sympathetic, to the detriment of a speedier and less costly resolution of disputes?**

- 4.1.1. Again the introduction of a cohesive, consistent division of the court with judges who are assigned for a number of years would probably determine the best way to deal with this issue. The current system has evolved, like the family law legislation in a piecemeal manner and the conduct of family law proceedings currently depends on the approach and personality of the judge, lawyers and clients in a particular case.

- 4.2. **There is now a Constitutional requirement to hear the voice of the child in certain family law proceedings. To what extent is this being done in practice? What are the best means of ensuring that the voice of the child is heard?**

- 4.2.1. Following the constitutional amendment to Article 42 of the Constitution and the subsequent Child and Family Relationships Act 2015, District Court Judges have been given the power to order reports (in proceedings for guardianship, custody or upbringing of, or access to a child) pursuant to section 32 of the Guardianship of Infants Act, 1964. The District Court Judge may give such directions as he thinks proper for the purpose of procuring from an

expert a report in writing on any question affecting the welfare of the child; and/or appoint an expert to determine and convey the child's views.

4.2.2. While the constitutional amendment was welcomed, unfortunately no additional resources were allocated to the District Court to provide for the expert reports or the experts. This lack of resources appears to be one of the most significant causes of the blockages in the District Family Court as if experts cannot be appointed due to the lack of any resources available to pay for same by the courts then either the District Court Judge hears the voice of the child by speaking directly to the child or children thus using up further valuable Court time or the voice of the child is not heard directly.

4.2.3. Realistically the best way of ensuring the voice of the child is heard is through the appointment of an expert by the Court. There is a significant issue regarding efficient use of resources if a judge must personally hear the voice of the child or children.

4.3. Operation of the in camera rule: How best can we reconcile respect for the privacy of the parties to proceedings with the need to monitor consistency both in the conduct of proceedings and in the nature of judgments being handed down?

Some relevant figures from 2014 are as follows:

Trends: Applications received									
Judicial Separation			Divorce		Nullity		Co-habitation	Dissolution Partnership of Civil	
Year	High	Circuit	High	Circuit	High	Circuit	High	High	Circuit
2017	23	1,271	31	3,964	1	23	6	1	56
2016	29	1,324	17	4,162	1	32	0	1	61
2015	35	1,384	24	4,290	2	33	6	3	75
2014	25	1,246	23	3,808	2	33	7		41

Source: Courts Service Annual Reports 2014-2017

4.3.1. As the figures show above, the vast majority of Judicial Separation and Divorce cases are taken in the Circuit Court rather than the High Court. Most judgements are delivered by the High Court and very few from the Circuit Court.

4.3.2. One of the best ways of ensuring consistency rather than media involvement in cases is to introduce publication in a certain format of Circuit Court cases.

- 4.3.3. The creation of a specialist division of the Circuit Court for family law would encourage this consistency of decisions and judgements.
- 4.3.4. It is more difficult in the District Court which is a court of summary jurisdiction and where the volume of cases is much greater.
- 4.3.5. Currently it is very difficult to get access to the court files rather than the cases. Access to the court files would permit a researcher to provide a much more detailed piece of research on the operation of family law cases and this amendment could be made easily to the 2004 Act.
- 4.4. The Rights of fathers – are they being adequately respected and protected within the family law system?**
 - 4.4.1. From a practical viewpoint but without empirical evidence, it appears that fathers who wish to have extensive access with their children face an uphill battle in the Irish courts and will not receive extensive access without the agreement of their spouse or a section 47 or 32 report. Shared parenting ie 50/50 is not widespread currently.
 - 4.4.2. Fathers are being respected but in relation to children they may not always be fairly treated.
 - 4.4.3. Again more fact based research is required. The creation of a specialist family law division may assist in the development of a court policy towards fathers which may be more enlightened than the current position.



Submission to the Joint Oireachtas Committee on Justice and Equality

February 20th 2019

Thank you for the invitation to speak to the Committee today on the reform of the Family Law System. RCNI recognises the expert and detailed consideration given to the issues of interest to this Committee in reports over the past 12 months from the Garda Inspectorate, the Child Care Law Reporting Project, HIQA and the Child Rapporteur. Rather than repeat them I will focus today on RCNI's particular area of expertise and specialist concern, sexual violence and in this context, the child victim of familial sexual violence; incest.

We have three priorities

1. the establishment of a specialist family court
2. Transparency and accountability of our child protection system including the family law system,
3. the development of a national strategy on child sexual violence.

Child sexual violence is a crime, not just a civil matter. However, in child sexual violence and incest, very often the criminal justice system fails and the protection of these children can become the subject of the family law courts, both publicly and privately.

Tusla receives approximately 3,000 referrals on child sexual violence per annum (the number of children concerned will be fewer). I'd invite you to consider what happens to these 3,000 reports.

International in-depth studies of disclosures, from whatever source, of sexual violence committed against children⁶⁵ allows us to say that we can expect some false allegations at a rate of approximately 2% – 8% with the lowest rate of false allegations being detected for the child who discloses themselves.

In accordance with the law and protocols all cases are notified to An Garda Síochána. Difficulties with these protocols are detailed in the specialist reports cited above and are part of the implementation plan arising in particular from the Garda Inspectorate report⁶⁶. I don't propose to dwell on those matters here.

According to the Garda Inspectorate, for these cases there is a 4% prosecution rate, with less than 2% resulting in a criminal conviction.

Less than 2%.

Therefore, our criminal justice failure rate in reported child sexual violence is between 90% and 96%.

For these children, risk needs to be managed and they need protection regardless of the absence of a criminal conviction. The protection of these children is one of the complex tasks we expect families and communities to undertake informally and which the legislature have mandated Tusla

⁶⁵ Garda Inspectorate Report Responding to Child Sexual Abuse in 2012: 'Thankfully, false complaints of child sexual abuse represent only a small proportion of all such complaints. A US study of 576 child sexual abuse investigations found that 6% of allegations made by parents and 2% of the allegations made by children could be classified as having been intentionally false.'

Most recent meta-analysis of the literature on false allegations on child sexual abuse, William O'Donohue, Caroline Cummings & Brendan Willis (2018) The Frequency of False Allegations of Child Sexual Abuse: A Critical Review, *Journal of Child Sexual Abuse*, 27:5, 459-475

Sources include an Australian study of 551 reports of child sexual abuse documented a 2.5% rate of false allegations. A Canadian study, which reviewed 798 child sexual abuse investigations, found that 6% of them were intentionally false. The highest rate of malicious and false reports – 8.5% – was reported in a study of 350 child sexual abuse investigations in the UK. The report cites this source: Trocme, N. and Bala, N., (2004) False Allegations of Abuse and Neglect when Parents Separate p.1336, <http://leadershipcouncil.org/docs/Trocme.pdf> (Accessed on 15 June, 2010). See also (Jones, D. P. H., and J. M. McGraw: Reliable and Fictitious Accounts of Sexual Abuse to Children. *Journal of Interpersonal Violence*, 2, 27-45, 1987; Oates, R. K., D.P. Jones, D. Denson, A. Sirotnak, N. Gary, and R.D. Krugman: Erroneous Concerns about Child Sexual Abuse. *Child Abuse & Neglect* 24:149-57, 2000; Everson, M.D., and B.W. Boat: False Allegations of Sexual Abuse by Children and Adolescents. *Journal of the American Academy of Child and Adolescent Psychiatry*, 28, 230-5, 1989.

⁶⁶<http://www.gsinsp.ie/en/GSINSP/Responding%20to%20Child%20Sexual%20Abuse%20-%20A%20follow%20up%20review%20-%20Full%20Report.pdf/Files/Responding%20to%20Child%20Sexual%20Abuse%20-%20A%20follow%20up%20review%20-%20Full%20Report.pdf>

to undertake formally on all our behalf. In the course of this work, Tusla relies on the family law courts for some of its actions such as applications for care orders.

In addition, these cases arise in private family law because for many child victims, the family is not a safe place, it is the location of the harm.

The Inspectorate Report (December 2017) found that, in 44% of child sexual violence cases, the alleged perpetrator was a family member. When we look at different age cohorts within childhood which the RCNI did in our National Rape Crisis Statistics 2015, I can tell you that in 62% of all under 13s' cases of child sexual violence, they were reported as perpetrated by family members.

62% involved incest.

For many of these families, where a child discloses incest, some but not all, will result in the family breaking up. This can be expected to be a highly acrimonious situation which are likely to escalate into the private family courts⁶⁷. This means that we can expect that a significant proportion of family separation and child custody cases going through our family courts, involve the rape and sexual abuse of children by family members in the absence of a parallel criminal conviction.

The Family Court Services process on average 11,600 cases involving guardianship, custody and access matters. Both the Child Care Law Reporting Project and the Legal Aid Board have tried to estimate how many of these involve child sexual violence. RCNI believe this figure should not be a matter of a guesstimate. It would be possible (if novel) for court services to gather and release statistics on how many private family law cases involve allegations of child sexual violence. **We would recommend that the Courts Services should gather and publish this information regularly as an imperative matter of justice and public interest.**

The fact is our family courts are handling highly criminal matters of the most sensitive and urgent child protection nature in unknown numbers, without criminal authority, without the appropriate tools and in the absence of appropriate specialisation.⁶⁸ RCNI would advocate strongly for a special family law court which addresses these concerns.

Such a court was recommended in 1996 by the Law Reform Commission, and since then by the Child Rapporteur, the Child Care Law Reporting Project amongst others.⁶⁹ It is long overdue.

⁶⁷ It is the RCNI position that mediation and Alternative Dispute Resolution is not appropriate or safe in cases involving child sexual abuse and domestic violence.

⁶⁸ Child Care Law Reporting Project March 2018

⁶⁹ Law Reform Commission Family Courts Working Group (1996)

<https://www.lawreform.ie/fileupload/Reports/rFamilyCourts.htm>

Department of Justice and Equality

<https://merriestreet.ie/en/News-Room/Speeches/address-by-the-minister-for-justice-equality-and-defence-alan-shatter-t-d-a-new-structure-for-family-courts-consultative-seminar-in-law-society-blackhall-place-saturday-6-july-2013.html>

Transparency:

As noted by the Committee, the family courts are held *in camera*. This means that apart from the very welcome Child Care Law Reporting Project and the work of the Rapporteur there is little by way of gathering and collating of data to allow for accountability and reassurance.

A thorough review of how the *in camera* rule impacts transparency and accountability, should be considered.

In addition to the *in camera* rule, confidentiality and non-disclosure clauses imposed on parties in the family courts do sometimes occur – whereby the court rules, amongst other things, that a child’s disclosures of rape and sexual violence must not be reported to the state’s investigative authorities, An Garda Síochána, directly but must instead be mediated through appointed individuals or Tusla who will decide when a child’s voice can be heard by our mandated criminal justice investigative authorities.

There is no data or analysis generated by the courts services or Tusla to make publicly transparent how many children and their guardians are bound by civil court-ordered, non-disclosure clauses.

While we recognise the complexity of the cases we would recommend that achieving greater transparency on these matters, through Courts Services data, is a minimum for the discharge of oversight, when such grave matters are at issue.

A National Strategy

Lastly we would recommend the Committee add their voice to calling for an urgent child sexual violence national strategy that would ensure that the child victim of rape and most particularly of incest, does not continue to be at risk of falling through the cracks.

Until we increase our family courts and allied child protection structures transparency and accountability, children, and their voice remain disturbingly silent and indeed potentially systemically and institutionally, under the sanction of our civil courts, contained.

Ends

Appendix

Matters a special family court could address:

- standardised thresholds,

Law Society of Ireland, Submission to the Department of Justice, Equality and Defence Family Law – The Future (2014)

<https://www.lawsociety.ie/globalassets/documents/committees/family/familylawsubmission2014.pdf>

Geoffrey Shannon, 11th Report of the Special Rapporteur on Child Protection

https://www.dcy.gov.ie/documents/child_welfare_protection/2018121811ReportSpecRappChildProtect.pdf

Child Care Law Reporting Project Final Report CCLRP-Full-final-report_FINAL2 (1).pdf

- the voice of the child,
- interagency input
- the criteria, accountability and availability of specialisation of the various actors and
- the support structures in place for what is a harrowing and wearying area of legal practice.

Recommended data that could and should be made public:

- How many cases in front of civil family law courts include allegations of child sexual violence and domestic violence, including coercive control?
- A set of data points around the communications and interactions between the criminal and civil authorities in regard to those cases,
- Data points tracking people's engagement in the system so that the multiplicity and length of these cases can be better understood,
- Data tracking how many children are bound by (directly, through their guardians or both) 'non-disclosure' or 'confidentiality' clauses on direction of the civil courts with regards potential future disclosures of criminal matters of sexual violence?

Opening Statement of Dr Conor O'Mahony, Senior Lecturer, School of Law, University College Cork

Oireachtas Committee on Justice and Equality, 20 February 2019

[Note: my oral presentation will be an abridged version of this written statement.]

A chairde,

Thank you for the invitation to address the Committee today on this important topic. I plan to focus on two issues, namely the obligation to ascertain the views of children and the structure of the courts system. As I will explain, these two issues are connected, and making adequate provision for child participation necessitates a degree of structural reform also.

Ascertaining the views of children

Ireland is a party to several international human rights law Conventions that require that children should have the opportunity to express their views in court proceedings affecting them. This is most clearly stated in Article 12 of the United Nations Convention on the Rights of the Child (1989),⁷⁰ and increasingly being read into Article 8 of the European Convention on Human Rights (1950).⁷¹ In 2012, we amended the Irish Constitution by inserting Article 42A, which requires that in a wide range of court cases concerning children, provision shall be made by law that the views of any child who is capable of forming his or her own views shall be ascertained and given due weight having regard to the age and maturity of the child.

Article 42A of the Constitution is not self-executing; the inclusion of the phrase “provision shall be made by law” means that its implementation is dependent on legislation passed by the Oireachtas. Unfortunately, since the amendment came into effect in 2015, the response of the Oireachtas has been rather timid; I would argue that as things stand, the State is not in compliance with its constitutional obligations.

Article 42A is mandatory. It requires that in every case where the child is capable of forming his or her own views, those views shall be ascertained. Age and maturity are relevant to the question

⁷⁰ Article 12 reads in full: “1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those 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.”

⁷¹ See, e.g., *M and M v Croatia* (10161/13, 3 September 2015).

of how much weight to place on those views, but do not relieve the court of the obligation to ascertain the views of the child unless it is deemed that the child is incapable of forming their own views. This is an extensive obligation, but it is not one which is currently matched by our child and family law legislation.

First, in child protection cases, the Child Care Act 1991 is out of line with the constitutional obligation. Although it states that the court shall, “in so far as is practicable, give due consideration, having regard to his age and understanding, to the wishes of the child”,⁷² it confuses the situation by establishing two mechanisms for this purpose (appointing a solicitor⁷³ or a guardian *ad litem*⁷⁴), but giving the court discretion as to whether to utilise these mechanisms. No detail is provided on how the views of the child should be ascertained where these mechanisms are not utilised. Research conducted by the Child Care Proceedings research group in UCC (of which I was a member),⁷⁵ and by Dr Carol Coulter and the Child Care Law Reporting Project,⁷⁶ clearly demonstrates that there is enormous variation in the frequency with which the views of children are ascertained in child care proceedings, and that many cases are heard without this constitutional obligation being discharged. A review of the Child Care Act is underway, and draft heads of Bill have been developed for reform of the Guardian *Ad Litem* system. However, in the meantime, it is clear that the conduct of child protection cases often falls short of what the Constitution requires.

Second, in private family law cases concerning guardianship, custody and access, the Children and Family Relationships Act 2015 partly addressed this matter by obliging courts to take the child’s ascertainable views into account when assessing the child’s best interests.⁷⁷ The Act further provides that in obtaining the ascertainable views of a child, the court shall facilitate the free expression by the child of those views and, in particular, shall endeavour to ensure that any views so expressed by the child are not expressed as a result of undue influence.⁷⁸ Unfortunately, the Act contains a number of weaknesses that render it an ineffective discharge of the requirements of Article 42A of the Constitution.

⁷² Section 24.

⁷³ Section 25.

⁷⁴ Section 26.

⁷⁵ *Aisling Parkes, Caroline Shore, Conor O’Mahony and Kenneth Burns, “The Right of the Child to be Heard? Professional Experiences of Child Care Proceedings in the Irish District Court” (2015) 27(4) Child and Family Law Quarterly 423-444.*

⁷⁶ Carol Coulter, *Second Interim Report: Child Care Law Reporting Project* (October 2014), available at: www.childlawproject.ie/wp-content/uploads/2014/10/Interim-report-2-Web.pdf, pp 7, 10 and 61.

⁷⁷ Section 31(2)(b) of the Guardianship of Infants Act 1964 (as inserted by section 63 of the Children and Family Relationships Act 2015).

⁷⁸ Section 31(6) of the Guardianship of Infants Act 1964 (as inserted by section 63 of the Children and Family Relationships Act 2015).

First, the Act makes it clear that the appointment of an expert to determine and convey the views of the child is entirely at the discretion of the court.⁷⁹ This is not necessarily a problem; Article 42A.4 does not require the appointment of a person to ascertain and convey the views of the child, as long as the child is given the opportunity to express those views in some form. However, the Act is silent as to what exactly should happen in cases where the court decides not to appoint an expert. This lack of clarity has potential to pose difficulties. The obligation to facilitate the free expression of the child's views remains, but the absence of clear provisions stipulating how this should happen leaves the door open to nothing happening at all. This is particularly so since the current default in private family law proceedings is that the views of the child are not ascertained. Many judges may not feel qualified to speak to children in chambers, and direct testimony from the witness box will often be inappropriate, given the nature of the proceedings. Rather than granting the court the discretion to appoint an expert and leaving silence on the fall-back position, the better approach would have been for the Act to make the appointment of an expert the default position, with clear stipulations as to the exceptions where this need not occur, and what should happen instead.

Second, the Act does not clarify how a court is to determine whether a child is capable of forming views, which is the issue on which the existence or otherwise of an obligation to ascertain those views hinges. In the absence of any guidelines, it would seem that this is a matter for each individual judge to determine; no guidance is given as to what judges should take into account (or indeed what practical steps they should follow) when making this determination. The obvious route would be to appoint an expert to make this assessment on their behalf, and indeed, one of the items stipulated in the prescribed form of the order directing a report from an expert is to ascertain whether the child is capable of forming their own views on the proceedings.⁸⁰ However, as already noted, the appointment of an expert is not mandatory in every case; moreover, as will be seen below, issues relating to the costs of experts will dictate that there will be many cases where they are not appointed. Whether judges are suitably qualified to make this determination themselves is open to question, and the absence of any guidance on how they should do so is a recipe for inconsistency. In all likelihood, some judges will rely heavily on chronological age rather than on a detailed assessment of the individual child's capacity, while other judges may meet with the children and make an assessment of the issue for themselves. Since capability of forming views is the gateway to the application of the constitutional obligation, it is rather disappointing that the Act has remained completely silent on this issue.

The final weakness relates to the treatment of the issue of costs where an expert is appointed to ascertain the child's views. The Act provides that the fees and expenses of an expert appointed under this section shall be paid by such parties to the proceedings concerned, and in such proportions, or by such party as the court may determine, while the fees for an expert may be

⁷⁹ Section 32 of the Guardianship of Infants Act 1964 (as inserted by section 63 of the Children and Family Relationships Act 2015).

⁸⁰ S.I. No. 17/2016 - District Court (Children and Family Relationships Act 2015) Rules 2016, O. 58, r.14.

fixed by regulations made by the Minister.⁸¹ Experience from the use of section 47 of the Family Law Act 1995 as a means of procuring an expert report on children demonstrates the potential for an uneven and potentially discriminatory operation of these provisions, whereby experts are not appointed to ascertain the views of children in cases where the parties are of modest financial means and cannot afford to pay for the fees of the expert. *The Denham Report* highlighted difficulties faced by non-legally aided persons in meeting costs for the appointment of experts under section 47 of the 1995 Act.⁸² Hogan and Kelly have outlined that cases involving limited resources are denied the benefit of these reports, as the parties are already involved in legal action that by nature is very costly.⁸³ Therefore, the fact that the Act makes it mandatory for the fees of the expert to be paid by the parties to the proceedings risks a situation where not all children are afforded a similar opportunity to be heard, which falls short of the intended effect of Article 42A.4.

The other categories of cases not covered by the 2015 Act include adoption cases and international child abduction cases. For adoption cases, the Adoption Act 2010 does not specifically require that the child is entitled to be heard in cases concerning adoption orders. Section 55 gives discretion to hear from any person who, in the opinion of the court, ought to be heard; by contrast, section 43 stipulates that the child is entitled to be heard by the Adoption Authority in the application for the adoption order. The situation in international child abduction cases is somewhat better, since the Brussels II *bis* Regulation (which governs the majority of such cases) contains a strong obligation to ascertain the views of the child.⁸⁴ However, the failure of Irish law to provide a specific mechanism for this purpose means that it has been left to judges to develop a practice for this purpose (which, at present, takes the form of procuring a report prepared by a child psychologist). There has been no coherent policy choice made on whether this is the best available mechanism, or whether reliance on a single mechanism is sufficient.

In summary, therefore, the constitutional obligation imposed by Article 42A of the Constitution to ascertain the views of all children capable of forming their own views is not currently reflected in the vast majority of our child and family law legislation. Extensive legislative reform is required to bring our laws into compliance with what the People voted to approve in 2012. However,

⁸¹ Sections 32(9) and 32(10) of the Guardianship of Infants Act 1964 (as inserted by section 63 of the Children and Family Relationships Act 2015).

⁸² The Sixth Report of the Working Group on a Courts Commission (The Denham Report) (Dublin: Government Publications, 1999), available at [http://www.courts.ie/Courts.ie/Library3.nsf/\(WebFiles\)/96E384ACEAED7F4F80256DA60039A0B8/\\$FILE/court6.pdf](http://www.courts.ie/Courts.ie/Library3.nsf/(WebFiles)/96E384ACEAED7F4F80256DA60039A0B8/$FILE/court6.pdf), p.68.

⁸³ C. Hogan & S. Kelly, "Section 47 reports in family law proceedings: Purpose, evidential weight and proposal for reform" (2011) 2 *Irish Journal of Family* 27.

⁸⁴ Article 11(2) of the Regulation provides: "When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity." Article 42(2)(a) of the Regulation obliges courts, before ordering the return of a child to the jurisdiction of habitual residence, to certify that the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity. For an example of this provision being applied in practice, see *N v N* [2008] IEHC 382.

legislative reform, while a necessary step, is not sufficient to ensure effective child participation. All of the evidence indicates that at present, our courts are an adversarial forum, with facilities that are unsuitable for child participation, and staff who often have not been provided with the training necessary to facilitate child participation in an effective and appropriate manner. In a survey of legal practitioners conducted in 2017 by the IDEA Child Rights project in UCC (of which I am a member), 48% stated that “the lack of a child friendly environment” was an obstacle to communicating with children, while a further 29% identified “education about talking with children” as an obstacle.⁸⁵ Unless further measures are taken to make the courts a more child- and family-friendly place, an implementation gap will emerge that will frustrate the realisation of the child’s right to be heard.

Courts structure

There have been multiple calls over the past two decades for the establishment of a specialist court in Ireland dealing with child and family law. Among the first was a report by the Law Reform Commission in 1996, when the approach of the Irish courts to family law matters was described as a ‘system in crisis’.⁸⁶ The Report identified numerous problems, including inadequate physical facilities, an absence of specially trained judges, inconsistency between courts and judges in decision-making and excessive caseloads.⁸⁷ The Commission made a series of recommendations, including the establishment of a system of regional family courts with unified jurisdiction over family matters, dedicated physical facilities tailored to the needs of family law, integrated support services and dedicated judges with suitable experience and training.⁸⁸

Few of the Report’s recommendations (and none of those just mentioned) were implemented. Several research projects have produced evidence that the problems identified by the Commission in 1996 remain in existence.⁸⁹ In 2014, the Law Society of Ireland commented that ‘little has changed’ since the LRC’s 1996 Report, and called for the implementation of all of the

⁸⁵ Elaine O’Callaghan, *Conor O’Mahony* and Kenneth Burns “‘There is nothing as effective as hearing the lived experience of the child’: Practitioners’ Views on Children’s Participation in Child Care Cases in Ireland” (2019) 22(1) *Irish Journal of Family Law* (in press).

⁸⁶ Law Reform Commission, *Report on Family Courts*, LRC 52–1996 (Dublin: Law Reform Commission, 1996), p.ii, available at <http://www.lawreform.ie/fileupload/Reports/rFamilyCourts.htm>.

⁸⁷ *Ibid*, pp.9–17.

⁸⁸ Law Reform Commission, *Report on Family Courts*, LRC 52–1996 (Dublin: Law Reform Commission, 1996), pp.22–46.

⁸⁹ See *Conor O’Mahony*, Caroline Shore, Kenneth Burns and Aisling Parkes, “Child Care Proceedings in Non-Specialist Courts: The Experience in Ireland” (2016) 30 *International Journal of Law, Policy and the Family* 131–157; Carol Coulter, *Second Interim Report: Child Care Law Reporting Project* (2014), available at <http://www.childlawproject.ie/wp-content/uploads/2014/10/Interim-report-2-Web.pdf>; and Conor O’Mahony, Aisling Parkes, Caroline Shore and Kenneth Burns, “Child Care Proceedings and Family-Friendly Justice: The Problem with Court Facilities” (2016) 19(4) *Irish Journal of Family Law* 75–81.

reforms mentioned above, as well as for efforts to make proceedings less adversarial.⁹⁰ This position has been echoed by the Government's Special Rapporteur on Child Protection, Dr Geoffrey Shannon;⁹¹ by Dr Carol Coulter of the Child Care Law Reporting Project;⁹² and by the UCC Child Care Proceedings research group.⁹³ More broadly, specialisation in the area of family law is now commonplace among judges and courts across Europe.⁹⁴

The establishment of a separate court or court division dedicated to cases concerning families or children will not, in itself, rectify the difficulties identified above unless it is properly designed and resourced. Specialisation, rather than mere separation, is what really matters in this context. In Australia, research has documented many of the same difficulties that have been documented in Ireland, notwithstanding the fact that specialist children's courts exist at State level. Similar findings have been made in each of Victoria,⁹⁵ Queensland⁹⁶ and New South Wales.⁹⁷ A common finding was that even though a dedicated children's court exists, cases outside of major metropolitan centres are often heard by a generalist judge who does not specialise in child law.

Conversely, even within a general courts system, potential exists to make significant improvements by improving physical facilities and case management, addressing staffing levels and providing specialist training to professionals. Nonetheless, our view is that there is a limit to what can be achieved through the latter approach. Participants in the UCC study characterised family law and child care as being the 'lowest of the pile' and the 'poor cousin' within the general

⁹⁰ Law Society of Ireland, *Submission to the Department of Justice, Equality and Defence: Family Law – The Future* (2014), p.37, available at <http://www.lawsociety.ie/Documents/committees/Family/FamilyLawsubmission2014.pdf>.

⁹¹ Shannon, G., *Seventh Report of the Special Rapporteur on Child Protection: A Report Submitted to the Oireachtas* (2014), p.98, available at <http://www.dcy.gov.ie/documents/publications/SeventhSpecialRapReport2014.pdf>.

⁹² Carol Coulter, *Second Interim Report: Child Care Law Reporting Project* (2014), p.27, available at <http://www.childlawproject.ie/wp-content/uploads/2014/10/Interim-report-2-Web.pdf>

⁹³ Conor O'Mahony, Caroline Shore, Kenneth Burns and Aisling Parkes, "Child Care Proceedings in Non-Specialist Courts: The Experience in Ireland" (2016) 30 *International Journal of Law, Policy and the Family* 131 at pp.150-153.

⁹⁴ Council of Europe Consultative Council of European Judges (2012) *Opinion No. 15 of the Consultative Council of European Judges on the Specialisation of Judges*, available at [https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE\(2012\)4&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864#P53_1776](https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2012)4&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864#P53_1776).

⁹⁵ Sheehan, R. and Borowski, A., 'Australia's Children's Courts: An assessment of the status of and challenges facing the child welfare jurisdiction in Victoria' (2014) 36(2) *Journal of Social Welfare and Family Law* 95-110.

⁹⁶ Queensland Child Protection Commission of Inquiry, *Taking Responsibility: A Roadmap for Queensland Child Protection* (2013), pp. 464-474, available at http://www.childprotectioninquiry.qld.gov.au/data/assets/pdf_file/0017/202625/QCPCI-FINAL-REPORT-web-version.pdf.

⁹⁷ Wood, J., *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008), pp.528-543.

courts system,⁹⁸ with the limited time allocated to child care in some venues a particular manifestation of this. This echoes findings in other jurisdictions.⁹⁹ Participants also highlighted the fact that some District Court judges lack interest in this area of law. In the words of one judge interviewed for the study, ‘there are too many judges doing this kind of work who don’t want to be doing it. And that is dynamite. They are making orders to get rid of it.’¹⁰⁰

Judges and other professionals who spend the clear majority of their time on other issues are not incentivised to significantly upskill in the area of child and family law. By contrast, in a specialist family court, cases would not have to compete with criminal law and other matters for attention and resources, and it would be easier to ensure that staff involved in such proceedings had an appropriate level of interest, experience and specialist training. This was among the reasons cited by the Family Justice Review in England and Wales when recommending the establishment of a Single Family Court (even though family divisions had existed within the general courts for over a decade). The Report encouraged that this court be staffed by judges who specialise in family law and professionals who receive specialist, inter-disciplinary training.¹⁰¹

The imbalanced distribution of population in Ireland means that there is a limit to the number of specialist regional family courts that could feasibly be developed; each centre would require a critical population mass to justify the investment of dedicated judges and buildings. Regional centralisation of child and family law cases, which has already been possible to a degree in Dublin due to spatial density and a large population, would present challenges if families have to travel a significant distance to attend proceedings in these dedicated courts instead of in their local District Court. However, this obstacle is hardly insurmountable, and a balance could be struck through combining specialist regional facilities in some areas with travelling specialist judges and refurbished facilities in existing court buildings in other areas. For example, in Queensland, the recommended solution was the appointment of additional specialist judges in key locations where the greatest case load arises; this was to be achieved in part by appointing generalist judges as magistrates of the Children’s Court where they had already developed a *de facto* degree of specialisation by managing child protection lists.¹⁰²

⁹⁸ See *Conor O’Mahony, Caroline Shore, Kenneth Burns and Aisling Parkes, “Child Care Proceedings in Non-Specialist Courts: The Experience in Ireland” (2016) 30 International Journal of Law, Policy and the Family 131 at p.151.*

⁹⁹ See, e.g., Queensland Child Protection Commission of Inquiry, *Taking Responsibility: A Roadmap for Queensland Child Protection* (2013), p.455.

¹⁰⁰ *Conor O’Mahony, Caroline Shore, Kenneth Burns and Aisling Parkes, “Child Care Proceedings in Non-Specialist Courts: The Experience in Ireland” (2016) 30 International Journal of Law, Policy and the Family 131 at p.151.*

¹⁰¹ Norgrove, D., *Family Justice Review: Final Report* (2011), pp.68-77 and 81-89, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217343/family-justice-review-final-report.pdf.

¹⁰² Queensland Child Protection Commission of Inquiry, *Taking Responsibility: A Roadmap for Queensland Child Protection* (2013), pp. 464-466.

Finally, it should be stressed that no constitutional amendment is required to facilitate the establishment of a specialised child and family court; ordinary legislation would suffice. This is plainly evident from previous initiatives, most obviously the designation of the District Court as the Children Court under Children Act 2001 for the purpose of juvenile justice matters. It would be a straightforward legislative matter to establish a District Family Court, a Circuit Family Court and a Family Law Division of the High Court (akin to how the High Court sits as the Central Criminal Court for criminal matters at present) by simply stipulating that certain categories of cases relating to certain Acts of the Oireachtas shall be heard in those courts. The legislation could then set down the particular specialised characteristics of those courts.

Opening Statement by Dr Carol Coulter
Director, Child Care Law Reporting Project

Thank you very much for the opportunity to address your committee. My colleague, Maria Corbett, and I will be very happy to answer any questions you may have after my presentation.

First of all, my experience of the family courts is two-fold. In 2007/2008, while on leave of absence from The Irish Times, I conducted a pilot project for the Courts Service reporting on family law proceedings, following the modification of the *in camera* rule. This mainly concerned private family law proceedings, that is, disputes between private individuals. Since 2012 I have been running the Child Care Law Reporting Project which reports on public family law, when the State intervenes in a family where it considers a child to be in need of protection. It does so through the Child and Family Agency, previously through the HSE, and the District Court is the court designated by legislation to hear all proceedings involving the taking of children into care. Today I will speak mainly in relation to how public family law is dealt with in our courts.

1. Courts Structure

I fully endorse what previous speakers, in particular Dr Conor O'Mahony of UCC and the Law Society, have said in relation to the courts structure and the urgent need to establish a family court. This need is illustrated by a report we are about to publish on child care hearings in the District Court. We found over-crowding, lack of privacy, over-lengthy lists and over-worked judges in most of the courts attended. In some courts child care cases featured in a lengthy mixed list of criminal, civil, private family law and child care cases. The situation is little better when child care cases are heard along with private family law – there can be over 100 cases on a list of private and public family law, and people can be waiting all day for their case to be heard.

The establishment of a family court division of the existing courts, with specialist judges trained in family law and allocated to these courts for a period of 2-4 years, and with appropriate support facilities to allow for proper management of cases, would address many of the problems in family law. I would suggest between 12 and 15 dedicated regional centres, where there could be easy access for wheelchairs and buggies, adequate consultation rooms, a comfortable waiting area along with a separate room for vulnerable witnesses and children, and basic facilities like drinking water and a vending machine. As stated by others, no constitutional amendment is necessary to do this.

2. Alternative Dispute Resolution

It is clearly desirable to keep family disputes out of court as far as possible and alternative dispute resolution offers a useful alternative. However, a distinction needs to be made between private and public family law. There is a difference between a dispute involving two private individuals and a situation where the State intervenes in a family to remove parents' constitutional rights to raise their children, and a child's constitutional right to be brought up by his or her parents, as happens in child care proceedings. There is a clear imbalance in power between the State and individual parents, and mediation or other forms of alternative dispute resolution may not uphold the individual's right to fair procedures.

When a constitutional right is at stake it is particularly important that an individual's right to fair procedures is upheld, including the right to adequate legal representation and to a hearing before a court. That is provided for by the hearing of child care proceedings in the District Court, which normally insists on parents being aware of their right to legal representation, and urging them to exercise it. That is usually provided by the Legal Aid Board. Parents have full rights to appeal or judicially review decisions of the District Court.

This said, there are areas in child protection where alternative dispute resolution may be appropriate, for example, when children are in care, in relation to disputes about access, decisions about education or holidays, psychological and medical assessments of the child, and so on.

3. Conduct of family law proceedings

Formality

Because most child care proceedings in the District Court are not conducted in a separate court, or on a separate day, they follow the usual format of proceedings for the District Court – the applicant's (Tusla) and respondent's (parents') lawyers sit at a table in front of the judge, with the witnesses and parents on benches in the body of the court, observing the proceedings until they are called. In a specialist family court, with dedicated child care days, there should be scope for a greater degree of informality, with parents, lawyers and witnesses sitting around a table with the judge and discussing the issues. This format is used in the Children's (criminal) Court.

Voice of the child

Others have drawn attention to the limitations of the existing provisions for hearing the voice of the child, which we endorse. In addition, I would like to draw attention to a provision in the 1991 Child Care Act, which govern child protection proceedings, for a solicitor to be appointed by the court to represent the child in the proceedings. This is rarely used, and then usually only when the proceedings involve older teenagers. However, it is common in Scotland, for example, for a lawyer to take instructions from and represent a child in such proceedings. Here in criminal

proceedings involving children they are represented by their own lawyers. In our view enabling children in child protection proceedings to instruct their own lawyers (appropriately trained to receive such instruction) to represent their views should be part of a suite of measures to represent the voice of the child.

***In camera* rule**

The *in camera* rule has been significantly amended twice in the past 15 years, and has given rise to two parallel regimes for reporting on family law proceedings. The first change, introduced in 2004 by then Minister for Justice, Michael McDowell, was designed to permit reporting of private family law proceedings without allowing the media attend. This was extended in 2007 to cover public family law, with the Child Care (Amendment) Act. This legislation names the Courts Service, the ESRI, the Law Reform Commission and all the major academic institutions as bodies that can nominate people to attend proceedings and write reports, subject to protecting the anonymity of the parties. I was asked by the Courts Service to conduct the Family Law Reporting Project under the 2004 legislation and the Child Care Law Reporting Project operates under the 2007 Act, nominated by NUIG.

The second major change came in 2013, and was introduced by then Minister for Justice, Alan Shatter. It allows *bona fide* members of the press attend and report, but subjects the media to a large number of restrictions on what may be reported. This legislation gives the court extensive powers to limit reporting, and provides for severe penalties for breaching the terms of the legislation – up to €50,000 in a fine and three years in jail for both journalists and media executives who publish prohibited material.

Thus the earlier regime for reporting family law is restrictive in who can attend proceedings and report on them, while not being prescriptive about what can and cannot be reported, subject to protecting a family's anonymity; the later law allows the media free access to the family courts, but is highly restrictive as to what can be reported, with heavy sanctions. Since its enactment five years ago there has, understandably, been little media attendance at family law proceedings. In any case, no media organisation has the resources to provide comprehensive coverage.

Given the heavy workload of the judiciary, it is difficult to see how they could provide written judgments in most family law cases, and no resources exist to provide for the redaction of the judgments in order to remove all possibly identifying information. A limited number of written judgments on child care from the District Court is published on the Courts Service website.

In my opinion, the only way to ensure balanced and systematic reporting of all family law proceedings is by way of a dedicated reporting body that can attend a representative sample of cases, staying with complex cases through repeated adjournments and publishing the exchanges between the parties' lawyers, judges and witnesses, as well as the court's conclusions. Such a

body should apply a Protocol that ensures the protection of the anonymity of the parties, and therefore filters out any identifying information before it reaches the public domain. The Child Care Law Reporting Project operates in this way, and its Protocol can be seen on our website, www.childlawproject.ie

Rights of fathers

This issue mainly arises in private family law proceedings. In child care proceedings fathers, where they are identified, are respondents in the case along with the mothers and are entitled to legal representation. However, data collected by the Child Care Law Reporting Project has shown that the majority of child protection cases involve one parent, usually the mother, parenting alone, with limited or no involvement of the father in the child's life. Some judges have made rulings requiring the Child and Family Agency to prove that both the father and mother are unable to parent a child safely before making a care order, and have directed that the CFA supports a father in caring for a child. In other cases, however, the proceedings have tended to focus on the mother with little involvement from the father.

In relation to private family law proceedings, in my 2008 report for the Courts Service I observed that there was a specific inequity towards certain fathers due to the operation of the civil legal aid scheme. As it is strictly means-tested, a situation often arose where a working father earning a modest wage was above the means threshold while his wife, if a mother, would typically not be working or working part-time, and would fall under the means threshold. Therefore when the marriage broke down she would be eligible for legal aid and he would not, giving rise to an inequality of arms in any subsequent proceedings. A solution to this would be to remove or significantly increase the means test, while asking for means-related contributions from litigants, so a person on an average income could avail of the civil legal aid scheme and contribute according to their means.

My colleague, Maria Corbett, and I will be happy to answer any questions the committee may have. In particular, Maria can address specific issues relating to the impact of Brexit on child protection proceedings.

Short Submission 6th March 2019; Reform of the Family Law System

Identifying Solutions

Submitted by Dr Róisín O' Shea, Partner Arc Mediation

With Contributions from;

Dr Sinéad Conneely, Senior Law Lecturer W.I.T.

Shane Dempsey, Partner Arc Mediation
Nuala Jackson SC
Marie Dennehy, Associate Arc Mediation

Support at the earliest possible point.

Somehow this conversation always starts at the wrong end of the pipeline, the courtroom.

Instead we should begin at the beginning.

If I am injured in a car crash I am brought straight to the Emergency Department. We need family ED. Fast, effective supports. If the new norm was to first step into a wrap-around multi-disciplinary early intervention ED with **mediation** at its core, and with the ability to go straight to court in certain circumstances, we would solve the main problems of congestion, delay, significant cost and the destructive escalation of conflict over time.

How do we do this?

I first explored much of my submission in my 2014 PhD a 3 year empirical study of 1,200 cases in the Circuit Court all over Ireland, funded by the Irish Research Council.

We don't need to re-invent the wheel, we need to grab and adapt the most effective solutions from other jurisdictions and adapt them for the Irish landscape, both legislative and societal.

In the District Court I have found that Family law litigants are experiencing two very different worlds. In the provincial courts there are still impossibly long lists. Litigants in Dolphin House by contrast benefit from a brilliant innovative system implemented by Eoin Manning, where almost 95% of the litigants are now self-representing. Judges who have a huge commitment to the area have developed a quasi mediation/inquisitorial approach which reduces conflict in the courtroom. Judge Gerard Furlong is the lead innovator in this area and shows an extraordinary empathy, understanding and patience, while implementing the law fairly.

Right now we should start to work with what we have, people cannot wait for shiny new buildings or reform of a system that is not fit for the **users** of that system.

Cost-effective use of State Resources

We should start with families experiencing financial hardship; the State should offer two access points for fast intervention;

Path A; Leverage existing State resources, in the Community, at local level, and start diverting people away from the courtroom. Our Family Mediation Project is now available across the south

of Dublin city in four Family Resource Centres, Quarryvale, Killinarden, St Kevin's Kilnamanagh, and Ballyboden. Mediation is provided by a team of mediators from the not-for-profit Dublin Community Mediation

Appointments in 10 days

Means-tested

A flat hourly rate of € 25, that can be waived

It is child-inclusive,

Cases are co-mediated, and bi-gender

It is court-linked

Issues that can be mediated are; Guardianship, Custody, Access and Maintenance.

The mediator assists the parents and children to access the wide range of supports available in FRCs, including counselling, play therapy, parenting courses, support groups, referrals for mental health or addiction issues, and can signpost additional resources such as MABS, FLAC and Citizens Information.

Path B; **The Family Mediation Service** could then be freed up to focus on separation and divorce, again there needs to be a form of means-testing so that the State resources are targeted for the users that need it most. A less complicated means-testing approach could be used, which our research project has also developed, and is now being used in the AALS family mediation project at Denver University.

This two-level offering by the State, for the users that need it most, at local level and through the Legal Aid Board would slash waiting times and get appropriate help to families at the earliest possible point.

Mediation (before filing an application)

We should have mandatory mediation information sessions for parents **and** mandatory intake sessions, which will help people to understand the process.

The regulation of mediation must remain a priority. I am in a working group convened by the Legal Aid Board to work towards forming a Mediation Council, and once that Council gets about its work as set out in the Act, the uptake of mediation will then increase as potential users; know what it is, understand the benefits, and become confident of the training standards and competency of mediators.

The two main reasons that I have observed for those choosing litigation as the first option is that (a) people believe or are being told that they will get a better outcome and (b) they believe they will get their day in court and that the judge will tell the other person they are wrong.

People need to understand that neither is likely to be true.

The overwhelming majority of cases settle out in the corridors of courtrooms.

Reduce VAT

We charge 123 per hour in our practice for family mediation, and 23 euros of that is VAT. One immediate step the Government could do to support families in distress is to reduce the State tax element of fees. Those who need the services of a family mediator and a family law solicitor are individuals rather than businesses and therefore cannot reclaim VAT, which at the current rate of 23% is almost a quarter on top of the fees charged.

The Family Courts – the problems [Nuala Jackson SC]

Nuala Jackson sets out in detail in our submission that our framework for resolution of disputes must take the following into account;

1. Satisfactory resolution;
2. In a timely manner;
3. With the least acrimony possible;
4. That is affordable to those in dispute.

Family Law Courts – some solutions

We need specialist volunteer Family Law judges with a genuine interest in this area of law, who are not rostered in but opt-in. We could use the 80/20 Canadian approach and we should also ensure that specialist family law judges have an aptitude and personality suitable for family law.

We need to change the jurisdiction of the Courts, as our system currently discriminates against married people, who are forced to make any application relating to Separation or Divorce at Circuit Court level, generally a much more costly exercise with greater time delays. I propose that all private law matters relating to children and maintenance are heard in the District Court, and the Circuit Court deals with everything else in relation to separation or divorce.

We need Regional hubs with as many days as are needed so that we can move to a case managed system like in Oshawa Family Courts Toronto, where specific appointment times are set for a case to be heard and there is no gathering of multiple cases at a Courthouse at the start of the day for call-over

Users need predictability, the unfettered discretion of judges results in a considerable variation of approach and outcome. It is difficult to identify any pattern, with outcomes depending on the personal views and disposition of a judge. We need formulas that quantify maintenance and guidelines for all other matters. These exist in other countries and I am happy to go ask for permission for us to use those here.

We need to encourage litigants to try mediation and the State can offer further support by opening up the Courthouse facilities for mediation sessions where a case is already underway and has been adjourned to allow time for mediation.

Children

The most appropriate way to hear the views of a child, in relation to access, custody and guardianship, is in child-inclusive mediation, with appropriately trained mediators. A judge who is subsequently asked to rule or enforce any agreement resulting from mediation can be satisfied that the views of the child have been heard.

The court needs a panel of Child View Experts immediately available, who can produce a report for the court within a reasonable time-frame. If we operate a Regional hub approach, then it may be more cost-effective to have these Child View Experts on salary.

We should have parenting guidelines for judges based on international research, so that a child's right to have both parents in their lives is effectively prioritised.

Parents

We need to ensure parity of treatment for both parents in our courts. Non-resident parents are over-whelmingly fathers in Ireland, and their role as parents is generally not supported by the current approach of the courts. Where access Orders are unilaterally breached, enforcement must follow, and the sanctions open to the court under the 2015 Act should be consistently applied.

I would like to thank this committee for the opportunity to make a submission and my colleagues who contributed, Dr Sinead Conneely, Shane Dempsey, Nuala Jackson and Marie Dennehy. We are ready, willing and able to do what we can to help, we will meet any member of the committee and provide any assistance we can,

We await your call

Thank you.



THE BAR
OF IRELAND

The Law Library

Council of The Bar of Ireland to the Joint
Oireachtas Committee on Justice and
Equality

REFORM OF THE FAMILY LAW SYSTEM

4 March 2019

INTRODUCTION

The Council of the Bar of Ireland is the accredited representative body of the independent referral Bar in Ireland. The independent referral bar are members of the Law Library and has a current membership of approximately 2,200 practising barristers.

The Council of the Bar of Ireland ('the Council') has prepared this submission at the request of the Joint Committee on Justice and Equality for the purposes of its consideration of the topic of the Reform of the Family Law System having regard to the discussion questions provided with the invitation to appear before the Committee.

The Council makes this brief submission as a preliminary to what needs to be a full and comprehensive discussion of the issues arising and the proposed solutions to embark on a reform of the family law system. The Council will consult fully with its members on any detailed proposals for change that may emerge in due course.

NECESSITY FOR REFORM

Family law proceedings are conducted as part of the existing court structure in Ireland. The present system allows the Circuit Court deal with the vast majority of private family law litigation. The High Court is available to deal with more complex or urgent matters, or where it is thought appropriate that the High Court hear the case. It is submitted that this division of jurisdiction works well and reflects the ability of differing courts to administer justice within their spheres.

Rules of procedures exist to filter cases brought in the High Court which are more suited to determination in a lower court. For example, a custody application brought in the High Court is automatically listed to allow the Applicant make arguments why the High Court should deal with the case and why the matter should not be remitted to the District or Circuit Court. In any case commenced in the High Court a party may apply to have it remitted down to the Circuit Court for hearing. It is submitted that there is appropriate balance in allocation of cases in differing jurisdictions at present.

COURT STRUCTURE

The following table identifies the various jurisdiction of the court which deal with family law proceedings:

District Court	<ul style="list-style-type: none"> • Childcare (including emergency care orders, care orders, interim care orders, and supervision orders) • Custody and access • Domestic violence applications (including barring orders, protections orders, safety orders) • Maintenance
Circuit Court	<ul style="list-style-type: none"> • Appeals from the District Court • Dissolution of Civil Partnership • Cohabitation • Divorce • Domestic violence • Judicial Separation • Nullity
High Court	<ul style="list-style-type: none"> • Appeals from the Circuit Court • Case Stated from the District Court • Habeas Corpus • Judicial Review • Adoption • Child Abduction • Dissolution of Civil Partnership • Cohabitation • Divorce • Judicial Separation • Nullity

As evidenced from the above table, applications which arise in the context of relationship and marital breakdown are heard and determined in different jurisdictions within the existing court structure. While an application for dissolution of civil partnership, divorce or judicial separation may only be heard in the Circuit Court or the High Court, many applications for custody, access and maintenance, particularly in relationship breakdown in non-marital situations, are heard before the District Court.

In Dublin, there are up to seven dedicated family law District Courts and there are three Circuit Courts sitting five days a week hearing family law cases. There are one to two High Courts allocated to hearing such cases. Outside of Dublin, much depends on the practice on each District and Circuit.

VOLUME OF FAMILY LAW APPLICATIONS

The following is an indicative table of family law applications, the jurisdiction of the court in respect of which that application came before, and the 2017 statistics in respect of those applications:¹⁰³

		Incoming	Resolved
Adoption	High Court	37	44
Child Abduction	High Court	36	44
Childcare	District Court	11,931	10,635
	High Court	32	21
Divorce	Circuit Court	3,964	3,389
	High Court	31	46
Domestic violence	District Court	15,962	16,314
	Circuit Court	n/a	51
Guardianship, custody and access	District Court	12,442	13,728
Judicial Separation	Circuit Court	1, 271	735
	High Court	23	53
Maintenance	District Court	9,234	11,936
Nullity	Circuit Court	23	19
	High Court	1	3

As appears from the above table, the District Court is experiencing a high volume of family law applications. This places a significant burden on the existing court system. Since the introduction of the Children and Family Relationships Act 2015, cases involving custody, guardianship and access applications require the Court to hear the voice of the child. While welcomed, this now requires a number of listings before the Court whereas previously such applications would have been heard for the most part in one sitting.

¹⁰³ The Courts Service Annual Report

The Council is strongly of the view that the expedient and efficient resolution of family law proceedings arising from relationship and marital breakdown is in the interests of children and the parties to the proceedings. The delays currently experienced in family law proceedings increases difficulties and complications which arise in the context of relationship breakdown.

The Courts have adopted Practice Directions and Rules in an effort to reduce the delays experienced in family law proceedings.

The existing court structure means that family law proceedings are often listed alongside criminal and civil matters. This is particularly the case outside of Dublin. In Dublin, there are dedicated family law courts and while delays remain in the system, there are not the chronic delays that can be experienced in other parts of the country. Outside of Dublin, the number of days allocated to family law sittings can be quite limited which results in system clogging and long gaps between the institution of proceedings and their determination. Practically, this can mean that clients attend court on numerous dates only for the case not to be heard with the inevitable frustration and anxiety this can cause as a result. It can increase legal costs for the parties where there is no certainty as to whether a case will proceed or not on a given date.

It is likely that family law cases would be dealt with more efficiently if a specialist division of family law courts and Judges were created. This would ensure that the same Judges would deal with family law lists on an ongoing basis which would not only ensure greater efficiency but also greater consistency. It is not envisaged that specialist Judges would be confined to family law but would be assigned to family law from the pool of general Judges. Such a family law division exists de facto in Dublin and can operate within existing structures. However, such a division is meaningless unless adequate resources are allocated to it.

JUDICIAL TRAINING

The existing court structure has resulted in judges determining family law applications without necessarily having detailed training or practical experience of family law proceedings. The Committee for Judicial Studies was established pursuant to the Court and Court Officers Act 1995 to organise training and seminars for members of the judiciary. Due to the absence of designated family law judges, the training provided to the judiciary is of a general nature.

Furthermore, on the basis that Judicial Assistants are assigned to specific members of the judiciary as opposed to specific lists such as family law, relevant expertise is not utilised as effectively as it could be.

INADEQUATE FACILITIES

The Council notes that the lack of adequate facilities generally for the conduct of family law proceedings has given rise to significant safety issues for members of the public, legal practitioners and the judiciary. Recently, a very serious security incident occurred in the context of a family law application being heard in Phoenix House where a litigant produced an imitation firearm and a suspect device and held a member of the judiciary, a legal practitioner and a litigant hostage. There have been other serious incidents in recent years.

In the absence of a purpose-built family law complex in Dublin, applications are heard and determined in various locations which are unfit for use. Current locations include child care cases being dealt with in the District Court sitting at the Bridewell, a nineteenth century court venue, Dolphin House, a nineteenth century hotel, and Phoenix House.

Outside of Dublin, family law applications are heard in existing District Court and Circuit Court locations on appointed days, as are Circuit Court Appeals. Due to the fact that family law proceedings outside of Dublin are generally heard on specially fixed days, the applications will necessarily take place in courtrooms constructed for multiple purposes; both civil and criminal. In such venues, it is not feasible to have designated or purpose designed resources for family law cases, which represent only a portion of the business conducted in the courtroom.

IMPACT OF CONSTRUCTION AND DESIGN OF COURT HOUSES

The construction and design of courtrooms has a direct impact on the way in which family law proceedings are conducted. Certain designs can encourage or foster an adversarial approach to litigation. Similarly, a lack of informed courtroom construction, whereby parties are forced to conduct themselves in close proximity, can increase anxiety, tension and has given rise to significant safety issues. The inconsistent resources in court venues and lack of adequate consultation rooms directly impacts on the manner in which family law proceedings are conducted. The failure to provide separate waiting areas or family friendly spaces in court venues can significantly increase avoidable stress and anxiety prior to participating with a

family law application. Situations of increased stress and anxiety can result in volatility in the course of family law litigation.

The lack of consultation rooms or adequate consultation rooms results in delays in the hearing of family law applications. In the absence of private spaces, legal practitioners and their clients face difficulties in discussing important matters prior to entering the courtroom. This has the consequence that legal practitioners may not always be afforded time to be properly appraised of developing or changing facts from the client prior to the commencement of a hearing with the result that the hearing is delayed or frustrated in its progression. This directly informs the conduct of family law proceedings, is unavoidable and contrary to the policy of dealing with family matters otherwise than in public.

As family law applications are held *in camera*, it is inappropriate for consultations to take place between legal practitioners and parties to proceedings, including children, in public areas such as corridors adjacent to a courtroom. The failure to provide consultation rooms or an adequate number of consultation rooms has resulted in parties being required to discuss sensitive family matters in public contrary to the legislative and public policy purpose behind the *in camera* nature of family law proceedings.

There is generally no special provision made to accommodate parties and children involved in family law proceedings other than that ordinarily available to parties attending a court venue for other matters.

URGENT NEED FOR PURPOSE-BUILT FAMILY LAW COURT

The intention to construct a purpose-built family law court venue at Hammond Lane is welcome but has not progressed. The Office of Public Works purchased the site for £4 million in 1999². It has remained vacant since that time, twenty years ago. It has been expressly indicated that the development of a purpose-built family law court venue at Hammond Lane will address the several deficiencies in the family law court venues. The failure to construct this site in conjunction with inadequate facilities gives rise to a significant and serious risk that the existing system cannot adequately protect the rights of individuals participating in family law proceedings or children.

It is the view of the Council that the construction of dedicated family law facilities at Hammond Lane is absolutely necessary and will go a long way towards addressing deficiencies in the current family law system.

PROCEEDINGS OTHERWISE THAN IN PUBLIC

The Courts (Supplemental Provisions) Act 1961 provides that matters of a matrimonial nature or involving a child should be heard otherwise than in public. Pursuant to section 40 of the Civil Liability and Courts Act 2004, the category of persons entitled to attend family law proceedings and publish reports therefrom was extended. Part 2 of the Courts and Civil Liability (Miscellaneous Provisions) Act 2013 allows *bona fide* members of the press to attend family law proceedings and to publish reports subject to certain conditions designed to ensure the anonymity of parties to family law proceedings.

The *in camera* rule is due to the sensitive nature of the proceedings. While the administration of justice in public necessarily involves a loss of privacy, the public interest is not served in requiring family issues and issues involving a child to be heard in public.

The Council welcomes the entitlement of *bona fide* members of the press to attend family law proceedings and report and is of the view that the present regime adequately balances the rights of the public to monitor the consistency and conduct of family law proceedings and the rights of parties to have their family affairs regulated in private.

ROLE OF CHILDREN

There are considerable difficulties in practice in attempting to give effect to the voice of the child in the context of various proceedings, including guardianship, custody and access, where the views of a child are to be ascertained and given due weight. Section 31(2) of the Guardianship of Infants Act 1964, as inserted by the Children and Family Relationships Act, 2015 sets out 11 factors to be taken into account by a court in determining what is in the best interest of a child.

Pursuant to the Child and Family Relationship Act 2015, the court may give directions for the purpose of procuring an expert report arising from questions affecting the welfare of a child and appoint an expert to determine and convey the views of the child. The court has considerable discretion regarding the circumstances in which such a report or determination should be required. The recent Guardianship of Infants Act 1964 (Child's Views Expert)

Regulations are problematic in a number of respects, not least on account of the maximum fee set for the expert who are to provide such reports.

Among current difficulties are the following:

- (i) Absence of child friendly or suitable waiting facilities
 - the absence of child friendly or suitable waiting facilities may result in children attending court venues which are simultaneously hearing criminal and civil matters
 - the absence of child friendly or suitable waiting facilities may cause stress and anxiety to children where they come into contact with criminal and civil matters outside of designated family law facilities
- (ii) Lack of consistency in the manner in which the child is heard
 - while placing children in the witness box may assist judge or court personnel in hearing their views, such situations may have a stressful effect for children where they are placed in a situation of enhanced exposure
 - while some members of the judiciary come down to the body of a courtroom to sit with children while they give their views, such a method is not widespread and is restricted by venue and also the pressures and case load of the individual judge
 - while hearing the views of children in chambers may be a more informal method, there is no consistency in who may attend in chambers with the judge and how such a practice should be conducted.
- (iii) Child protection
 - the failure to provide guidance regarding the proper way to ascertain the views of children may give rise to child protection concerns

RIGHTS OF FATHERS

The Council notes an absence of data regarding the outcome for fathers involved in family law proceedings. While custody may be granted jointly, it is still largely the practice to order that the child reside with one parent and have access with the other.

The Children and Relationship Act 2015 also provided new powers for the court to enforce custody and access rights. This includes the grant of enforcement orders to allow further access to a child to a parent who has been denied access in order to mitigate against any adverse effects which estrangement may have on the child. An unmarried father can seek a declaration from the Court that he is automatically entitled to be a guardian where he has lived with the child's mother for 12 consecutive months after 18th January 2016, including at least 3 months with the mother and the child following the child's birth. Furthermore, the court can order that either or both parents attend a parenting programme, family counselling or receive information on mediation. The Council notes that custody and access issues should not be viewed as competing rights between parents of children but rather from the perspective of the child's right to the society and involvement of both of its parents where appropriate. This legislative protection for custody and access is welcomed by the Council as it further gives effect to the child's right to have the involvement of both parents, where appropriate.

The Court is required to conduct a balancing of rights when making custody and access arrangements following marital and relationship breakdown and this balancing of rights frequently results in access being afforded to a child's father. It is recommended that the collation of data regarding the outcome of custody and access applications would assist in understanding how the rights of fathers are presently balanced in family law proceedings.

ALTERNATIVE DISPUTE RESOLUTION

The Mediation Act 2017 imposes new obligations on the providers of legal services to advise their clients about the advantages of resolving disputes through alternative dispute resolution methods including mediation.

This obligation has existed in the context of relationship and marital breakdown since its infancy and the passing of the Judicial Separation and Family Law Reform Act 1989 where safeguards were put in place to ensure a party's awareness to alternatives to legal proceedings and to ensure that legal practitioners discussed with their clients the possibility of engaging in mediation to effect a separation on an agreed basis. This was also provided for in the context of divorce pursuant to the Family Law (Divorce) Act 1996.

Alternative Dispute Resolution should be encouraged in suitable cases. This can be done not only by legal practitioners but also, when litigation is in being, by Courts in the context of case management. Given the particular dynamics at play in family law proceedings, there will be some family law cases that are simply not suitable for the application of alternative dispute resolution processes.

COST OF FAMILY LAW CASES

A properly functioning civil legal aid system is essential in providing access to justice. It is clear that the Legal Aid Board requires significant additional resources if a properly functioning civil legal aid system is to be provided. Despite the best efforts of practitioners employed by the Legal Aid Board, there are regularly lengthy delays in the running of litigation where either or both parties are represented by the Legal Aid Board. This adds to delays in Court and to litigation costs, especially where one party is privately represented.

At first sight the general civil law provision that “costs follow the event” seems attractive. However, in family law cases a significant number of litigants are legally aided by the Legal Aid Board. In most other cases, the reality is that costs, whether legal or in relation to expert witnesses, are coming from the one pot. These factors complicate the manner in which Courts deal with costs.

There are undoubtedly cases in which parties should be sanctioned and Judges are quite willing and capable of doing so. In the context of a specialist division of family courts and Judges, with the same Judge dealing with a particular list for some time, there is a realistic prospect of greater consistency in respect of all matters dealt with by the Court, including costs.

In addition, there are cases where litigants conduct the litigation in such a manner, such as causing undue delay and bringing multiple and perhaps unnecessary applications, that the Court should impose a financial sanction. This does occur but, as noted above, in most cases there is little reality to the Costs Order. While it is arguably best to leave the discretion in respect of costs to Judges on a case by case basis, the need for consistency, specialist Judges and an adequately resourced civil legal aid system is fundamental.

Other approaches to minimise costs include increased early judicial case management and an emphasis on early settlement negotiations. Some of the areas touched upon throughout this

submission demonstrate how administrative organisation of the court structure and improvement in court facilities can each have a positive impact on the management of family law applications and lead to reductions in cost.

Opening Statement to the Joint Oireachtas Committee on Justice and Equality on the Reform of the Family Law System

6 March 2019



Founded in 1974, Treoir unites over one hundred members working together to ensure the best outcomes for unmarried parents and their children. Our aim is an Ireland where all families, irrespective of marital status, are respected and protected in the Ireland's laws, policies and services. Some of our members and associate members include:

**Aislinn
Barnardos
Anew Support Services
Clarecare
Doras Buí
Familibase Youth Centre
Here2Help
St. Catherine's Community Services Centre
Sligo Social Service Council
The Swan Health Centre**

**Carr's Child and Family Services
Bessborough Centre
Coombe Women's Hospital
Foróige
Health Service Executive
Rotunda Hospital
Home Start
Limerick Social Service Council
National Maternity Hospital
St. Anne's Day Nursery**

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Opening Statement

Treoir, the National Federation of Services for Unmarried Parents and their Children welcomes this opportunity to address the Joint Oireachtas Committee on Justice and Equality on the reform of the family law system. Treoir unites its members working together to improve the lives of unmarried parents and their children. We advocate for changes to the law to ensure their rights and welfare are acknowledged and protected in legislation, policy, and in access to services. Treoir provides legal information to parents and their extended families; and to professionals through our information service and by way of nationwide outreach clinics. We make submissions to government and produce position papers on rights and entitlements.

Treoir welcomes the examination of Family Law Reform by the Joint Oireachtas Committee. We note the far-reaching changes to family law which have taken place in Ireland over the past five years.

Nonetheless, despite changes to the law, which Treoir welcomes, significant deficiencies exist in terms of how the legal system and family court structure, operates. Treoir and other organisations deal with the fallout from this daily. Through our information service we repeatedly respond to questions to with to do with the rights of unmarried parents especially regarding guardianship, access, and maintenance.

This brings to the fore two key issues in terms of the operation of the family court system. One is the lack of information in the public domain among unmarried parents, social workers, Gardaí, the legal profession and society at large around the rights, or lack thereof, of unmarried parents. The second issue concerns access to legal advice and representation, and the question of economic inequality. The discussion that follows is grounded in the premise that the court and the family law system does not operate in a vacuum, but that it is very much a part of the society in which it operates.

This presentation talks about both issues and suggests remedies to improve the operation of the family court system.

A System in Crisis

For example, a 1994 Law Reform Commission Report on the family law system notes that while family law has undergone a transformation, the structures for the mediation and resolution of family conflict are inadequate in the extreme.¹⁰⁴ Fast forward to 2019 and the family mediation service remains grossly under resourced. The service is characterised by long waiting lists with people waiting from twelve to twenty-six weeks for an appointment. This is part of a broader issue where not enough is being done to ensure Alternative Dispute Resolution (ADR) is properly resourced and available for parents in dispute. This is important, as in terms of establishing and sustaining shared parenting, Ireland lags far behind other countries. Treoir believes all children have a right to know, be loved and cared for by both parents, where possible. Shared parenting gives children the possibility of a nurturing relationship with both parents and their extended families and works well if it is child-focused, rather than adult-focused. The essential element is the goodwill and determination of both parents to make it work. When parents support their child's relationship with the other parent, they are promoting their child's right to an independent and meaningful relationship with each parent.

¹⁰⁴ The Law Reform Commission: Consultation Paper on Family Courts, March 1994.

In Ireland, conflict between unmarried parents is often exacerbated by the fact that unmarried fathers do not have automatic guardianship rights when the child is born. When a child is born in the Republic of Ireland having his name on the child's birth certificate does not give an unmarried father any rights in respect of his child. At the outset, this creates inequality in terms of parental rights and responsibilities which often results in the parents going to Court. The adversarial route clogs up the Courts and leads to tension and conflict between the parents. The child is caught in this maelstrom with the result that their right to have a relationship with both parents is put under pressure.

Twenty-five years have passed since the 1994 Law Reform Commission Report identified the grossly inadequate nature of family mediation and resolution structures. This remains the case in- spite of international evidence strongly supporting Alternative Dispute Resolution as the most successful default route for couples who need assistance.¹⁰⁵

Treoir is calling on the Oireachtas Committee to recommend to the Minister that automatic guardianship rights be extended to unmarried fathers whose names are registered on the child's birth certificate. This practice has been in force in Northern Ireland since 2002. Currently a father can only become guardians if the mother agrees to joint guardianship and both parents sign a statutory declaration, if the father goes to court or if he satisfies the cohabitation requirement, or marries the mother.

Unrepresented Parties and the Voice of the Child

The 1994 Report describes the courts as buckling under the pressure of inadequate facilities; it notes Judges dealing with family disputes do not always have the necessary experience or aptitude; and that too many litigants go to court unrepresented. Alarming, it warned, "an unhealthy two-tier system of family justice had developed".

In 2019 people on low incomes remain at clear disadvantage when it comes to the Family Law System. For example, those who qualify for Legal Aid must make a minimum contribution of €130, a large amount of money if you are dependent on welfare or a low paid worker.

In the current two-tier system those who are less well- off and from working class backgrounds often end up representing themselves in family law hearings. This delays the entire process and places huge pressure on an already struggling Court System, while also increasing tension between the parties.

Inequality between those who have the financial where-with-all to hire legal representation and those who do not is replicated yet again, when it comes to the voice of the child. Article 42A .4.2 of the Constitution enshrined the right of children to have their views heard in guardianship, adoption, custody and access proceedings. *The Children and Family Relationship Act 2015* was commenced on 18 January 2016. Under the Act, the court in deciding an application may give such directions as it

¹⁰⁵ In Australia, mandatory mediation and expanded support services are credited with increasing shared parenting and reducing conflict between parties while research from Canada and Sweden shows that enhanced community based supports and properly resourced pre- court services can minimise the role of the courts in parental disputes. See *Unmarried Father's in Ireland: An Examination of the Barriers to Shared Parenting* (Treoir 2018).

thinks proper for the purpose of procuring from an expert a report in writing on any question affecting the welfare of the child; or appoint an expert to determine and convey the child's views, or do both. A fundamental flaw of this provision is that the parties, regardless of their financial means, must pay the for report.

People entitled to legal aid get 50% of the expert report covered by the Legal Aid Board, but if you are already struggling the costs can be quite onerous. Treoir is concerned that many parents, especially those on low incomes are not able to afford this, with the result that the constitutional right of the child to be heard is compromised.

Taken together these factors i.e., the lack of legal representation, the cost of the expert report, and the socio-economic position of the parent(s) has a huge impact in determining their ability to access, to the full, the Family Law System.

The Information Deficit

A recurring theme emerging from Treoir's information service is the law of knowledge about the Family Law System. There is a lot of confusion about the meaning of guardianship and the extent or limits of people's rights concerning access, custody and maintenance. People are intimidated by the thought of going to court and worry about their lack of legal representation, or if in receipt of legal aid about the limited nature of it.

Treoir has identified a significant gap in knowledge around family law amongst members of the Gardaí, the legal profession, social workers, and the Judiciary themselves. This is compounded by a pronounced geographical variation in how the Family Law System operates, perhaps best exemplified by the haphazard use of the critically important document, the Statement of Arrangement for a Child.¹⁰⁶ To this end we urge the Committee to recommend t that a circular be sent to all Circuit and District Court Judges emphasizing the importance of the Statement of Arrangement Form and insisting it be used

Finally, Treoir urges the Minister to introduce a national public information campaign on these issues. In a major review of family law in Australia the Australian government introduced such a campaign which has since proved to be hugely successful.

Recommendations

- 1.** Extend guardianship rights to fathers whose names are registered on the child's birth certificate.
- 2.** Until recommendation one is enforced establish a register of guardians, without further delay.
- 3.** Ensure the National Mediation Service is properly resourced and a system of Alternative Dispute Resolution is introduced.
- 4.** That a circular be sent to all District Court Judges emphasizing the importance of the

¹⁰⁶ The Children and Family Relationships Act 2015 commenced on 18 January 2016. The Statement of Arrangements for Child is a critical component of the Act as it gives a fuller picture of the child's broader familial environment with regard to care arrangements, domestic violence, maintenance, criminality, and the involvement of state agencies such as Tusla. See Appendix 1 for a copy of the form.

Statement for Arrangements for a Child form and insisting that it be used for all hearings.

5. That the Minister introduce a national public information campaign on key issues to do with, access, custody, guardianship, birth registration and maintenance.

Thank you for your attention, we are happy to take any questions you may have.

Men's Voices Ireland

Opening Statement to Oireachtas Committee on Justice and Equality

March 13, 2019

We appreciate the Committee's invitation to Men's Voices Ireland and Nemo Forum to address you on family law, because the family law system has evolved over the past forty years with little regard for the rights, needs, interests or experiences of men.

Family courts are adversarial, exacerbate hostility, ill will, and are bad for parents and children. The system is overloaded, delays are frequent, and judges dislike them intensely.

Instead of addressing a social issue Family Law has evolved into a high growth civil law industry which thrives on exploiting conflict and benefits only lawyers and solicitors and other professionals. It plunders scarce family resources which will be even more stretched following a separation.

The system takes far too long to reach a settlement. Legal fees are very expensive and place lay litigants at a disadvantage. Men are less likely to qualify for legal aid and very many are unable to afford legal representation.

A point made repeatedly at the March 6 hearing was the threshold for legal aid was too low and disadvantages men.

Children suffer from costly long drawn out conflict but may also be used as pawns in custody battles. Joint custody in a real 50:50 sense occurs in only about 1% of cases.

We believe that breach of access orders should be dealt with firmly with sanctions imposed as they currently are not.

Outcomes in the family courts are bad for men and this is well attested. Too often it is a winner takes all situation in which the man is removed from the home, may still have to pay maintenance and/or a mortgage as well as provide for himself. Furthermore, he will discover that access to his children is gravely diminished, in many cases because he can no longer provide suitable accommodation for himself and his children due to his removal from the family home under section 10 of the Family Law Act, 1995.

There is a need to reform the law and remove Section 10 of the 1995 Act to prevent these disastrous outcomes. This is also essential to ensure that mediation is entered into meaningfully by both parties.

ADR produces far better, more conciliatory results in far shorter time and costs far less. There is evidence for this from Irish Mediation services, as well as from Finland and New Zealand and elsewhere. It has much better outcomes for children. It should therefore be regarded as the

normal procedure. Application to the courts should only be made in the event of failure of mediation and be regarded as the exception not the rule.

As you will see from our supporting documentation many of our proposals such as the introduction of 'Families-in Transition' programmes, replacement of the Civil Bill with 'Proposals for the Reorganisation of the Family Unit' and 'Mandatory Mediation' are designed to reduce hostility and expectations of victory which are inherent features of the

current family law system. We hope that these proposals will be of interest to, and given due consideration by, the Committee.

(I will now hand over to my colleague David)

We strongly support the point made by Treoir for automatic guardianship rights for unmarried fathers and the need for a central register for these documents.

In the tussle between competing parental rights the rights of the child are being lost. We emphasise instead the principle of equal rights for both parents.

Current practice puts the adult at centre stage whereas the child's welfare should be paramount and his/her fundamental right to know and spend time with both parents.

Reference was made at the March 6 hearing to the case where a father was alleged to be violent and denied access as a result. Apart from the fact that such an allegation does not need to be proved beyond reasonable doubt in a civil court, a father still retains his right to be a father to his child as one judge affirmed in Dolphin house recently. But this is not common practice and once again underlines the need for clear parenting guidelines and compliance with these. We also strongly support the case made in favour of mediation where domestic violence is alleged and not only for reasons outlined above.

The term domestic violence covers a very wide range of behaviour from physical violence to abusive behaviour such as emotional and psychological abuse. We know from a wealth of sources that around 50% of domestic violence is reciprocal, is engaged in by both parties. In such situations there is not an identifiable mutually exclusive pair of victim and perpetrator. This crucial point is not recognised at all. There are many other surprising findings listed in the work cited in our written submission.

Parental alienation is now recognised as serious problem by a number of commentators.

In a Dail debate Feb. 25, 2015, two deputies referred in graphic terms to parental alienation. I quote from one:

There is an enormous problem, where people are estranged, of the primary custodial parent, who most often is the mother, deliberately obstructing fathers from accessing children. They are using children as pawns, going to war with fathers, causing some fathers to have nervous breakdowns, and destroying relationships deliberately between children and fathers.

Hearing the voice of the child is something that appears attractive at a superficial level but needs to be approached with great caution. As one expert has said It is a question of differentiating between the expressed wishes of the child and the ascertainable wishes and feelings of the child and this requires expertise. This issue was referred to on Mar 6.

Fatherlessness or father absence is a huge problem whose importance has not been sufficiently recognised. There is ample evidence that children, especially boys in this situation, suffer a range of behavioural problems.

The US academic Sara McLanahan found negative effects of father absence on outcomes in educational attainment, mental health, relationship formation and stability, and labour force success. Boys who grow up without a father are twice as likely to end up in jail than those who come from two-parent families.

She found strong evidence that father absence negatively affects children's social-emotional development. Effects were more pronounced for boys than for girls.

The US academic Warren Farrell in a TED talk in Oct 2015 warned: Prisons are centres for dad deprived boys. This shocking statement underlines the importance of fatherhood and that we neglect it at our peril; father absence needs to be moved to a far higher place on the agenda.

We thank the committee for their attention and stand ready to take questions.



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Opening Statement Joint Oireachtas Committee on Equality and Justice

13th March 2019

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A chairde,

Thank you for the invitation to address the Committee today on the important topic of **“Reform of the Family Law System”**. I plan to focus on three issues:

- a) the impact of the *in camera* rule on hearing from children and families.
- b) the need for consistency between courts.
- c) articulating a clear model for child care proceedings.
- d)

My knowledge of these issues is based on my role as Principal Investigator of two research studies at University College Cork examining child care proceedings in the District Court¹⁰⁷ and voluntary care agreements¹⁰⁸, as co-editor of a book examining child welfare removals in eight countries¹⁰⁹, as an educator of social work students and as a former front-line practitioner and manager in child protection and welfare.

I endorse previous contributions to the committee by Dr Conor O’Mahony, School of Law and Dr Carol Coulter and Maria Corbett of the Child Care Law Reporting Project. I am intentionally not addressing themes which I feel are important as they were already addressed in earlier contributions.

Updating the *in camera* rule: the voice of parents, children and young people

Through our research, and discussions with experienced judges and legal practitioners, it has become clear that the *in camera* rule is poorly defined in Irish law, despite recent clarifying amendments in 2007¹¹⁰ and 2013¹¹¹. The precise parameters of what is prohibited are not set out, and whether any particular conversation about a set of *in camera* proceedings would breach the rule largely comes down to the subjective opinion of individual judges. These amendments focus largely on permissions for attendance in, and the reporting of, these proceedings and do not appear to cover research with participants *outside* of the proceedings. In essence, any person who is involved in a *in camera* proceeding (whether in the field of child protection, private family law or elsewhere) risks being held in contempt of court every time that they discuss the proceedings with anyone other than their legal representative or the other parties to the proceedings. The law neither clearly allows nor prohibits interviews with children, young people and their parents. In the absence of clarity, researchers, children, young people and parents are at risk of being held in contempt.

This is not just an issue of academic concern. We should be proud of recent developments in Irish legal, constitutional and practice reforms which have sought to promote the participation of children, young people and parents, to ascertain their views, and to facilitate greater involvement in decision-making. We now have a considerable amount of quality-Irish research on the operation of child care proceedings. However, the specific issue I have documented with the *in camera* rule has had a chilling effect on research, thereby silencing the voices of children, young people and parents who are most impacted by these proceedings. Further to observations previously made by Dr O’Mahony at this committee, this is further

¹⁰⁷ Child Care Proceedings in the District Court Research Study publications: <https://www.ucc.ie/en/appsoc/resconf/res/childcareproceedingsinthedistrictcourt2012-2019/>

¹⁰⁸ New University College Cork study examining social workers, solicitors and parents’ views of the voluntary care system (Child Care Act 1991, S.4). Data collection during 2018. Reporting of findings end of 2018/early 2019.

¹⁰⁹ Burns, K., Pösö, T. and Skivenes, M. (2017) *Child Welfare Removals by the State: A Cross-Country Analysis of Decision Making Systems*, New York, Oxford University Press.

¹¹⁰ Child Care (Amendment) Act 2007, s. 3, as implemented by the Child Care Act 1991 (s. 29(7)) Regulations 2012 (SI 467/2012).

¹¹¹ Courts and Civil Law (Miscellaneous Provisions) Act 2013, s. 8.

evidence that there is a significant implementation gap which is frustrating the realisation of the child's right to be heard¹¹².

Lack of consistency between courts

A key finding in our Child Care Proceedings in the District Court study (2012-2018), feedback from front-line practitioners during children's rights and child protection training in the EU-funded IDEA project¹¹³ and a dominant theme in our ongoing Voluntary Care in Ireland Study (2018-2020), is professional frustration and concern regarding a lack of consistency between courts and about how child care proceedings should be conducted¹¹⁴. This lack of consistency and significant differences in court cultures and practices is problematic for a number of reasons. Firstly, all participants should expect a degree of predictability in court proceedings. Secondly, citizens participating in court proceedings involving state intervention in family life should not experience significantly different models of practice depending on their address. Thirdly, there is some concern that in courts where an adversarial approach is dominant, that a focus on the welfare of the child can be lost, that this model is not conducive to facilitating children's participation, it can lead to significant delay in decision-making and significant extra court time for professionals. Clearly, this issue is inextricably linked to other reforms items such as: a lack of specialist family courts and judges, limited judicial and inter-disciplinary professional training, the absence of a judicial council, the need for investment to address judges' high caseloads¹¹⁵ and suitable child- and family-friendly facilities¹¹⁶.

Articulating a clear model for child care proceedings

There is a pressing need for the Oireachtas, through the Child Care Act 1991 review process and through the establishment of specialist family courts, to articulate a clear vision of what the orientation of these proceedings ought to be. The revised Act should be detailed in describing the model to reduce implementation discretion and to promote consistency. Lessons from other jurisdictions¹¹⁷ illustrate that there is no 'ideal' model that can be adopted ready-made from the shelf. Indeed, will need to be exercised to try and avoid unintended consequences such as those discovered with time limits for child protection proceedings when introduced in England and Wales¹¹⁸. However, there is clear evidence in other countries

¹¹² Elaine O'Callaghan, Conor O'Mahony and Kenneth Burns (2019) "There is nothing as effective as hearing the lived experience of the child': Practitioners' Views on Children's Participation in Child Care Cases in Ireland", 22(1) *Irish Journal of Family Law*, pp. 1-10.

¹¹³ Five country training project co-funded by the European Union DG Justice and Consumers and University College Cork (Burns, O'Mahony and O'Callaghan): <https://ideachildrights.ucc.ie>

¹¹⁴ See, Kenneth Burns, Conor O'Mahony, Caroline Shore and Aisling Parkes (2018) "What social workers talk about when they talk about child care proceedings in the District Court in Ireland". *Child and Family Social Work*, 23(1), pp. 113-121; *Conor O'Mahony, Caroline Shore, Kenneth Burns and Aisling Parkes, "Child Care Proceedings in Non-Specialist Courts: The Experience in Ireland" (2016) 30 International Journal of Law, Policy and the Family 131-157; Carol Coulter, Second Interim Report: Child Care Law Reporting Project (2014), available at <http://www.childlawproject.ie/wp-content/uploads/2014/10/Interim-report-2-Web.pdf>; and Conor O'Mahony, Aisling Parkes, Caroline Shore and Kenneth Burns, "Child Care Proceedings and Family-Friendly Justice: The Problem with Court Facilities" (2016) 19(4) *Irish Journal of Family Law*, pp. 75-81.*

¹¹⁵ Coulter, C. (2019) *District Court Proceedings: A National Overview*, Child Care Law Reporting Project, Dublin, https://www.childlawproject.ie/wp-content/uploads/2019/03/CCLRP-regional-report-2019_FINAL.pdf.

¹¹⁶ Conor O'Mahony, Aisling Parkes, Caroline Shore and Kenneth Burns, "Child Care Proceedings and Family-Friendly Justice: The Problem with Court Facilities" (2016) 19(4) *Irish Journal of Family Law*, pp. 75-81 and Coulter, C. (2019) *District Court Proceedings: A National Overview*, Child Care Law Reporting Project, Dublin, https://www.childlawproject.ie/wp-content/uploads/2019/03/CCLRP-regional-report-2019_FINAL.pdf.

¹¹⁷ Burns, K., Pösö, T. and Skivenes, M. (2017) *Child Welfare Removals by the State: A Cross-Country Analysis of Decision Making Systems*, New York, Oxford University Press.

¹¹⁸ Masson, J., Dickens, J., Bader, K., Gardise, L. and Young, J. (2018) 'Achieving Positive Change for Children? Reducing the Length of Child Protection Proceedings: Lessons from England and Wales', *Adoption and Fostering*, 41(4), pp. 401-413.

of significant reforms of their court and court-like decision-making models for child welfare removals¹¹⁹. When comparing Ireland's child care proceedings with the reforms in other countries, the Irish system appears dated and has changed little, despite wider changes to the child protection system, and legal and Constitutional developments. Difficult decisions will have to be made, significant investment is required, and change may be hard, but the research and practice-level evidence now available is clear that reform is required.

Whatever model is proposed, it should attend to these questions:

1. Is the new model child- and parent-friendly, maximising participation and amplifying the proceeding's focus on the welfare of the child?
2. Are decision-makers sufficiently trained and resourced to make timely and evidence-informed decisions in the best interests of children?
3. What principles should underpin the revised model and what practical changes are required to implement them?
4. What type of implementation strategy is required to ensure that there are no significant deviations in the model across the country?

Reform discussion will need to examine: the inclusion of some decision-makers with specialist knowledge who are not judges, the merits of pre-proceeding processes, what would non-court like buildings and rooms look like?, time-limits on proceedings to ensure timely decisions, consistency in the implementation of thresholds for care orders, protocols for referrals to mediation or similar processes to address an impasse, articulating in detail the principles underpinning the model and codifying these in law, adopting child-friendly justice principles and practices¹²⁰, exploring how the testing of evidence could be undertaken in lieu of adversarial cross-examination, consideration of a wide range of methods to facilitate direct and indirect participation of children, and the establishment of specialist family courts.

Based on our research, there is consensus that reform is required, but there is less consensus on what types of reforms should be implemented. An independent, focused consultation process with stakeholders from civil society groups, experts by experience, social work, law, professional associations, the courts service and relevant state agencies could go some way to informing decisions about these reforms. What is clear is that children and parents can't wait another decade before meaningful reforms are decided upon and implemented.

¹¹⁹ See, for example, Schnurr, S. (2017) 'Child Welfare Proceedings in Switzerland' and Haug and Höynck (2017) Removing Children from their Families due to Child Protection in Germany' in Burns, K., Pösö, T. and Skivenes, M. (2017) *Child Welfare Removals by the State: A Cross-Country Analysis of Decision Making Systems*, New York, Oxford University Press; Masson, J., Dickens, J., Bader, K., Gardise, L. and Young, J. (2018) 'Achieving Positive Change for Children? Reducing the Length of Child Protection Proceedings: Lessons from England and Wales', *Adoption and Fostering*, 41(4), pp. 401-413.

¹²⁰ Council of Europe (2011) *Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice* - <https://rm.coe.int/16804b2cf3>



FLAC Presentation to the Joint Oireachtas Committee on Justice and Equality on Reform of the Family Law System

13 March 2019

Access to justice and legal aid

FLAC welcomes the opportunity to make a submission to the Joint Oireachtas Committee on Justice and Equality on reform of the family law system.

Family law is the largest area of queries on our information phone line and in the 67 FLAC legal advice clinics which we operate around the state where volunteer lawyers provide legal advice. As part of our project PILA, McCann Fitzgerald partners with Women's Aid to provide advocacy to women representing themselves in proceedings. For 50 years, we have been promoting access to justice which obviously includes access to legal aid, but also importantly access to the courts and effective remedies.

Access to justice is about democracy. Provisions in legislation which the Oireachtas has enacted such as the important provision in the DV Act will only be effective if they can be enforced. Access to justice is fundamental to the rule of law as it enables the state and bodies like Tusla /HSE to be held to account, and fundamentally, it is about social inclusion.

People who present at FLAC clinics or in the casework often have a number of legal issues. It is important not to view family law and family courts in isolation – family law problems often are accompanied by debt, unemployment, and housing problems and homelessness makes all of these issues so much worse. Solving an issue like housing or homelessness may have a positive impact and contribute to solving or perhaps even ameliorating other issues. Addressing these issues will increase social inclusion.

The Legal Aid Board and the Courts Service are statutory bodies who, as part of the positive duty set out in section 42 of the IHREC Act 2014, have to promote equality and human rights in all of their functions, which involves access to legal aid and providing courts services that are accessible as per the Equal Status Acts. These Acts prohibit discrimination on a number of grounds and requires the reasonable accommodation of people with disabilities.

The Legal Aid Board and the Courts Services need to be regarded and treated as critical to administration of justice and the rule of law and resourced appropriately.

However, problems with the provision of include problems with delays, meant test contributions, waivers certs, areas of law excluded and transparency around reasons for refusal and amount of contributions collected

It is important to pay tribute to work of the staff of the Legal Aid Board –who are facing huge demands on their services – our submission and commentary should not be seen as a critique of their work; the service from the staff is excellent but problems arise from structures and resources.

There are significant waiting times of 10 months and over for the first consultation in Blanchardstown and Finglas, and 33 weeks in Cork, 32 weeks in Tralee law centres

The means test has not been amended since 2008 and we understand that the Department of Justice is open to reviewing it and that the Legal Aid Board have made recommendations in this regard. The means test requires that a person must have a disposable income of less than €18,000 as well as a disposable capital of less than €100,000. Your family home is not considered when assessing disposable capital. It allows for a deduction of €8,000 per year for accommodation cost, this translates into €666 per month, which remains far below the average monthly accommodation for private rented or a mortgage property

Childcare expenses of up to €6,000 per annum may be discounted but the average childcare costs can be well over €1,000 per month in some areas. The means test needs to be poverty proofed on an ongoing basis and discretion must be available where someone fails to meet the means test in exceptional cases.

Even where a person is on an income of less than €18,000, they must make a financial contribution. Legal aid is not free. The minimum contribution for legal aid is €130 which is significant if you are on the reduced rate of social welfare paid to under 26s. Persons may be required to make contributions in the region of thousands. There is a waiver available if the contribution causes undue hardship however it is not well advertised and many people don't know about it.

FLAC campaigned to have the financial contribution removed for victims of domestic violence which was successful, however a person still has to make a financial contribution when they go for access custody or maintenance. Financial contributions should be a way of funding legal aid. There are also difficulties around the number of "certs" a person may receive each year, which does not make sense given that very often applications may be appealed.

Contribution should not be a way of funding legal aid unless there was a much more realistic means test.

There is a lack of clarity as to whether there is legal aid available in housing cases.

FLAC submitted an amendment to the Department of Justice and Equality which, if enacted, would ensure that legal aid was available to anyone facing evictions from the family home.

We need more transparency from the Legal Aid Board in relation to the use of the waiver, level of contributions collected, number of refusals and the reasons therefore.

Lay Litigants and Court Infrastructure

Given the limited nature of legal aid and the restrictions on what you can be granted it for, many people end up representing themselves. This raises all sorts of difficulties because of how complex processes are. In our submission to the

Committee we have made a range of recommendations regarding accessible forms and so on that will assist persons in representing themselves.

We have also made recommendations around unbundled legal services, and further statistics that should be compiled so that we might have a true picture of the needs of family court users. We have also made a range of recommendations to address difficulties faced by persons with disabilities in the courts such as inaccessible courts, inaccessible offices of legal practitioners, legal documentation being unavailable in accessible formats, and procedural systems being too complex to navigate including introducing accessible formats and accessibility testing. We have also made recommendations regarding the availability of information for people who use Irish Sign Language.

There are very clear problems with the actual physical infrastructure of the family courts in Ireland. Hearings on domestic violence, guardianship of children, maintenance, matters pertaining to passport applications and blood tests to determine parentage are heard in Dolphin House. Given the large geographic area that Dolphin House caters to, there is a high volume of traffic in the court building itself however the building itself is simply not equipped for the level of activity that takes place within its walls. Regarding speakers of other languages, the lack of regulation of legal interpretation services is a major issue. We have concerns about the quality of some interpretation that is being provided and given that there can often be Constitutional rights in the balance, this is an issue of major importance.

Those who do not have sufficiency in English should still be able to access justice.

We absolutely recognise the work of the Courts Service staff and legal practitioners within the courts, however Dolphin House is at capacity. It is a building filled with people, many of whom are in a vulnerable position and from marginalised communities, engaging in consultations with solicitors in the hall and on the stairs as the few consultation rooms that are available will already have been occupied.

Most people do not know where to go when they enter and it is common to witness people having consultations in the hall with their solicitors hurrying them along. They have no option but to share intimate details of their lives, including their physical and mental health, within earshot of strangers because there is nowhere available for them to do it in private. There are visibly distressed people and upset children cramped in what is a dirty, poorly laid out building.

Because of the lack of space in family law courts, applicants and respondents mostly wait in the same area which can be particularly distressing for victims of domestic violence, and makes it especially difficult to have a consultation with a solicitor who has very little time to give to the case. Where a person's legal aid certs have run out, they are dependent on the courts service staff to explain the basic information on different orders, the requirements needed to apply for the them.

While we note Dolphin House in particular, we understand that the lack of consultation space is an issue that is replicated across the state.

FLAC would be happy to attend this committee again or meet with any individual members and discuss these issues. Thank you.

Appendix 5 – Submissions

Submissions received by the Committee have been included in a separate booklet that will be made available on the Committee's webpage on www.oireachtas.ie .