**Initial Submission to the Family Justice Oversight Group**
**on behalf of Dr Carol Coulter and Maria Corbett**
**of the Child Care Law Reporting Project**

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## Introduction

In September 2020, the Minister for Justice published the General Scheme of the Family Court Bill which proposes to establish a unified Family Court comprising District, Circuit and High Court divisions. In addition, the Minister established the Family Justice Oversight Group (FJOG) to consider reforms in parallel with those arising from the enactment of the Bill, and is engaging with the various stakeholders to discuss necessary reforms.

The Child Care Law Reporting Project (CCLRP) warmly welcomes both initiatives and is committed to participate to the fullest extent possible in the consultation process. Our observations are based on the CCLRP's experience of child protection proceedings and related research. We have been observing child care proceedings since 2012, and have published over 650 case reports and numerous research reports and observations, all of which are available on our website <www.childlawproject.ie>. In this submission, we refer to three of our reports which we believe are of particular relevance to the work of the FJOG. These reports are:

> Observations on the General Scheme of the Family Court Bill 2021
>
> District Court Child Care Proceedings: A National Overview 2019
>
> Child Care Proceedings: A Thematic Review of Irish and International Practice (Maria Corbett and Carol Coulter, commissioned by DCYA 2019) Available at: https://bit.ly/2ZASpy2

We attach a submission we have sent to the Oireachtas Joint Committee on Justice on the General Scheme of the Family Court Bill and are also engaged in discussions with the Department of Children, Equality, Disability, Integration and Youth (DCEDIY) on its review of and amendments to the Child Care Act 1991.

In this, our initial submission, we have a provided a top-line response to the consultation topics posed by the FJOG and look forward to providing more detailed responses either as part of advisory group discussions or in further submissions.

We warmly welcome the creation of a unified family division within the court system to hear both private family and public child law cases and the proposal to introduce other related reforms. However, as we point out in our submission to the Justice Committee, in some parts of the General Scheme, a greater focus on child care law is needed to articulate and address the differences between the two types of law. Broader reforms also need to take account of the differences between child care law, in which the State is involved usually as the applicant party, and private family law, where the dispute is usually between two private individuals.

To situate our observations below are a few words by way of introduction to child care proceedings. Public law child care proceeding concern matters of child protection and child welfare and are governed by the Child Care Act 1991. They are heard in the 24 districts of the District Court, with the exception of applications for secure care orders which are heard in the High Court, or cases on appeal to the Circuit Court. District Court hearings concern an application for one of four orders (emergency, interim, supervision or care order) or to address a question relating to a child in State care (access, aftercare provision etc). The Child and Family Agency/Tusla (CFA) is usually the applicant and the child's parents are the respondents. In most cases, the child has no legal status in the proceedings: they are the subject of the proceedings but are not a party to them though under the Child Care Act they may be made a party. In some cases, at the discretion of the judge a Guardian *ad litem* (GAL) or solicitor may be appointed to represent the views and interests of the child. Children are usually not present in court. Practice varies within the 24 districts in terms of waiting lists, case management, appointment of GALs and judicial reviews.

Proceedings in the High Court where the CFA seeks special care orders are different, in that the child who will be the subject of the order (and therefore detained for protection and therapy) is the respondent and is represented by a Guardian ad Litem and by a solicitor and barrister. The parent may be a notice party.

### Terms of Reference

We welcome the inclusion within the FJOG's terms of reference of the development of a vision, objectives, priorities, goals and milestones for the development of a national family justice system. We acknowledge the complexity of this task. To ensure the timely completion of the reform project, we believe it would be beneficial for all interested parties to have a published roadmap of key activities and an indication where the successful completion of an action is dependent on another action. We hope this roadmap will adopt an ambitious timeframe in recognition of the fact the current system is not fit for purpose and in some areas current practice exposes the State to a challenge for a breach of human rights. Importantly, we believe many key reforms could, and should, be progressed in the short-term as they are not reliant on the establishment of the Family Court but are necessary to its successful operation.

## Consultation Topics Phase 1

We have structured our initial submission in line with the list of consultation topics contained in Appendix 1 of the letter from the FJOG of 18 December 2020. In addition, the CCLRP proposes the inclusion of a sixth heading, "Transparency and Accountability".

### 1. Optimising the Delivery of Family Justice

*Use of Technology:* The Covid pandemic has already allowed the courts acquire some experience of the use of technology. In general, this has been positive, and can provide the basis for the development of a more structured use of technology and, in particular, remote hearings in some circumstances. However, this experience has also highlighted problems that can arise, particularly for vulnerable parties. Not everyone has access to appropriate technology or is able to use it. Remote hearings are usually unsuitable for contested cases involving child welfare. A consultation about the use of remote hearings in the Family Court of England and Wales highlighted many of these problems, https://www.judiciary.uk/wp-content/uploads/2020/05/remote-hearings-rapid-review.pdf.

*Facilities:* In 2019, the CCLRP published a national overview of District Court child care proceedings based on attendance at a full-day sitting in 35 court venues, covering each of the 24 Districts over a four-month period. In this report we describe facilities in the various court venues. We found that in many venues the physical facilities are poor. There is a shortage of waiting and consultation rooms, an absence of water fonts and vending machines, in some case even an absence of toilets, and difficulties with accessibility and acoustics. In addition, there is a lack of suitable spaces for hearing child care cases. The court venues have traditional courtrooms with fixed furniture, so it is not possible to set up the room in a round table negotiation style format which may be more suitable in some child care cases. The importance of the lack of access to drinking water, let alone other refreshments for people, must be understood in the context that people often waited all day for their case to be heard, and dared not leave the building in case it was called. Private rooms should be available for those waiting, especially those accompanied by children, and for vulnerable parties and witnesses.

We discuss professional supports under consultation topic 4 'The Family Courts' below.

*Separation of Proceedings:* Section 29 of the Child Care Act 1991 provides that proceedings shall 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' and section 31(1) provides that 'No matter likely to lead members of the public to identify a child who is or has been the subject of proceedings … shall be published or broadcast'. The findings from our 2019 survey of how child care hearings are heard in the District Court found that in half of the courts (17) surveyed, child care was heard as part of a family law list, comprising public child care and private family law matters. These lists can be very long, typically up to 60 or 70 cases. In one court surveyed, there were 126 cases on the list. In a quarter of the courts (9), child case was heard as part of a general list, alongside family, criminal and other civil law matters. The remaining quarter of courts surveyed (9) had regular days on which only child care was heard. Thus, the majority of child care proceedings (74 per cent) is not separated from the general and family list – in terms of place, time or day of hearing. This has implications for lack of

privacy, over-crowding, scheduling practices leading to long waits for cases to be heard, excessive case lists, over-worked judges and a lack of time to hear proceedings.

Consideration should be given to providing in the Family Court that private family and child law hearings should be listed for hearing at different times or on different days within the District Family Court, with the exception of the hearing of emergency applications. This separation will support the objective of protecting a child's right to privacy. It will also decrease the experience of parents and children waiting for public child care hearings in the same building as private family law parties where acrimonious disputes may break out in the environs of the court.

*Case Management:* The 2019 survey documented the difficulties caused by hearing cases in a non-specialist court which deals with an enormous volume of work. These include scheduling practices leading to long waits for cases to be heard, potentially putting Ireland in breach of Articles 6 and 8 of the European Convention on Human Rights; the lists being overcrowded leading to pressure to hear cases quickly or to engage in informal negotiation; lack of privacy; complex cases not being transferred to a higher court; staff not being specialists; lack of case management in many courts; and the lack of a national Practice Directions to promote consistency across the country. An efficient and effective system of case management could reduce the adversarial nature of proceedings and shorten the length of a hearing.

*Judicial Continuity:* Where the same parties are involved in proceedings based on the same facts in the criminal, private family law and child protection courts, mechanisms should be put in place to enable coordination between the different proceedings to ensure they do not conflict or cause undue delay. Consideration should be given to provide, as far as is practicable, for judicial continuity within the Family Court, where cases concerning the same parties are heard from start to finish by the same judge and court staff. To facilitate this principle, provision should be made for the transfer of a hearing to the court with jurisdiction of another case involving the same parties. This would allow the same judge to hear an application relating to access between a child in care and his or her parents and an application for protection under domestic violence statutes involving the same parents. Where the second application is to a higher court than the existing application, consideration should be given to transferring the first case to the higher court.

## 2. The Place of Mediation in Family Justice

The General Scheme of the Family Courts Bill, while requiring that mediation should be explored prior to the initiation of family law proceedings, exempts the Child Care Act 1991 from this requirement, which is appropriate as the 1991 Act is not provided for under the Mediation Act 2017. We consider that the development of forms of alternative dispute resolution in addition to mediation should be explored, including conciliation and arbitration. While we hold that the removal of constitutional family rights, as occurs in child protection orders, cannot be the subject of mediation, we consider that there is a place for mediation and other forms of alternative dispute resolution in other issues that arise during child protection proceedings. Such issues include access between parents and children, decisions relating to medical treatment, the issuing of passports and permission for foreign travel, education and the maintenance of children's cultural and religious identities.

Mediation can be problematic in the area of child protection, as there is likely to be a power imbalance between the professionals representing the state and the parents, which would need to be addressed in the mediation process. Conciliation, supervised by a judge or other independent arbitrator, may be more appropriate in some cases. Also, some parents may need assistance and support in order to engage in alternative dispute resolution. Involvement in child protection matters is likely to require additional training for family mediators, whose experience is largely in private family law.

An example from international experience is that of New South Wales, where the parties may be directed to attend a Dispute Resolution Conference (DRC) by the Magistrate, held under s.65 of the Children and Young Person's (Care and Protection) Act 1998. The primary purpose of the DRC is to provide the parties with an opportunity to agree on the action that should be taken in the best interest of the child. DRC can take place at any stage during care proceedings. The Dispute Resolution Conference follows a conciliation model and is convened by a Children's Registrar specially trained in ADR. Other examples of the use of ADR in child protection are outlined in the Corbett and Coulter report for the DCYA referred to above, available at https://bit.ly/2ZASpy2.

*Pre-Court Proceedings*: In the area of child care law there is no formal pre-proceedings process, however, an element of social work practice is the holding of Child Protection and Family Welfare conferences. Consideration could be given to include a requirement that applications for a non-urgent application under the Child Care Act 1991 should state whether a Child Protection Conference or Family Welfare Conference has been held. Child Protection Conferences are not currently provided for in statute. However, this could be remedied by way of an amendment to the 1991 Child Care Act or inclusion in the Rules of Court for the new Family Court.

## 3. Reimagining the Structure of Civil Legal Aid in Family Justice

Access to legal advice and representation is vital for parents in the child protection system, the vast majority of whom are economically disadvantaged, and some of whom also face additional challenges, for example, cognitive disability, mental health problems, addiction, English not being their first language and lack of familiarity with Irish State institutions.

Section 4 of the Child Care Act 1991 provides for voluntary care, where the parent(s) can voluntarily place their child in care with agreement from the Child and Family Agency. Voluntary care plays a major role in child protection and is often part of a continuum leading to court-ordered care. It should therefore be included in any consideration of reform of the family justice system, as decisions made in relation to voluntary care can have a major impact on subsequent court proceedings. It is important that parents who place their child in voluntary care should have access to legal advice and be informed of their right to do so.

The current structure of legal aid imposes a specific, and very low, income threshold for access to legal aid. This excludes many on modest incomes who may not be able to afford private legal advice. Consideration should be given to removing or significantly raising the income threshold, accompanied by a sliding scale of contributions from the litigant up to the maximum paid by the Legal Aid Board to private practitioners. Allowing for such substantial contributions would mitigate any additional costs involved.

## 4. The Family Courts

*Prioritisation:* A debate on prioritisation of cases is perhaps moot in child care proceedings as statutory timelines exist on the hearing of emergency and interim orders. The more pressing issue is the delays in securing access to a date for a care order, which may be as long as a year in some parts of the country.

To reflect the principle of 'child friendly justice' (or 'justice for children'), the Court Rules could include a provision that the scheduling of non-urgent hearings and any application for an adjournment take into account the impact on the child's needs and timescales. It could require the judge and the parties to pay particular attention to the child's age and important landmarks in the immediate life of the child. This would include (a) the child's birthday; (b) the start of pre-school or school; (c) the start/end of a school term/year; (d) any proposed change of school; and/or (e) any significant change in the child's family, or social, circumstances.

*Court Support Services:* To ensure access to justice, parties must understand the proceedings and be able to instruct their solicitor. Our research has identified that many respondents in child care proceedings face personal difficulties which impair their capacity to understand and engage in judicial proceedings, including literacy difficulties, intellectual disability, mental health difficulties, English not being their first language or they are unfamiliar with the Irish legal system and state agencies. Consideration should be given to establishing a Court Support Office, which would oversee the appointment and regulation of independent advocates for persons with impaired capacity, interpreters, translation services and cultural mediators.

*Support for Judicial Decision-Making:* To assist the court is its decision-making, child and parental assessments and expert reports are often commissioned. No panel of appropriate experts exists for the use of the courts, such assessors and experts are usually private individuals whose availability varies, which may lead to multiple adjournments while the court awaits a report. Sometimes the court must rely on the recommendations of lawyers for the parties, with the inevitable attendant danger of "expert shopping". To ensure the court has access to experts without undue delay when needed, consideration should be given to the establishment of a service attached to the Family Court that could provide suitably qualified expert evidence in child and family proceedings and recommend referral to appropriate supports and therapies. This would improve the consistency of decision-making and reduce the delays that often arise as a result of the commissioning of multiple reports.

One example that could be examined is the Children's Court Clinic in the Australian states of Victoria and New South Wales, an independent organisation which conducts psychological and psychiatric assessments of children and families for the Children's Court and which are used in both criminal and family divisions of this court. In some cases, limited treatment is also provided by the Clinic. Authorised clinicians are psychologists, psychiatrists or social workers. The Clinic also conducts assessments relating to the impact of drug use on a child or young person and may make recommendations about appropriate treatment. Only a judge/magistrate can request an assessment by the Children's Court Clinic.

*Family Drug and Alcohol Programme*: Parental addiction is the core reason for a significant proportion of children coming into and remaining in care. These parents have the potential with support to overcome their addiction, to be able to parent safely and to be reunited with their children. Family Drug and Alcohol Courts (FDAC) operating in different jurisdictions have had a positive impact on the rate of family reunification. Ireland has a legal and moral duty to work towards family reunification where this is safe and in the child's best interest. One way to honour this obligation is to support parents to overcome addiction difficulties. The FDAC model is one of a few initiatives that has proven to be successful in reducing the numbers of children in care. Serious consideration should be given to establishing a pilot family drug and alcohol programme within the existing District Court child care system, with access to the necessary addiction and other support services. A similar model is already in place, the Drug Treatment Court programme in relation to criminal matters. The setting up and running of a FDAC and associated support services would be a good financial investment given the high costs incurred by the State of supporting a child to grow up in care and in aftercare.

## 5. Voice of the Child

We have adopted a broad approach to our input under this topic to include not only ascertaining and taking into account the views of a child but also the provision of information and participation of children in proceedings. We welcome the commitment by the FJOG to consult with children themselves.

Since 2015, the child has a constitutional right to have their views ascertained and taken into account in legal proceedings concerning them but this right has yet to be provided for by statute nor is it uniformly adhered to in practice. The Government has committed to remedy this legislative gap and put in place an infrastructural framework to vindicate this right. Children also have a right to fair procedures.

There are many ways in which the views of the child can be heard, very few of which are in operation at the moment. At present, a child does not have a right to information about proceedings concerning them or how to participate in those proceedings and there is little information on the judicial process available in child-friendly and accessible language. The child does not have a right to consent or assent to an order. Section 25 of the 1991 Act (making a child party to proceedings) is under-used. There is no express obligation on the CFA to include the views of the child in their grounding affidavit to the court. In addition, there is no uniform approach to the admission of hearsay evidence from a child which can lead to inconsistencies and delays. In District Court proceedings, the judge has discretion on the appointment of a GAL or legal representation for a child, making the child a party to proceedings or meeting with the child. However, there is little training or guidance for lawyers on how to represent a child or for judges on the holding of a meeting with a child. The vast majority of decisions are delivered verbally, although a digital audio recording is created.

Practice in other jurisdictions is very different. In some jurisdictions, children have a statutory right to receive information, including court documents; to be consulted and consent to an order; to be legally represented; to attend hearings; and to have their views heard and taken into consideration. In some jurisdictions, such as Germany, it is common practice that a child meets with the judge.

The CCLRP has been engaged in consultations with the DCEDIY on many of these issues and can provide a more detailed submission on request.

## 6. Transparency and Accountability

The various judgments of the superior courts in relation to the administration of justice in public, and the role of the media in this, apply equally to family law proceedings, subject only to the requirement of maintaining the anonymity of the parties and their children. Transparency in court proceedings is particularly important in an area that touches the most intimate areas of people's lives, and, in the case of child care law, involves the interference of the State in the fundamental constitutional rights of children and families, and is required under the jurisprudence of the European Court of Human Rights.

For decades family law proceedings were dogged by accusations of secrecy, often accompanied by allegations of bias. The only way to counter such allegations is by robust mechanisms for ensuring transparency and various statutes were enacted to facilitate this. The legislation concerned is the 2004 Courts and Civil Liability Act, the 2007 Child Care (Amendment) Act, and, most recently, the 2013 Courts and Civil Law (Miscellaneous Provisions) Act, which amended the 2004 and 2007 Acts. Both the 2004 and the 2007 Acts inserted into family law legislation exceptions to the *in camera* rule, permitting lawyers and organisations named in secondary legislation to attend the proceedings and have access to relevant documents in order to prepare reports, and these are replicated in the Scheme of the Family Court Bill. These Regulations name the main third level academic or educational institutions and a number of other organisations (the Law Reform Commission, the Courts Service, the NGO Free Legal Advice Centres and the Economic and Social Research Council) who may nominate people, subject to approval by the Minister, to attend court and publish reports and decisions. The CCLRP operates under the 2007 Act and the ensuing Regulations.

In contrast, the 2013 Courts and Civil Law (Miscellaneous Provisions) Act, which opened the family courts up to *bona fide* representatives of the media, allows all of the media access into court, but is highly restrictive in spelling out what cannot be published, in giving the court extensive powers to limit reporting, and in providing for severe penalties for breaching the terms of the legislation, particularly in relation to identifying the parties – up to €50,000 in a fine and three years in jail for both journalists and media executives who publish prohibited material. Since its enactment seven years ago there has, understandably, been little media attendance at family law proceedings. Such coverage as has occurred usually relates to domestic violence applications in private family law.

In addition, the District Court publishes certain decisions in child protection cases, which are published on the Courts Service website, and provide an important insight into such proceedings. However, the vast majority of such judgments come from the Dublin Metropolitan District Court, as it enjoys the luxury of three judges hearing child care almost exclusively. Very few published District Court judgments come from outside Dublin.

The CCLRP, set up to report on child care proceedings, operates with a protocol designed to ensure that children and their families cannot be identified from its reports. It has published some 650 reports of proceedings since it began reporting in 2013, and highlights from its regular volumes of reports are re-published by both the print and broadcast media, who do so secure in the knowledge that they are not publishing information that could lead to the identification of the families involved. It also publishes regular analyses of the findings from its reports.

The CCLRP is of the opinion that transparency in family law proceedings requires that the process whereby the decision is made, as well as the decision itself, is published, and that this should apply to both public and private family law. This is especially important in the light of the enactment of a body of new legislation relating to private family law. This means that the arguments made by the parties and the judge's response to them should be reported, allowing readers to see how such arguments are evaluated, that is, how justice is administered.

Reform of the family justice system should include establishing and funding a mechanism whereby a representative selection of all family law proceedings, and in particular of those involving children, can be reported, subject of course to protecting the anonymity of the parties and their children. The legislation framework exists in the 2004 and 2007 Acts, and the establishment of such a mechanism would merely require the amendment of the Regulations referred to in these Acts.

## The Child Care Law Reporting Project

### Who We Are

Established in November 2012, the Child Care Law Reporting Project (CCLRP) supports better outcomes for children and their families by bringing transparency through reporting and research to child law in Ireland. We provide information to the public on the operation of the child care system in the courts with the aim of promoting transparency and accountability. We conduct research on these proceedings to promote debate and inform policymakers. We operate under a protocol to protect the anonymity of the children and their families subject to proceedings. Through our work we seek to promote confidence in the child care system.

The remit of the CCLRP is set and limited by law, the Child Care (Amendment) Act 2007. We can only report on what happens and is said in court about such proceedings. We can also use the information given in court for broader analysis of trends emerging from the selection of cases we attend. Currently, we report on District Court child care hearings and High Court special care hearings and some wardship cases involving children and young adults emerging from other forms of care.

The CCLRP is a company limited by guarantee (CLG) and is governed by a Board of Directors. We are funded by the Department of Children, Equality, Disability, Integration and Youth; our operational independence is guaranteed in the agreement between the CCLRP and the department. We employ a Director (Dr Carol Coulter) and Deputy Director (Maria Corbett) and engage a number of reporters, all on a part-time basis.

### Our Work

To date, we have published over 650 case reports from our attendance at child care proceedings. We have also published seven analytical reports drawing on the information in these reports. All our case reports and analytical reports are available on our website <www.childlawproject.ie>

Latest case report: https://www.childlawproject.ie/publications/ (published bi-annually summer/winter)

Observations on response to Covid19 pandemic and related case reports
https://www.childlawproject.ie/covid-19/

Observations on the General Scheme of the Family Court Bill 2021
Observations on Child Care Amendment Bill 2019
District Court Child Care Proceedings: A National Overview
An Examination of Lengthy, Contested And Complex Child Protection Cases In the District Court, By Carol Coulter, March 2018
Final Report, Child Care Law Reporting Project by Dr Carol Coulter November 2015
Child Care Proceedings: A Thematic Review of Irish and International Practice (Maria Corbett and Carol Coulter, commissioned by DCYA) https://bit.ly/2ZASpy2

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