

I would like to take this opportunity to thank the Committee for the invitation to address it on the topic of “Reform of the Family Law System”. My opening statement will focus on three of the issues suggested for discussion. These are:

- The structure of the court system;
- Alternative dispute resolution;
- Ascertaining the views of the child during family law proceedings.

1. COURT STRUCTURE

Ireland does not yet have a specialised family or children’s court system. Such systems are commonplace across Europe and in common law jurisdictions. In Ireland, most cases concerning children are heard in the general courts system by judges who generally do not specialise in laws concerning children or families. The cases may be heard in the same buildings used for proceedings concerning minor crime, for example, and road traffic offences.¹

The establishment of a specialised family and children’s court system is a recommendation in the Council of Europe guidelines.² The intention to establish such a system has been announced,³ but the necessary detail, resources and implementation are now needed in order to make those plans a reality.⁴

In the 1980’s, the Probation Service sat in every family law case - but that changed in the late 1980’s as the Probation Service concentrated on criminal law cases. Unfortunately, the HSE was not in a position to fill the gap as its staff was not forensically trained. Moreover, the HSE did not have sufficient social workers to undertake the work that had been carried out by the Probation Service in family law cases. This left a significant gap in the provision of support services to vulnerable family law clients which has never been filled. The gap takes on added significance when one considers the fact that most family law cases have lay litigants - and that legal aid is not always provided for them. This is of increased concern given the introduction of complex legislation such as the Children and Family Relationships Act 2015 and the Domestic Violence Act 2018.

It should be acknowledged that the President of the District Court, Judge Rosemary Horgan, has introduced innovations in the Dublin Metropolitan District Court through the development of a case management system for family law, child care and criminal law cases. The advent of written decisions in the Dublin Metropolitan District Court is also to be welcomed. Admirably, the Chief Justice in his first public address focussed on access to justice. That said, much broader structural reform is needed to ensure our family law system meets the needs of citizens who access the system at a very vulnerable time in their lives.

Some states do well in ensuring a specialised judiciary for cases concerning children. In France, judges in child protection cases have the title of “Judge for Family Affairs” and they

¹ In Dublin, Cork and Limerick District and Circuit Courts, they are heard in separate buildings. The Children Court in the Dublin Metropolitan District is located in Smithfield.

² Council of Europe, *Guidelines on Child-Friendly Justice* (2010), at 10.

³ Colm Keena, “Specialist family law courts to be set up through legislation. District Family Court, Circuit Family Court and Family High Court are to be established” *Irish Times*, Tuesday, November 24, 2015.

⁴ See Mr Justice Michael White, “Challenges in Family Law Proceedings”, presentation delivered at a conference: *What About Me? Prioritising Children in Family Breakdown Proceedings* (May, 2013), at 8.

are highly specialised and trained in child welfare.⁵ This specialist judiciary work closely with social workers to provide support and advice throughout the legal process and to secure the agreement of all parties.⁶ 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”.⁷ 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. Tunisia has also invested heavily in training child protection representatives in children’s rights, collaborating with Belgium and UNICEF; initiating various projects to raise awareness of the 1989 United Nations Convention on the Rights of the Child (CRC).⁸

1.1 Options

The proposal set out by the Law Reform Commission Family Courts Working Group in 1996 recommended the establishment of a two tier court system: the District Court and the Regional Family Court.

Under this proposal, the lower tier would have some of the jurisdiction the District Court currently has, but that court would not make final orders, as is stated at page 128-129 of the Law Reform Commission’s Working Group’s Report:

The jurisdiction of the District Court in family law matters should be limited to the making of emergency orders and interim orders especially in situations of emergency. In all of these matters the jurisdiction of the District Court would be parallel with the jurisdiction of the Regional Family Court. What is envisaged is a system whereby all substantive decisions having long-term effect would be reserved to the Regional Family Court. Any extension of an interim order would be determined in the Regional Family Court.⁹

The proposal was that rather than having the current volume of sittings of the Family District Court where there are “family law days” in each District, sometimes as infrequently as once per month, that there would be more specialised sittings of the Family District Court, which would sit in fewer locations than the current District Court does, but with more frequency. This would have the advantage of being local and, even if somewhat more distant than at present, these courts would have a dedicated court, staff, and would have other services available and a specialised judge to hear the case.

The second tier proposed was the establishment of Regional Family Courts with information centres attached. These were to be the same tier of jurisdiction as the current Circuit Court and would use specially trained members of the judiciary. It was also recommended that

⁵ Andy Bilson and Sue White, “Representing Children’s Views and Best Interests in Court: An International Comparison” 14 *Child Abuse Review* 220 (2005), at 231-3.

⁶ *Ibid.*

⁷ In 2010, 400 graduated as youth lawyers. Cited in *Listening to Children about Justice: Report of the Council of Europe’s Consultation with Children on Child-Friendly Justice* (Council of Europe, 2010), at 26.

⁸ Representing Children Worldwide, *How Children’s Voices are Heard in Protective Proceedings, Tunisia: Summary Analysis*. Available at: <http://www.law.yale.edu>, Tunisia.

⁹ Page 128 and 129 <http://www.lawreform.ie/fileupload/Reports/rFamilyCourts.htm>.

there would be other services which would assist with family breakdown, either on site or close by which would be connected with the family law courts in a real and meaningful manner.

A second tier, to be known as the “Regional Family Court” would have jurisdiction on all other issues: separation, divorce, dissolution of civil partnership, cohabitation, children cases, Hague and Luxembourg cases, adoption, surrogacy, succession cases, and perhaps cases for children requiring secure care. It was proposed that there would be approximately 15 centres nationwide, and that their location would be proportionate to populations across the country. The judges assigned would be specialised Family Law Judges, provided with training.

The right of appeal from the “Regional Family Court” could be to the High Court, though in some instances it could be to the Court of Appeal.

1.2 Other Jurisdictions

An analysis of the Family Law Court system in England and Wales and 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. Australia originally placed such importance on family cases being heard by Superior Courts, that the result was that procedural or simplistic cases were being unnecessarily heard by judges of their Superior Courts. This resulted in a change to its system where most cases now proceed before the Federal Circuit Court, with certain “categories” of cases being designated appropriate for the higher Family Court of Australia.

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. This mechanism of managing which case goes to which court is best suited to the Irish context. It would, however, require adequate court staff and Registrars with case management experience.

1.3 Resources

Systems must be adequately resourced in order to be fit for purpose. A better system will require significant resources, especially at the outset. Systems will require more support professionals and specially trained judges. Good systems and necessary modifications are not cost neutral. Legal aid cuts have had a disproportionate impact on women and children, who are in greatest need of legal aid.¹⁰

The discourse of a ‘cost/benefit’ analysis; that is, attempting to ensure that expenditure is perceived to have sufficient (economic) benefits; pervades all discussions of children’s services.¹¹ Although there are already moral and international human rights law obligations to ensure access to good systems and legal aid, there are in fact economic benefits to adequate support in legal proceedings. Cuts to legal aid budgets have led to proceedings which are more drawn-out and more difficult to resolve; where adequate support is lacking. The time constraints faced by professionals actually cost more money in the long run. Kirkman and Melrose outline the challenges that social workers face when making decisions

¹⁰ Felicity Kaganas, “Justifying the LASPO Act: Authenticity, Necessity, Suitability, Responsibility and Autonomy” *Journal of Social Welfare and Family Law* (2018), and Mavis Maclean, John Eekelaar and Benoit Bastard, eds., *Delivering Family Justice in the 21st Century* (Hart Publishing, 2015), at 1.

¹¹ See the many references to cost/benefit analysis in Family Justice Review, *Final Report* (Published on behalf of the Family Justice Review Panel by the Ministry of Justice, the Department for Education and the Welsh Government, November 2011).

about children (including time and workload pressures) and receiving information of relatively low quality (which further affects the time and workload issue as much follow-up is needed).¹²

1.4 The Adversarial System

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.¹³ The binary nature of family processes is also problematic for complex family situations. Children state that it is very important to them to have flexibility built-in to arrangements so that children themselves can seek to change them if they wish.¹⁴ However, children are frequently unable to secure changes to private law arrangements,¹⁵ or to timelines imposed by the courts.

It is unclear whether inquisitorial systems are better for family law and for proceedings concerning children in particular. Those in favour of a more inquisitorial system (in 2014 the Lord Chief Justice of England and Wales appeared to advocate such a change) point to the decreased bitterness and the potential for economic savings.¹⁶ Those against it say that it will not in fact save money as more judges will be necessary and that judgments will be delivered less considerately.¹⁷ Research is needed into whether inquisitorial systems are better for family law, and if so whether it may be a model which could be adopted in Ireland.

2. ALTERNATIVE DISPUTE RESOLUTION

Alternative dispute resolution (ADR) is a means of reducing the conflict and adversarial nature of family law proceedings. Mediation, for example, is one arena in which there is potential for greater flexibility in family law, particularly since the enactment of the Mediation Act 2017. It has been recommended as an area for greater attention having regard to international practice and what would be possible in Ireland.¹⁸ Mediation and other alternative dispute resolution approaches appear to result in more amicable and enduring arrangements, with the attention of parents more likely to be on children’s needs.¹⁹ It may facilitate families to better explore options and solutions themselves. There are significant questions over encouraging more mediation if this is conceptualised as an alternative to legal

¹² Elspeth Kirkman and Karen Melrose, “Clinical Judgement and Decision-Making in Children’s Social Work: An Analysis of the ‘Front Door’ System” (Department of Education [England and Wales], 2014), at 4-5.

¹³ 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.

¹⁴ John Eekelaar, “The Interests of the Child and the Child’s Wishes: The Role of Dynamic Self-Determinism” in Philip Alston, ed., *The Best Interests of the Child: Reconciling Culture and Human Rights* (Clarendon Press, 1994), at 42.

¹⁵ Judith Timms, Sue Bailey and June Thoburn, “Children’s Views of Decisions Made by the Court: Policy and Practice Issues Arising from the Your Shout Too! Survey” (2008) 14 *Child Care in Practice* 257, at 268.

¹⁶ Owen Bowcott, “Inquisitorial System may be Better for Family and Civil Cases, Says Top Judge” *The Guardian Online* (4 March 2014). Available at <https://www.theguardian.com/law/2014/mar/04/inquisitorial-system-family-civil-cases-judge-lord-thomas> (last accessed 1 March 2019).

¹⁷ Lorna Borthwick, “Why an Inquisitorial System for Family Courts Won’t Work” *Halsburys Law Exchange* (12 March 2014). Available at <http://www.halsburyslawexchange.co.uk/why-an-inquisitorial-system-for-family-courts-wont-work/> (last accessed 1 March 2019). See also Adrienne Barnett, “Family Law without Lawyers: A Systems Theory Perspective” 39 *Journal of Social Welfare and Family Law* 223 (2017).

¹⁸ Law Society of Ireland, *Submission to the Department of Justice, Equality and Defence: Family Law – The Future* (Dublin: Law Society of Ireland, 2014).

¹⁹ Joan Kelly, “Children’s Living Arrangements Following Separation and Divorce: Insights from Empirical and Clinical Research” 46 *Family Processes* 35 (2007), at 40.

aid.²⁰ In England and Wales, separating couples frequently do not want to engage in mediation, opting instead to self-represent in court.²¹ There are issues relating to power dynamics in relationships and children are often excluded from alternative dispute resolution. Therefore, it should be seen as a useful alternative mechanism for resolving family law disputes, not as a cost-saving measure.

I believe that ADR should be actively promoted and facilitated, wherever possible, having regard to the facts and circumstances of the case and the needs of particular clients.

Mandatory ADR information meetings could be considered prior to any client issuing family law proceedings and a certificate of exemption produced in exceptional circumstances.

Information sessions could be held *in situ* in the District Court, Circuit Court and High Court nationwide. ADR specialists such as accredited mediators, conciliators and lawyers could provide such information sessions and adhere to a code of conduct. While they would not furnish legal advice in any specific case, they could usefully provide information on ADR generally.

Family law clients should also be recommended and preferably mandated to attend either a course or an information session on shared parenting, and other family law issues arising.

Judges should also have, at their discretion, the authority to either determine or mediate a case. All relevant judges and county registrars might therefore be trained as mediators.²²

3. HEARING CHILDREN

One crucial element of an adequate courts system for children and families is the participation of children in proceedings. Apart from the physical environment of the courts, a family law system must be equipped to not only have children present, but also to facilitate them to have meaningful involvement in proceedings. Courts in Ireland have a duty to hear children and to give due weight to their wishes under the CRC and also under domestic law. Section 24 of the Child Care Act 1991 requires a Court to give due consideration to the wishes of the child having regard to the age and understanding of the child. The enactment of the Children and Family Relationships Act 2015 incorporated the right of children to be heard in private law proceedings, though it is not yet clear how this is being fully implemented. Article 42A of the Constitution provides a more heavily entrenched right for children to be listened to in private family law cases.

There is a distinct lack of provision in Ireland for hearing children.²³ Guardians *ad litem* are often the most effective mechanism in which children can present their views to the courts, yet they may or may not be appointed in a given case.

²⁰ Rachel Treloar, “The Neoliberal Context of Family Law Reform in British Columbia, Canada: Implications for Access to (Family) Justice” in Mavis Maclean, John Eekelaar and Benoit Bastard, eds., *Delivering Family Justice in the 21st Century* (Hart Publishing, 2015).

²¹ Rosemary Hunter, “Inducing Demand for Family Mediation: Before and After LASPO” 39 *Journal of Social Welfare and Family Law* 189 (2017).

²² Indeed, many judges are trained as mediators.

²³ See, for example, Aoife Daly, “The Judicial Interview in Cases on Children’s Best Interests: Lessons for Ireland” 20 *Irish Journal of Family Law* 3 (2017); Aoife Daly, “Limited Guidance: The Provision of Guardian *ad litem* Services in Irish Family Law” (2010) 13(1) *Irish Journal of Family Law* 8.

Another issue in Ireland is that of the judicial interview. CRC Article 12 stipulates that children may be heard by the decision-maker directly, and the UN Committee on the Rights of the Child emphasises that children should have a choice in this matter.²⁴ Though judges may meet occasionally with children in Ireland, data is not collected on the extent to which it happens. Furthermore, there are no guidelines for meetings between judges and children apart from some points set out in 2008 in *O'D v O'D*.²⁵ The guidelines of Abbott J. included: judges should not seek to act as a child expert; the terms of reference should be agreed with the parties beforehand; the judge should explain the nature and purpose of the interview to the children, including the fact that children will not have a determinative say; the judge should assess “whether the age and maturity of the child are such as to necessitate considering his or her views”; and only speak to children in confidence if the parents agree.²⁶ Though these points are useful, they are not comprehensive. They also fail to acknowledge that under CRC Article 12 the process should begin with an assumption in favour of hearing children, and they focus on adult-centric concerns about securing the agreement of parents rather than on ensuring children’s comfort and consent.²⁷

In England and Wales, the 2010 Family Justice Council Guidelines for Judges Meeting Children in family proceedings lays-out guidance for judges when meeting children. The 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.

One area in which change is particularly needed, not least because of the Children and Family Relationships Act 2015, is implementing the right of children to be heard in proceedings affecting them. Whether children can be represented by giving instructions as opposed to a representation of their best interests is one question. Furthermore, as stated above, there is no clear guidance for judges meeting children in family law proceedings in Ireland. It has also been argued that children do not have sufficient outcomes in proceedings in which their best interests are being determined, and that greater priority should be accorded to their autonomy, considering the extent to which autonomy is valued in other areas of the law such as medical law and the rights of those with disabilities.

The state of Israel has in recent years initiated a holistic system whereby therapeutic endeavours are introduced, and there is a presumption that children will be involved in proceedings. This inclusivity and holistic approach, as well as the success of and satisfaction with the model, means that this model is very interesting for the Irish context. The Scottish children’s hearings system is another unique model to consider for Ireland. It uses a lay panel to establish the welfare needs of children in cases concerning child care and criminal behaviour, and which involves children and families together in relatively informal hearings.

²⁴ General Comment No. 12, (2010).

²⁵ [2008] IEHC 468.

²⁶ See further Aoife Daly, “The Judicial Interview in Cases on Children’s Best Interests: Lessons for Ireland” 20 *Irish Journal of Family Law* 3 (2017).

²⁷ *Ibid.*

4. RECOMMENDATIONS

The clear preferred system emerging from other jurisdictions is a Family Law Court system which is not overly interwoven with the rest of the Courts System. What also seems clear is the importance of managing the “type” of case which goes before each tier of the Court.

The following is a summary of my recommendations for reform of the family law system:

- (a) Designated specialist family courts should be staffed by specially trained judges but these judges should remain part of a single judicial body.
- (b) 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. This mechanism of managing which case goes to which court is best suited to the Irish context.
- (c) Any new Family Court structure must recognise and actively promote an interdisciplinary system to ensure effective communication between all the disciplines involved in family law e.g. medical, law, education, guardians *ad litem* and social services.
- (d) Restructuring of the family law court without the involvement and promotion of a system of interdisciplinary information sharing would not achieve the objective of meeting the particular needs of the users of the family court structure.
- (e) 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;
 - implement supervised access orders.
- (f) 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. Without this addition, any new system remains as flawed as the current one.
- (g) The key ancillary services referred to in this opening statement are an essential part of any new family law court system and the success of this approach when introduced at District Court level in the Dolphin House initiative shows the value of having a variety of agencies such as legal aid, mediation services and the courts and courts offices under the one roof.
- (h) The new family courts should be located separately from current venues with sufficient rooms for private consultations and a welfare and assessment service

to support public and private family law proceedings. ADR facilities should be located in the new family law courthouses linked into the welfare system.

- (i) Experts in the area of attachment, child development and the impact of abuse ranging from neglect to sexual abuse should be provided to judges who are allocated to deal with child care matters in light of the fact that decisions made by these judges have such far-reaching consequences for children and families.
- (j) Other practical matters that are necessary to ensure that child and family law matters proceed smoothly include: having translators within easy reach to avoid lengthy delays or adjournments when there are language problems and providing sufficient space for parties to consult with their legal representatives.
- (k) The following recommendations from the 2011 Family Justice Service Review in the United Kingdom should be considered:

Children's voices: children and young people should be given age appropriate information to explain what is happening when they are involved in public and private law cases and should be able to make their views known.

Workforce: the Courts Service should establish a pilot in which judges would learn the outcomes for children and families on whom they have adjudicated.

Case management: judges must set firm timetables for cases. Timetabling and case management decisions must be child focused and made with explicit reference to the child's needs and timescales. This recommendation should be underpinned by primary legislation as delay and drift have a profound impact on the welfare of children and families.

5. CONCLUSION

The message from other jurisdictions is unequivocal and that is that children and family services in the court are best managed by a dedicated and integrated Family Court structure that is properly resourced to meet the particular needs of people at a vulnerable time in their lives. Ireland must invest the resources to ensure that its courts system is fit for purpose. It should be not only meeting the requirements of the Convention on the Rights of the Child, the Council for Europe guidelines and other international standards, but it should be leading the global inclination in favour of specialised family law systems, and of involving children in proceedings affecting them.

I would like to thank you very much for taking time to listen to me and I would be happy to answer any questions you might have.

Dr. Geoffrey Shannon
8 March 2019